VII. OPINION AND JUDGMENT

Military Tribunal III was established on 14 February 1947 under General Order No. 11, issued by command of the United States Military Governor for Germany. The indictment was filed with the Secretary General of Military Tribunals on 4 January 1947, and the case was assigned to Tribunal III for trial. A copy of the indictment in the German language was served upon each defendant at least 30 days before the commencement of the trial. The defendants were arraigned on 17 February 1947, each defendant entering a plea of "not guilty" to all charges preferred against him. German counsel selected by the defendants were approved by the Tribunal and have represented the respective defendants throughout the trial.

The presentation of evidence in support of the charges was commenced on 6 March 1947 and was followed by evidence for the defendants. The taking of evidence was concluded on 13 October 1947. Copies of the exhibits tendered by the prosecution were furnished in the German language to the defendants prior to the time of the reception of the exhibits in evidence. The Tribunal has heard the oral testimony of 138 witnesses. In addition it has received 641 documentary exhibits for the prosecution and 1,452 for defendants, many of them of considerable length. Some affidavits have been presented by the prosecution, but they are few in comparison with the hundreds offered by the defense.

Whenever possible, and in substantially all cases, applications of defense counsel for the production in open court of persons who had made affidavits in support of the prosecution have been granted and the affiants have appeared for cross-examination. Affiants for the defense were cross-examined orally by the prosecution in comparatively few cases.

The defendant Carl Westphal died before the commencement of the trial. On 22 August 1947, the Tribunal entered an order declaring a mistrial as to the defendant, Karl Engert, who has been able to attend court for only 2 days since 5 March 1947. The action was rendered necessary under the provisions of article IV (*d*) of Military Government Ordinance No. 7, and by reason of the serious and continuing illness of said defendant.

The trial was conducted in two languages with simultaneous translations of German into English and English into German throughout the proceedings.

Under Military Government Order of 14 February 1947, the following were designated as members of Military Tribunal III: Carrington T. Marshall, presiding judge; James T. Brand, judge; Mallory B. Blair, judge; Justin Woodward Harding, alternate judge. As thus constituted, the Tribunal entered upon trial of the case. On 21 June 1947, General Order No. 52 was issued by the Office of Military Government for Germany as follows:

"Pursuant to Military Government Ordinance No. 7

"1. Effective as of 19 June 1947, pursuant to Military Government Ordinance No. 7, 24 October 1946, entitled 'Organization and Powers of Certain Military Tribunals', JAMES T. BRAND is appointed Presiding Judge of Military Tribunal III, vice CARRINGTON T. MARSHALL, relieved because of illness.

"2. JUSTIN WOODWARD HARDING, Alternate Judge, is appointed Judge for Military Tribunal III.

"BY COMMAND OF GENERAL CLAY:

C. K. GAILEY
Brigadier General, GSC
Chief of Staff"

The trial has been continued before the Tribunal as thus reconstituted. The evidence has been submitted, final arguments of counsel have been concluded, and the Tribunal has heard a personal statement from each defendant who desired to address it.

In rendering this judgment it should be said that the case against the defendants is chiefly based upon captured German documents, the authenticity of which is unchallenged.

The indictment contains four counts, as follows:

(1) Conspiracy to commit war crimes and crimes against humanity. The charge embraces the period between January 1933 and April 1945.

(2) War crimes, to wit: violations of the laws and customs of war, alleged to have been committed between September 1939 and April 1945.

(3) Crimes against humanity as defined by Control Council Law No. 10, alleged to have been committed between September 1939 and April 1945.

(4) Membership of certain defendants in organizations which have been declared to be criminal by the judgment of the International Military Tribunal in the case against Goering, et al.

The sufficiency of count one of the indictment was challenged by the defendants upon jurisdictional grounds, and on 11 July 1947, the Tribunal made and entered the following order:

"Count one of the indictment in this case charges that the defendants, acting pursuant to a common design, unlawfully, willfully and knowingly did conspire and agree together to commit war crimes and crimes against humanity as defined in Control Council Law No. 10, article II. It is charged that the alleged crime was committed between January 1933 and April 1945.

"It is the ruling of this Tribunal that neither the Charter of the International Military Tribunal nor Control Council Law No. 10 has defined conspiracy to commit a war crime or crime against humanity as a separate substantive crime; therefore, this Tribunal has no jurisdiction to try any defendant upon a charge of conspiracy considered as a separate substantive offense.

"Count one of the indictment, in addition to the separate charge of conspiracy, also alleged unlawful participation in the formulation and execution of plans to commit war crimes and crimes against humanity which actually involved the commission of such crimes. We, therefore, cannot properly strike the whole of count one from the indictment, but, in so far as count one charges the commission of the alleged crime of conspiracy as a separate substantive offense, distinct from any war crime or crime against humanity, the Tribunal will disregard that charge.

"This ruling must not be construed as limiting the force or effect of article II, paragraph 2, of Control Council Law No. 10, or as denying to either prosecution or defense the right to offer in evidence any facts or circumstances occurring either before or after September 1939, if such facts or circumstances tend to prove or to disprove the commission by any defendant of war crimes or crimes against humanity as defined in Control Council Law No. 10."

THE JURISDICTIONAL ENACTMENTS

For convenient reference we have attached to this opinion copies of the London Agreement of 8 August 1945, with the Charter of the International Military Tribunal annexed thereto, Control Council Law No. 10, Military Government Ordinance No. 7, and the indictment, which are marked respectively Exhibits A, B, C, and D.*

* All the documents referred to are reproduced in the preface portion of this volume and are not reproduced as a part of this judgment. See Table of Contents.

The indictment alleges that the defendants committed crimes "as defined in Control Council Law No. 10, duly enacted by the Allied Control Council." We therefore turn to that law.

The Allied Control Council is composed of the authorized representatives of the four Powers: the United States, Great Britain, France, and the Soviet Union.

The preamble to Control Council Law No. 10 is in part as follows:

> "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 issued pursuant thereto and in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, * * * the Control Council enacts as follows:"

Article I reads in part as follows:

> "The Moscow Declaration of 30 October 1943 'Concerning Responsibility of Hitlerites for Committed Atrocities' and the London Agreement of 8 August 1945 'Concerning Prosecution and Punishment of Major War Criminals of the European Axis' are made integral parts of this Law. * * *"

The London Agreement, supra, provides that the Charter of the International Military Tribunal (hereinafter called the IMT Charter), "shall form an integral part of this agreement." (London Agreement, art. II). Thus, it appears that the indictment is drawn under and pursuant to the provisions of Control Council Law No. 10 (hereinafter called C. C. Law 10), that C. C. Law 10 expressly incorporates the London Agreement as a part thereof, and that the IMT Charter is a part of the London Agreement.

Article II of C.C. Law 10 defines acts, each of which "is recognized as a crime," namely, (*a*) crimes against peace, (*b*) war crimes, (*c*) crimes against humanity, (*d*) membership in criminal organizations. We are concerned here with categories (*b*), (*c*), and (*d*) only, each of which will receive later consideration.

The Procedural Ordinance

C. C. Law 10 provides that—

> "1. Each occupying authority, within its zone of occupation,
>
> "(*a*) shall have the right to cause persons within such Zone suspected of having committed a crime, including those charged with crime by one of the United Nations, to be arrested * * *.

* * * * * * *

"(*d*) shall have the right to cause all persons so arrested and charged, * * * to be brought to trial before an appropriate tribunal. * * *

"2. The tribunal by which persons charged with offenses hereunder shall be tried and the rules and procedure thereof shall be determined or designated by each Zone Commander for his respective Zone. * * *"

Pursuant to the foregoing authority, Ordinance No. 7 was enacted by the Military Governor of the American Zone. It provides:

"Article I

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

"Article II

"(*a*) Pursuant to the powers of the Military Governor for the United States Zone of Occupation within Germany 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 certain tribunals to be known as 'Military Tribunals' shall be established hereunder."

The tribunals authorized by Ordinance No. 7 are dependent upon the substantive jurisdictional provisions of C. C. Law 10 and are thus based upon international authority and retain international characteristics. It is provided that the United States Military Governor may agree with other zone commanders for a joint trial. (Ordinance 7, art. II, par. (*c*).) The Chief of Counsel for War Crimes, United States, may invite others of the United Nations to participate in the prosecution. (Ordinance 7, art. III, par. (*b*).)

The Ordinance provides:

"Article X

"The determinations of the International Military Tribunal in the judgments in Case No. 1 that invasions, aggressive acts, aggressive wars, crimes, atrocities or inhumane acts were planned or occurred, shall be binding on the tribunals established hereunder and shall not be questioned except insofar as

the participation therein or knowledge thereof by any particular person may be concerned. Statements of the International Military Tribunal in the judgment in Case No. 1 constitute proof of the facts stated, in the absence of substantial new evidence to the contrary."

The sentences authorized by Ordinance No. 7 are made definite only by reference to those provided for by C. C. Law 10. (Ordinance No. 7, Art. XVI).

As thus established the Tribunal is authorized and empowered to try and punish the major war criminals of the European Axis and "those German officers and men and members of the Nazi Party who have been responsible for, or have taken a consenting part in," or have aided, abetted, ordered, or have been connected with plans or enterprises involving the commission of the offenses defined in C.C. Law 10.

Source of Authority of C. C. Law 10

Having identified the instruments which purport to establish the jurisdiction of this Tribunal, we next consider the legal basis of those instruments. The unconditional surrender of Germany took place on 8 May 1945.[1] The surrender was preceded by the complete disintegration of the central government and was followed by the complete occupation of all of Germany. There were no opposing German forces in the field; the officials who during the war had exercised the powers of the Reich Government were either dead, in prison, or in hiding. On 5 June 1945 the Allied Powers announced that they "hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command, and any state, municipal or local government or authority," and declared that "there is no central government or authority in Germany capable of accepting responsibility for the maintenance of order, the administration of the country, and compliance with the requirements of the victorious powers." The Four Powers further declared that they "will hereafter determine the boundaries of Germany or any part thereof and the status of Germany or of any area at present being a part of German territory." [2]

On 2 August 1945 at Berlin, President Truman, Generalissimo Stalin, and Prime Minister Attlee, as heads of the Allied Powers, entered into a written agreement setting forth the principles which were to govern Germany during the initial control period. Reference to that document will disclose the wide scope of author-

[1] Text is reproduced in "The Axis in Defeat," Department of State Publication No. 2423 (Government Printing Office, Washington, D. C.), pages 24 and 25.

[2] Ibid., pages 62 and 63.

ity and control which was assumed and exercised by the Allied Powers. They assumed "supreme authority" and declared that it was their purpose to accomplish complete demilitarization of Germany; to destroy the National Socialist Party, to prevent Nazi propaganda; to abolish all Nazi laws which "established discrimination on grounds of race, creed, or political opinion * * * whether legal, administrative, or otherwise"; to control education; to reorganize the judicial system in accordance with the principles of democracy and of equal rights; to accomplish the decentralization of the political structure. The agreement provided that "for the time being no central German government shall be established". In the economic field they assumed control of "German industry and all economic and financial international transactions".* Finally, the Allies reaffirmed their intention to bring the Nazi war criminals to swift and sure justice.

It is this fact of the complete disintegration of the government in Germany, followed by unconditional surrender and by occupation of the territory, which explains and justifies the assumption and exercise of supreme governmental power by the Allies. The same fact distinguishes the present occupation of Germany from the type of occupation which occurs when, in the course of actual warfare, an invading army enters and occupies the territory of another state, whose government is still in existence and is in receipt of international recognition, and whose armies, with those of its allies, are still in the field. In the latter case the occupying power is subject to the limitations imposed upon it by the Hague Convention and by the laws and customs of war. In the former case (the occupation of Germany) the Allied Powers were not subject to those limitations. By reason of the complete breakdown of government, industry, agriculture, and supply, they were under an imperative humanitarian duty of far wider scope to reorganize government and industry and to foster local democratic governmental agencies throughout the territory.

In support of the distinction made, we quote from two recent and scholarly articles in "The American Journal of International Law."

> "On the other hand, a distinction is clearly warranted between measures taken by the Allies prior to destruction of the German Government and those taken thereafter. Only the former need be tested by the Hague Regulations, which are inapplicable to the situation now prevailing in Germany. Disappearance of the German State as a belligerant entity, necessarily implied in the Declaration of Berlin of 5 June 1945, signifies

* Ibid, page 10 et seq.

that a true state of war—and hence *belligerent* occupation—no longer exists within the meaning of international law." [1]

"Through the subjugation of Germany the outcome of the war has been decided in the most definite manner possible. One of the prerogatives of the Allies resulting from the subjugation is the right to occupy German territory at their discretion. This occupation is, both legally and factually, fundamentally different from the belligerent occupation contemplated in the Hague Regulations, as can be seen from the following observations.

"The provisions of the Hague Regulations restricting the rights of an occupant refer to a belligerent who, favored by the changing fortunes of war, actually exercises military authority over enemy territory and thereby prevents the legitimate sovereign—who remains the legitimate sovereign—from exercising his full authority. The Regulations draw important legal conclusions from the fact that the legitimate sovereign may at any moment himself be favored by the changing fortunes of war, reconquer the territory, and put an end to the occupation. 'The occupation applies only to territory where such authority (i.e., the military authority of the hostile state) is established and can be exercised' (*Art. 42, 2*). In other words, the Hague Regulations think of an occupation which is a phase of an as yet undecided war. Until 7 May 1945, the Allies were belligerent occupants in the then occupied parts of Germany, and their rights and duties were circumscribed by the respective provisions of the Hague Regulations. As a result of the subjugation of Germany, the legal character of the occupation of German territory was drastically changed." [2]

The view expressed by the two authorities cited appears to have the support of the International Military Tribunal judgment in the case against Goering, et al. In that case the defendants contended that Germany was not bound by the rules of land warfare in occupied territory because Germany had completely subjugated those countries and incorporated them into the German Reich. The Tribunal refers to the "doctrine of subjugation, dependent as it is upon military conquest," and holds that it is unnecessary to decide whether the doctrine has any application where the subjugation is the result of the crime of aggressive war. The reason given is significant. The Tribunal said:

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[1] Alwyn V. Freeman, "War Crimes by Enemy Nationals Administering Justice in Occupied Territory," The American Journal of International Law, XLI, July 1947, 605.

[2] John H. E. Fried, "Transfer of Civilian Manpower from Occupied Territory," The American Journal of International Law, XL, April 1946, 326–327.

"The doctrine was never considered to be applicable so long as there was an army in the field attempting to restore the occupied countries to their true owners, and in this case, therefore, the doctrine could not apply to any territories occupied after 1 September 1939."*

The clear implication from the foregoing is that the Rules of Land Warfare apply to the conduct of a belligerent in occupied territory so long as there is an army in the field attempting to restore the country to its true owner, but that those rules do not apply when belligerency is ended, there is no longer an army in the field, and, as in the case of Germany, subjugation has occurred by virtue of military conquest.

The views which we have expressed are supported by modern scholars of high standing in the field of international law. While they differ somewhat in theory as to the present legal status of Germany and concerning the situs of residual sovereignty, they appear to be in accord in recognizing that the powers and rights of the Allied Governments under existing conditions in Germany are not limited by the provisions of the Hague Regulations concerning land warfare. For reference see—

"The Legal Status of Germany According to the Declaration of Berlin," by Hans Kelsen, Professor of International Law, University of California, American Journal of International Law, 1945.

"Germany's Present Status," by F. A. Mann, Doctor of Law (Berlin) (London), paper read on 5 March 1947 before the Grotius Society in London, published in Sueddeutsche Juristen-Zeitung (Lawyers' Journal of Southern Germany), volume 2, No. 9, September 1947.

"The Influence of the Legal Position of Germany upon the War Crimes Trial," Dr. Hermann Mosler, Assistant Professor of the University of Bonn, published in Sueddeutsche Juristen-Zeitung, volume 2, No. 7, July 1947.

Article published in Neue Justiz (New Justice), by Dr. Alfons Steininger, Berlin, volume I, No. 7, July 1947, pages 146–150.

In an article by George A. Zinn, Minister of Justice of Hessen, entitled "Germany as the Problem of the Law of States," the author points out that if it be assumed that the present occupation of Germany constitutes "belligerent occupation" in the traditional sense, then all legal and constitutional changes brought about since 7 May 1945 would cease to be valid once the Allied troops were withdrawn and all Nazi laws would again and automatically become the law of Germany, a consummation devoutly to be avoided.

Both of the authorities first cited directly assert that the situation at the time of the unconditional surrender resulted in the transfer of sovereignty to the Allies. In this they are supported by the weighty opinion of Lord Wright, eminent jurist of the British

* Trial of the Major War Criminals, op. cit., judgment, volume I, page 254.

House of Lords and head of the United Nations War Crimes Commission. For our purposes, however, it is unnecessary to determine the present situs of "residual sovereignty." It is sufficient to hold that, by virtue of the situation at the time of unconditional surrender, the Allied Powers were provisionally in the exercise of supreme authority, valid and effective until such time as, by treaty or otherwise, Germany shall be permitted to exercise the full powers of sovereignty. We hold that the legal right of the four Powers to enact C. C. Law 10 is established and that the jurisdiction of this Tribunal to try persons charged as major war criminals of the European Axis must be conceded.

We have considered it proper to set forth our views concerning the nature and source of the authority of C. C. Law 10 in its aspect as substantive legislation. It would have been possible to treat that law as a binding rule regardless of the righteousness of its provisions, but its justification must ultimately depend upon accepted principles of justice and morality, and we are not content to treat the statute as a mere rule of thumb to be blindly applied. We shall shortly demonstrate that the IMT Charter and C. C. Law 10 provide for the punishment of crimes against humanity. As set forth in the indictment, the acts charged as crimes against humanity were committed before the occupation of Germany. They were described as racial persecutions by Nazi officials perpetrated upon German nationals. The crime of genocide is an illustration. We think that a tribunal charged with the duty of enforcing these rules will do well to consider, in determining the degree of punishment to be imposed, the moral principles which underlie the exercise of power. For that reason we have contrasted the situation when Germany was in belligerent occupation of portions of Poland, with the situation existing under the Four-Power occupation of Germany since the surrender. The occupation of Poland by Germany was in every sense belligerent occupation, precarious in character, while opposing armies were still in the field. The German occupation of Poland was subject to the limitations imposed by the Hague Convention and the laws and customs of land warfare. In view of these limitations we doubt if any person would contend that Germany, during that belligerent occupation, could lawfully have provided tribunals for the punishment of Polish officials who, before the occupation by Germany, had persecuted their own people, to wit: Polish nationals. Now the Four Powers are providing by C. C. Law 10 for the punishment of German officials who, before the occupation of Germany, passed and enforced laws for the persecution of German nationals upon racial grounds. It appears that it would be equally difficult to justify such action of the Four Powers if the situation here were the same as the situa-

tion which existed in Poland under German occupation and if consequently the limitations of the Hague Convention were applicable. For this reason it seems appropriate to point out the distinction between the two situations. As we have attempted to show, the moral and legal justification under principles of international law which authorizes the broader scope of authority under C. C. Law 10 is based on the fact that the Four Powers are not now in belligerent occupation or subject to the limitations set forth in the rules of land warfare. Rather, they have justly and legally assumed the broader task in Germany which they have solemnly defined and declared, to wit: the task of reorganizing the German Government and economy and of punishing persons who, prior to the occupation, were guilty of crimes against humanity committed against their own nationals. We have pointed out that this difference in the nature of the occupations is due to the unconditional surrender of Germany and the ensuing chaos which required the Four Powers to assume provisional supreme authority throughout the German Reich. We are not attempting to pass judicially upon a question which is solely within the jurisdiction of the political departments of the Four Powers. The fixing of the date of the formal end of the war and similar matters will, of course, be dependent upon the action of the political departments. We do not usurp their function. We merely inquire, in the course of litigation when the lives of men are dependent upon decisions which must be both legal and just, whether the great objectives announced by the Four Powers are themselves in harmony with the principles of international law and morality.

In declaring that the expressed determination of the victors to punish German officials who slaughtered their own nationals is in harmony with international principles of justice, we usurp no power; we only take judicial notice of the declarations already made by the chief executives of the United States and her former Allies. The fact that C. C. Law 10 on its face is limited to the punishment of German criminals does not transform this Tribunal into a German court. The fact that the four powers are exercising supreme legislative authority in governing Germany and for the punishment of German criminals does not mean that the jurisdiction of this Tribunal rests in the slightest degree upon any German law, prerogative, or sovereignty. We sit as a Tribunal drawing its sole power and jurisdiction from the will and command of the Four occupying Powers.

Examination will disclose that C. C. Law 10 possesses a dual aspect. In its first aspect and on its face it purports to be a statute defining crimes and providing for the punishment of persons who violate its provisions. It is the legislative product of the only body

in existence having and exercising general lawmaking power throughout the Reich. The first International Military Tribunal in the case against Goering, et al., recognized similar provisions of the IMT Charter as binding legislative enactments. We quote:

> "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." [1]
>
> "These provisions are binding upon the Tribunal *as the law to be applied to the case.*" [2] [Emphasis added.]

Since the IMT Charter and C. C. Law 10 are the products of legislative action by an international authority, it follows of necessity that there is no national constitution of any one state which could be invoked to invalidate the substantive provisions of such international legislation. It can scarcely be argued that a court which owes its existence and jurisdiction solely to the provisions of a given statute could assume to exercise that jurisdiction and then, in the exercise thereof, declare invalid the act to which it owes its existence. Except as an aid to construction, we cannot and need not go behind the statute. This was discussed authoritatively by the first International Military Tribunal in connection with the contention of defendants that the IMT Charter was invalid because it partook of the nature of *ex post facto* legislation. That Tribunal said: "The Charter makes the planning or waging of a war of aggression or a war in violation of international treaties a crime; and *it is, therefore, not strictly necessary to consider whether and to what extent aggressive war was a crime before the execution of the London Agreement.*" [3] [Emphasis added.]

As recently said by an American authority—

> "The Charter was, of course, binding upon the Tribunal in the same way that a constitutional statute would bind a domestic court." [4]

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

[1] Ibid., p. 218.
[2] Ibid., p. 174.
[3] Ibid., p. 219.
[4] Herbert Wechsler, "The Issues of the Nuremberg Trial," Political Science Quarterly, LXII, No. 1, March 1947, 14.

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Nazi Party who have been responsible for * * * atrocities." C. C. Law 10 recites that it was enacted to establish a "uniform legal basis *in Germany*" for the prosecution of war criminals. [Emphasis added.]

Military Government Ordinance No. 7 was enacted pursuant to the powers of the Military Government for the United States Zone of Occupation *"within Germany."* [Emphasis added.]

We concur in the view expressed by the first International Military Tribunal as quoted above, but we observe that the decision was supported on two grounds. The Tribunal in that case did not stop with the declaration that it was bound by the IMT Charter as an exercise of sovereign legislative power. The opinion went on to show that the IMT Charter was also "the expression of international law existing at the time of its creation." All of the war crimes and many, if not all, of the crimes against humanity as charged in the indictment in the case at bar were, as we shall show, violative of preexisting principles of international law. To the extent to which this is true, C. C. Law 10 may be deemed to be a codification rather than original substantive legislation. Insofar as C. C. Law 10 may be thought to go beyond established principles of international law, its authority, of course, rests upon the exercise of the "sovereign legislative power" of the countries to which the German Reich unconditionally surrendered.

We have discussed C. C. Law 10 in its first aspect as substantive legislation. We now consider its other aspect. Entirely aside from its character as substantive legislation, C. C. Law 10, together with Ordinance No. 7, provides procedural means previously lacking for the enforcement within Germany of certain rules of international law which exist throughout the civilized world independently of any new substantive legislation. (*Ex parte Quirin*, 317 U.S. 1; 87 L. ed. 3; 63 S. Ct. 2.) International law is not the product of statute. Its content is not static. The absence from the world of any governmental body authorized to enact substantive rules of international law has not prevented the progressive development of that law. After the manner of the English common law it has grown to meet the exigencies of changing conditions.

It must be conceded that the circumstance which gives to principles of international conduct the dignity and authority of law is their general acceptance as such by civilized nations, which acceptance is manifested by international treaties, conventions, authoritative textbooks, practice, and judicial decisions.*

It does not, however, follow from the foregoing statements that general acceptance of a rule of international conduct must be manifested by express adoption thereof by all civilized states.

* Hackworth, "Digest of International Law", (Government Printing Office, Washington, 1940), volume 1, pages 1–4.

"The basis of the law, that is to say, what has given to some principles of general applicability the quality or character of law has been the acquiescence of the several independent states which were to be governed thereby." *

[Page 5]

"The requisite acquiescence on the part of individual states has not been reflected in formal or specific approval of every restriction which the acknowledged requirements of international justice have appeared, under the circumstances of the particular case, to dictate or imply. It has been rather a yielding to principle, and by implication, to logical applications thereof which have begotten deep-rooted and approved practices."

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"It should be observed, however, that acquiescence in a proposal may be inferred from the failure of interested states to make appropriate objection to practical applications of it. Thus it is that changes in the law may be wrought gradually and imperceptibly, like those which by process of accretion alter the course of a river and change an old boundary. Without conventional arrangement, and by practices manifesting a common and sharp deviation from rules once accepted as the law, the community of states may in fact modify that which governs its members."

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"States may through the medium of an international organization such as the League of Nations, itself the product of agreement, find it expedient to create and accept fresh restraints that ultimately win widest approval and acceptance as a part of the law of nations. The acts of the organization may thus in fact become sources of international law, at least in case the members thereof have by their general agreement clothed it with power to create and put into force fresh rules of restraint."

"But international law is progressive. The period of growth generally coincides with the period of world upheavals. The pressure of necessity stimulates the impact of natural law and of moral ideas and converts them into rules of law deliberately and overtly recognized by the consensus of civilized mankind. The experience of two great world wars within a quarter of a

* Hyde, "International Law", (2d rev. ed., Boston, Little, Brown & Co., 1945), volume 1, page 4.

century cannot fail to have deep repercussions on the senses of the peoples and their demand for an international law which reflects international justice. I am convinced that international law has progressed, as it is bound to progress if it is to be a living and operative force in these days of widening sense of humanity."[1]

For the reasons stated by Lord Wright, this growth by accretion has been greatly accelerated since the First World War.[2] The IMT Charter, the IMT judgment, and C. C. Law 10 are merely "great new cases in the book of international law." They constitute authoritative recognition of principles of individual penal responsibility in international affairs which, as we shall show, had been developing for many years. Surely C. C. Law 10, which was enacted by the authorized representatives of the four greatest Powers on earth, is entitled to judicial respect when it states, "Each of the following acts is *recognized* as a crime." [Emphasis added.] Surely the requisite international approval and acquiescence is established when 23 states, including all of the great powers, have approved the London Agreement and the IMT Charter without dissent from any state. Surely the IMT Charter must be deemed declaratory of the principles of international law in view of its recognition as such by the General Assembly of the United Nations. We quote:

"The General Assembly recognizes the obligation laid upon it by article 13, paragraph 1 (a) of the Charter, to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification;

"Takes note of the agreement for the establishment of an International Military Tribunal for the prosecution and punishment of the major war criminals of the European Axis, signed in London on 8 August 1945, and of the Charter annexed thereto and of the fact that similar principles have been adopted in the Charter of the International Military Tribunal for the trial of the major war criminals in the Far East, proclaimed at Tokyo on 19 January 1946;

"Therefore—

"Affirms the principles of international law recognized by the Charter of the Nuernberg Tribunal and the judgment of the Tribunal;

"Directs the Committee on Codification of International Law established by the resolution of the General Assembly of

[1] Lord Wright, "War Crimes under International Law," The Law Quarterly Review, LXII, January 1946, 51.

[2] Hyde, op. cit., page 2.

* * * December 1946, to treat as a matter of primary importance plans for the formulation, in the text of a general codification of offenses against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nuernberg Tribunal and in the judgment of the Tribunal." [1]

Before the International Military Tribunal had convened for the trial of Goering, et al., the opinion had been expressed that through the process of accretion the provisions of the IMT Charter and consequently of C. C. Law 10 had already, in large measure, become incorporated into the body of international law. We quote:

"I understand the Agreement to import that the three classes of persons which it specifies are war criminals, that the acts mentioned in classes (*a*), (*b*), and (*c*) are crimes for which there is properly individual responsibility; that they are not crimes because of the Agreement of the four Governments, but that the Governments have scheduled them as coming under the jurisdiction of the Tribunal because they are already crimes by existing law. On any other assumption the Court would not be a court of law but a manifestation of power. The principles which are declared in the Agreement are not laid down as an arbitrary direction to the Court but are intended to define and do, in my opinion, accurately define what is the existing international law on these matters." [2]

A similar view was expressed in the judgment of the International Military Tribunal. We quote:

"The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law." [3]

We are empowered to determine the guilt or innocence of persons accused of acts described as "war crimes" and "crimes against humanity" under rules of international law. At this point, in connection with cherished doctrines of national sovereignty, it is important to distinguish between the rules of common international law which are of universal and superior authority on the one hand, and the provisions for enforcement of those rules which are by no means universal on the other. As to the superior authority of international law, we quote:

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[1] Philip C. Jessup, "The Crime of Aggression and the Future of International Law," Political Science Quarterly, LXII (Mar 1947), No. 1, page 2, citing Journal of the United Nations, No. 58, Supp. A–A/P. V./65, page 485.

[2] Lord Wright, op. cit., page 41.

[3] Trial of the Major War Criminals, op cit., volume I, page 218.

"If there exists a body of international law, which states, from a sense of legal obligation do in fact observe in their relations with each other, and which they are unable individually to alter or destroy, that law must necessarily be regarded as the law of each political entity deemed to be a state, and as prevailing throughout places under its control. This is true although there be no local affirmative action indicating the adoption by the individual state of international law.

"International law, as the local law of each state, is necessarily superior to any administrative regulation or statute or public act at variance with it. There can be no conflict on an equal plane." *

This universality and superiority of international law does not necessarily imply universality of its enforcement. 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. These 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. (*Ex parte Quirin, supra;* In re: Yamashita, 327 U.S. 1, 90 L. ed.) However, enforcement of international law has been traditionally subject to practical limitations. Within the territorial boundaries of a state having a recognized, functioning government presently in the exercise of sovereign power throughout its territory, a violator of the rules of international law could be punished only by the authority of the officials of that state. The law is universal, but such a state reserves unto itself the exclusive power within its boundaries to apply or withhold sanctions. Thus, notwithstanding the paramount authority of the substantive rules of common international law, the doctrines of national sovereignty have been preserved through the control of enforcement machinery. It must be admitted that Germans were not the only ones who were guilty of committing war crimes; other violators of international law could, no doubt, be tried and punished by the state of which they were nationals, by the offended state if it can secure jurisdiction of the person, or by an international tribunal if of competent authorized jurisdiction.

Applying these principles, it appears that the power to punish violators of international law in Germany is not solely dependent on the enactment of rules of substantive penal law applicable only in Germany. Nor is the apparent immunity from prosecution of

* Hyde, op cit., pages 16 and 17.

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

Construction of C. C. Law 10 War Crimes and Crimes Against Humanity

We next approach the problem of the construction of C. C. Law 10, for whatever the scope of international common law may be, the power to enforce it in this case is defined and limited by the terms of the jurisdictional act.

The first penal provision of C. C. Law No. 10, with which we are concerned is as follows:

"Article II

"1.—Each of the following acts is recognized as a crime:

* * * * * * *

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

Here we observe the controlling effect of common international law as such, for the statutes by which we are governed have adopted and incorporated the rules of international law as the rules by which war crimes are to be identified. This legislative practice by which the laws or customs of war are incorporated by reference into a statute is not unknown in the United States. (See cases cited in *Ex parte Quirin, supra.*)

The scope of inquiry as to war crimes is, of course, limited by the provisions, properly construed, of the IMT Charter and C. C. Law 10. In this particular, the two enactments are in substantial

harmony. Both indicate by inclusion and exclusion the intent that the term "war crimes" shall be employed to cover acts in violation of the laws and customs of war directed against non-Germans, and shall not include atrocities committed by Germans against their own nationals. It will be observed that article 6 of the IMT Charter enumerates as war crimes acts against prisoners of war, persons on the seas, hostages, wanton destruction of cities and the like, devastation not justified by military necessity, plunder of public or private property (obviously not property of Germany or Germans), and "ill-treatment or deportation to slave labor or for any other purpose of civilian population *of or in* occupied territory." [Emphasis added.] C. C. Law 10, *supra,* employs similar language. It reads—

> "* * * ill treatment or deportation to slave labour or for any other purpose, *of civilian population from occupied territory.*" [Emphasis added.]

This legislative intent becomes more manifest when we consider the provisions of the IMT Charter and of C. C. Law 10 which deal with crimes against humanity. Article 6 of the IMT Charter defines crimes against humanity, as follows:

> "* * * murder, extermination, enslavement, deportation, and other inhumane 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 within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."

C. C. Law 10 defines as criminal:

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

Obviously, these sections are not surplusage. They supplement the preceding sections on war crimes and include within their prohibition not only war crimes, but also acts not included within the preceding definitions of war crimes. In place of atrocities committed against civilians of or in or from occupied territory, these sections prohibit atrocities "against any civilian population." Again, persecutions on racial, religious, or political grounds are within our jurisdiction "whether or not in violation of the domestic laws of the country where perpetrated." We have already demonstrated that C. C. Law 10 is specifically directed to the

punishment of German criminals. It is therefore clear that the intent of the statute on crimes against humanity is to punish for persecutions and the like, whether in accord with or in violation of the domestic laws of the country where perpetrated, to wit: Germany. The intent was to provide that compliance with German law should be no defense. Article III of C. C. Law 10 clearly demonstrates that acts by Germans against German nationals may constitute crimes against humanity within the jurisdiction of this Tribunal to punish. That article provides that each occupying authority within its zone of occupation shall have the right to cause persons suspected of having committed a crime to be arrested and "(*d*) shall have the right to cause all persons so arrested * * * to be brought to trial * * *. Such Tribunal may, in the case of crimes committed by persons of German citizenship or nationality against other persons of German citizenship or nationality, or stateless persons, be a German court, if authorized by the occupying authorities."

As recently asserted by General Telford Taylor before Tribunal IV, in the case of the United States *vs.* Flick, et al.:*

> "This constitutes an explicit recognition that acts committed by Germans against other Germans are punishable as crimes under Law No. 10, according to the definitions contained therein, since only such crimes may be tried by German courts, in the discretion of the occupying power. If the occupying power fails to authorize German courts to try crimes committed by Germans against other Germans (and in the American Zone of Occupation no such authorization has been given), then these cases are tried only before non-German tribunals, such as these military tribunals."

Our jurisdiction to try persons charged with crimes against humanity is limited in scope, both by definition and illustration, as appears from C. C. Law 10. It is not the isolated crime by a private German individual which is condemned, nor is it the isolated crime perpetrated by the German Reich through its officers against a private individual. It is significant that the enactment employs the words "against any civilian population" instead of "against any civilian individual." The provision is directed against offenses and inhumane acts and persecutions on political, racial, or religious grounds systematically organized and conducted by or with the approval of government.

The opinion of the first International Military Tribunal in the case against Goering, et al., lends support to our conclusion. That

* Case 5, Volume VI, this series.

opinion recognized the distinction between war crimes and crimes against humanity, and said:

> "* * * insofar as the inhumane acts charged in the indictment, and committed after the beginning of the war, did not constitute war crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted crimes against humanity." *

The evidence to be later reviewed establishes that certain inhumane acts charged in count three of the indictment were committed in execution of, and in connection with, aggressive war and were therefore crimes against humanity even under the provisions of the IMT Charter, but it must be noted that C. C. Law 10 differs materially from the Charter. The latter defines crimes against humanity as inhumane acts, etc., committed, "in execution of, or in connection with, any crime within the jurisdiction of the tribunal", whereas in C. C. Law 10 the words last quoted are deliberately omitted from the definition.

THE EX POST FACTO PRINCIPLE

The defendants claim protection under the principle *nullum crimen sine lege*, though they withheld from others the benefit of that rule during the Hitler regime. Obviously the principle in question constitutes no limitation upon the power or right of the Tribunal to punish acts which can properly be held to have been violations of international law when committed. By way of illustration, we observe that C. C. Law 10, article II, paragraph 1(*b*), *"War Crimes,"* has by reference incorporated the rules by which war crimes are to be identified. In all such cases it remains only for the Tribunal, after the manner of the common law, to determine the content of those rules under the impact of changing conditions.

Whatever view may be held as to the nature and source of our authority under C. C. Law 10 and under common international law, the *ex post facto* rule, properly understood, constitutes no legal nor moral barrier to prosecution in this case.

Under written constitutions the *ex post facto* rule condemns statutes which define as criminal, acts committed before the law was passed, but the *ex post facto* rule cannot apply in the international field as it does under constitutional mandate in the domestic field. Even in the domestic field the prohibition of the rule does not apply to the decisions of common law courts, though the question at issue be novel. International law is not the product of statute for the simple reason that there is as yet no world author-

* Trial of the Major War Criminals, op. cit., volume I, pages 254 and 255.

ity empowered to enact statutes of universal application. International law is the product of multipartite treaties, conventions, judicial decisions and customs which have received international acceptance or acquiescence. It would be sheer absurdity to suggest that the *ex post facto* rule, as known to constitutional states, could be applied to a treaty, a custom, or a common law decision of an international tribunal, or to the international acquiescence which follows the event. To have attempted to apply the *ex post facto* principle to judicial decisions of common international law would have been to strangle that law at birth. As applied in the field of international law, the principle *nullum crimen sine lege* received its true interpretation in the opinion of the IMT in the case versus Goering, et al. The question arose with reference to crimes against the peace, but the opinion expressed is equally applicable to war crimes and crimes against humanity. The Tribunal said:

> "In the first place, it is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished." *

To the same effect we quote the distinguished statesman and international authority, Henry L. Stimson—

> "A mistaken appeal to this principle has been the cause of much confusion about the Nuremberg trial. It is argued that parts of the Tribunal's Charter, written in 1945, make crimes out of what before were activities beyond the scope of national and international law. Were this an exact statement of the situation we might well be concerned, but it is not. It rests on a misconception of the whole nature of the law of nations. International law is not a body of authoritative codes or statutes; it is the gradual expression, case by case, of the moral judgments of the civilized world. As such, it corresponds precisely to the common law of Anglo-American tradition. We can understand the law of Nuremberg only if we see it for what it is—a great new case in the book of international law, and not a formal enforcement of codified statutes. A look at the charges will show what I mean.

* * * * * * *

* Ibid., p. 219.

"It was the Nazi confidence that we would never chase and catch them, and not a misunderstanding of our opinion of them, that led them to commit their crimes. Our offense was thus that of the man who passed by on the other side. That we have finally recognized our negligence and named the criminals for what they are is a piece of righteousness too long delayed by fear." [1]

That the conception of retrospective legislation which prevails under constitutional provisions in the United States does not receive complete recognition in other enlightened legal systems is illustrated by the decision in Phillips *vs.* Eyre, L.R. 6 Q.B. 1 [27 (1870–71)] described by Lord Wright as "a case of great authority." We quote:

"In fine, allowing the general inexpediency of retrospective legislation, it cannot be pronounced naturally or necessarily unjust. There may be occasions and circumstances involving the safety of the state, or even the conduct of individual subjects, the justice of which, prospective laws made for ordinary occasions and the usual exigencies of society for want of prevision fail to meet, and in which * * * the inconvenience and wrong, *summum jus summa injuria.*"

We quote with approval the words of Sir David Maxwell-Fyfe:

"With regard to 'crimes against humanity', this at any rate is clear. The Nazis, when they persecuted and murdered countless Jews and political opponents in Germany, knew that what they were doing was wrong and that their actions were crimes which had been condemned by the criminal law of every civilized state. When these crimes were mixed with the preparation for aggressive war and later with the commission of war crimes in occupied territories, it cannot be a matter of complaint that a procedure is established for their punishment." [2]

Concerning the mooted *ex post facto* issue, Professor Wechsler of Columbia University writes:

"These are, indeed, the issues that are currently mooted. But there are elements in the debate that should lead us to be suspicious of the issues as they are drawn in these terms. For, most of those who mount the attack on one or another of these contentions hasten to assure us that their plea is not one of immunity for the defendants; they argue only that they should have been disposed of politically, that is, dispatched out of hand. This is a curious position indeed. A punitive enterprise launched on the basis of general rules, administered in an adversary

[1] The Nuremberg Trial: "Landmark in Law"; Foreign Affairs, January 1947, pages 180 and 184.

[2] Maxwell-Fyfe, foreword to "The Nuremberg Trial" (London, Penguin Books, 1947), by R. W. Cooper.

proceeding under a separation of prosecutive and adjudicative powers is, in the name of law and justice, asserted to be less desirable than an *ex parte* execution list or a drumhead court martial constituted in the immediate aftermath of the war. I state my view reservedly when I say that history will accept no conception of law, politics or justice that supports a submission in these terms."

Again, he says:

"There is, indeed, too large a disposition among the defenders of Nuremberg to look for stray tags of international pronouncements and reason therefrom that the law of Nuremberg was previously fully laid down. If the Kellogg-Briand Pact or a general conception of international obligation sufficed to authorize England, and would have authorized us, to declare war on Germany in defense of Poland—and in this enterprise to kill countless thousands of German soldiers and civilians—can it be possible that it failed to authorize punitive action against individual Germans judicially determined to be responsible for the Polish attack? To be sure, we would demand a more explicit authorization for punishment in domestic law, for we have adopted for the protection of individuals a prophylactic principle absolutely forbidding retroactivity that we can afford to carry to that extreme. International society, being less stable, can afford less luxury. We admit that in other respects. Why should we deny it here?" *

Many of the laws of the Weimar era which were enacted for the protection of human rights have never been repealed. Many acts constituting war crimes or crimes against humanity as defined in C. C. Law 10 were committed or permitted in direct violation also of the provisions of the German criminal law. It is true that this Tribunal can try no defendant merely because of a violation of the German penal code, but it is equally true that the rule against retrospective legislation, as a rule of justice and fair play, should be no defense if the act which he committed in violation of C. C. Law 10 was also known to him to be a punishable crime under his own domestic law.

As a principle of justice and fair play, the rule in question will be given full effect. As applied in the field of international law that principle requires proof before conviction that the accused knew or should have known that in matters of international concern he was guilty of participation in a nationally organized system of injustice and persecution shocking to the moral sense of mankind, and that he knew or should have known that he would

* Wechsler, op. cit., pages 23–25.

be subject to punishment if caught. Whether it be considered codification or substantive legislation, no person who knowingly committed the acts made punishable by C. C. Law 10 can assert that he did not know that he would be brought to account for his acts. Notice of intent to punish was repeatedly given by the only means available in international affairs, namely, the solemn warning of the governments of the states at war with Germany. Not only were the defendants warned of swift retribution by the express declaration of the Allies at Moscow of 30 October 1943. Long prior to the Second World War the principle of personal responsibility had been recognized.

> "The Council of the Conference of Paris of 1919 undertook, with the aid of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, to incorporate in the treaty of peace arrangements for the punishment of individuals charged with responsibility for certain offenses." [1]

That Commission on Responsibility of Authors of the War found that—

> "The war was carried on by the central empires, together with their allies, Turkey and Bulgaria, by barbarous or illegitimate methods in violation of the established laws and customs of war and the elementary laws of humanity." [2]

As its conclusion, the Commission solemnly declared:

> "All persons belonging to enemy countries, however high their position may have been, without distinction of rank, including Chiefs of States, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution." [3]

The American members of that Commission, though in substantial accord with the finding, nevertheless expressed a reservation as to "the laws of humanity." The express wording of the London Charter and of C. C. Law 10 constitutes clear evidence of the fact that the position of the American Government is now in harmony with the Declaration of the Paris Commission concerning the "laws of humanity." We quote further from the report of the Paris Commission:

> "Every belligerent has, according to international law, the power and authority to try the individuals alleged to be guilty of the crimes of which an enumeration has been given in chapter II on Violations of the Laws and Customs of War, if such persons have been taken prisoners or have otherwise fallen into

[1] Hyde, op. cit., volume III, page 2409.
[2] Ibid., pages 2409 and 2410.
[3] American Journal of International Law, Vol. 14 (1920), p. 117.

its power. Each belligerent has, or has power to set up, pursuant to its own legislation, an appropriate tribunal, military or civil, for the trial of cases." [1]

According to the Treaty of Versailles, article 228, the German Government itself "recognized the right to the Allied and associated powers to bring before military tribunals persons accused of offenses against the laws and customs of war. Such persons who might be found guilty were to be sentenced to punishments 'laid down by law'." [2] Some Germans were, in fact, tried for the commission of such crimes.

The foregoing considerations demonstrate that the principle *nullum crimen sine lege*, when properly understood and applied, constitutes no legal or moral barrier to prosecution in the case at bar.

CRIMES AGAINST HUMANITY AS VIOLATIVE OF INTERNATIONAL LAW

C. C. Law 10 is not limited to the punishment of persons guilty of violating the laws and customs of war in the narrow sense; furthermore, it can no longer be said that violations of the laws and customs of war are the only offenses recognized by common international law. The force of circumstance, the grim fact of world-wide interdependence, and the moral pressure of public opinion have resulted in international recognition that certain crimes against humanity committed by Nazi authority against German nationals constituted violations not alone of statute but also of common international law. We quote:

"If a state is unhampered in its activities that affect the interests of any other, it is due to the circumstance that the practice of nations has not established that the welfare of the international society is adversely affected thereby. Hence that society has not been incited or aroused to endeavor to impose restraints; and by its law none are imposed. The Covenant of the League of Nations takes exact cognizance of the situation in its reference to disputes 'which arise out of a matter which by international law is solely within the domestic jurisdiction' of a party thereto. It is that law which as a product of the acquiescence of states permits the particular activity of the individual state to be deemed a domestic one.

"In as much as changing estimates are to be anticipated, and as the evolution of thought in this regard appears to be constant and is perhaps now more obvious than at any time since the United States came into being, the circumstance that at any

[1] Hyde, op. cit., page 2412.
[2] Ibid., page 2414.

given period the solution of a particular question is by international law deemed to be solely within the control or jurisdiction of one state, gives frail assurance that it will always be so regarded."[1]

"The family of nations is not unconcerned with the life and experience of the private individual in his relationships with the state of which he is a national. Evidence of concern has become increasingly abundant since World War I, and is reflected in treaties through which that conflict was brought to a close, particularly in provisions designed to safeguard the racial, linguistic and religious minorities inhabiting the territories of certain states, and in the terms of part XIII of the Treaty of Versailles, of June 28, 1919, in respect to labour, as well as in article XXIII of that treaty embraced in the Covenant of the League of Nations."[2]

"The nature and extent of the latitude accorded a state in the treatment of its own nationals has been observed elsewhere. It has been seen that certain forms or degrees of harsh treatment of such individuals may be deemed to attain an international significance because of their direct and adverse effect upon the rights and interests of the outside world. For that reason it would be unscientific to declare at this day that tyrannical conduct, or massacres, or religious persecutions are wholly unrelated to the foreign relations of the territorial sovereign which is guilty of them. If it can be shown that such acts are immediately and necessarily injurious to the nationals of a particular foreign state, grounds for interference by it may be acknowledged. Again, the society of nations, acting collectively, may not unreasonably maintain that a state yielding to such excesses renders itself unfit to perform its international obligations, especially in so far as they pertain to the protection of foreign life and property within its domain.* The property of interference obviously demands in every case a convincing showing that there is in fact a causal connection between the harsh treatment complained of, and the outside state that essays to thwart it.

* "Since the World War of 1914–1918, there has developed in many quarters evidence of what might be called an international interest and concern in relation to what was previously regarded as belonging exclusively to the domestic affairs of the individual state; and with that interest there has been manifest also an increasing readiness to seek and find a connection between domestic abuses and the maintenance of the general peace. See article XI of the Covenant of the League of Nations, United States Treaty, volume III, 3339." (Hyde, "International Law," 2d rev. ed., vol. I, pages 249–250.)

[1] Ibid., volume I, pages 7 and 8.
[2] Ibid., p. 38.

The international concern over the commission of crimes against humanity has been greatly intensified in recent years. The fact of such concern is not a recent phenomenon, however. England, France, and Russia intervened to end the atrocities in the Greco–Turkish warfare in 1827.[1]

President Van Buren, through his Secretary of State, intervened with the Sultan of Turkey in 1840 in behalf of the persecuted Jews of Damascus and Rhodes.[2]

The French intervened and by force undertook to check religious atrocities in Lebanon in 1861.[3]

Various nations directed protests to the governments of Russia and Rumania with respect to pogroms and atrocities against Jews. Similar protests were made to the government of Turkey on behalf of the persecuted Christian minorities. In 1872 the United States, Germany, and five other powers protested to Rumania; and in 1915, the German Government joined in a remonstrance to Turkey on account of similar persecutions.[4]

In 1902 the American Secretary of State, John Hay, addressed to Rumania a remonstrance "in the name of humanity" against Jewish persecutions, saying, "This government cannot be a tacit party to such international wrongs."

Again, in connection with the Kishenef [Kishinev] and other massacres in Russia in 1903, President Theodore Roosevelt stated:

> "* * * Nevertheless there are occasional crimes committed on so vast a scale and of such peculiar horror as to make us doubt whether it is not our manifest duty to endeavor at least to show our disapproval of the deed and our sympathy with those who have suffered by it. The cases must be extreme in which such a course is justifiable. * * * The cases in which we could interfere by force of arms as we interfered to put a stop to intolerable conditions in Cuba are necessarily very few. * * *"[5]

Concerning the American intervention in Cuba in 1898, President McKinley stated:

> "First. In the cause of humanity and to put an end to the barbarities, bloodshed, starvation, and horrible miseries now existing there, and which the parties to the conflict are either unable or unwilling to stop or mitigate. It is no answer to say this is all in another country, belonging to another nation, and

[1] Oppenheim, "International Law", volume I, (3d ed.) (Longmans, Green & Co., London, 1920), page 229.

[2] State Department Publication No. 9, pages 153 and 154.

[3] Norman Bentwich, "The League of Nations and Racial Persecution in Germany," Problems of Peace and War, XIX, (London, 1934), page 75 and following.

[4] Ibid.

[5] President's Message to Congress, 1904, "The Works of Theodore Roosevelt, Presidential Addresses and State Papers", (P. F. Collier & Son, New York), volume III, pages 178 and 179.

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therefore none of our business. It is specially our duty, for it is right at our door." [1]

The same principle was recognized as early as 1878 by a learned German professor of law, who wrote:

"States are allowed to interfere in the name of international law if 'humanity rights' are violated to the detriment of any single race." [2]

Finally, we quote the words of Sir Hartley Shawcross, the British Chief Prosecutor at the trial of Goering, et al.:

"The rights of humanitarian intervention on behalf of the rights of man trampled upon by a state in a manner shocking the sense of mankind has long been considered to form part of the [recognized] law of nations. Here, too, the Charter merely develops a preexisting principle." [3]

We hold that crimes against humanity as defined in C. C. Law 10 must be strictly construed to exclude isolated cases of atrocity or persecution whether committed by private individuals or by governmental authority. As we construe it, that section provides for punishment of crimes committed against German nationals only where there is proof of conscious participation in systematic government organized or approved procedures amounting to atrocities and offenses of the kind specified in the act and committed against populations or amounting to persecutions on political, racial, or religious grounds.

Thus, the statute is limited by construction to the type of criminal activity which prior to 1939 was and still is a matter of international concern. Whether or not such atrocities constitute technical violations of laws and customs of war, they were acts of such scope and malevolence, and they so clearly imperiled the peace of the world that they must be deemed to have become violations of international law. This principle was recognized although it was misapplied by the Third Reich. Hitler expressly justified his early acts of aggression against Czechoslovakia on the ground that the alleged persecution of racial Germans by the government of that country was a matter of international concern warranting intervention by Germany. Organized Czechoslovakian persecution of racial Germans in Sudetenland was a fiction supported by "framed" incidents, but the principle invoked by Hitler was the one which we have recognized, namely, that government organized racial persecutions are violations of international law.

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[1] President's Special Message of 11 April 1898. Hyde, op. cit., volume I, page 259.

[2] J. Bluntschli, Professor of Law, Heidelberg University, in "Das Moderne Voelkerrecht der Civilisierten Staaten," (3d ed.) page 270 (1878). Professor Bluntschli was a Swiss national.

[3] Trial of the Major War Criminals, op. cit., volume III, page 92.

As the prime illustration of a crime against humanity under C. C. Law 10, which by reason of its magnitude and its international repercussions has been recognized as a violation of common international law, we cite "genocide" which will shortly receive our full consideration. A resolution recently adopted by the General Assembly of the United Nations is in part as follows:

> "Genocide is a denial of the right of existence of entire human groups, as homicide is a denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations.
>
> "Many instances of such crimes of genocide have occurred when racial, religious, political, and other groups have been destroyed, entirely or in part.
>
> "The punishment of the crime of genocide is a matter of international concern.
>
> "The General Assembly therefore—
>
> "Affirms that genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices—whether private individuals, public officials, or statesmen, and whether the crime is committed on religious, racial, political or any other grounds—are punishable; * * *."*

The General Assembly is not an international legislature, but it is the most authoritative organ in existence for the interpretation of world opinion. Its recognition of genocide as an international crime is persuasive evidence of the fact. We approve and adopt its conclusions. Whether the crime against humanity is the product of statute or of common international law, or, as we believe, of both, we find no injustice to persons tried for such crimes. They are chargeable with knowledge that such acts were wrong and were punishable when committed.

The defendants contend that they should not be found guilty because they acted within the authority and by the command of German laws and decrees. Concerning crimes against humanity, C. C. Law 10 provides for punishment whether or not the acts were in violation of the domestic laws of the country where perpetrated (C. C. Law 10, art. II, par. 1(*c*)). That enactment also provides "the fact that any person acted pursuant to the order of his Government or of a superior does not free him from respon-

* Journal of the United Nations, No. 58, Supp. A–C/P. V./55, page 485; as cited in Political Science Quarterly (Mar 1947), volume LXII, No. 1, page 8.

sibility for a crime, but may be considered in mitigation." (C. C. Law 10, art. II, par. 4(*b*).)

The foregoing provisions constitute a sufficient, but not the entire, answer to the contention of the defendants. The argument that compliance with German law is a defense to the charge rests on a misconception of the basic theory which supports our entire proceedings. The Nuernberg Tribunals are not German courts. They are not enforcing German law. The charges are not based on violation by the defendants of German law. On the contrary, the jurisdiction of this Tribunal rests on international authority. It enforces the law as declared by the IMT Charter and C. C. Law 10, and within the limitations on the power conferred, it enforces international law as superior in authority to any German statute or decree. It is true, as defendants contend, that German courts under the Third Reich were required to follow German law (i.e., the expressed will of Hitler) even when it was contrary to international law. But no such limitation can be applied to this Tribunal. Here we have the paramount substantive law, plus a Tribunal authorized and required to apply it notwithstanding the inconsistent provisions of German local law. The very essence of the prosecution case is that the laws, the Hitlerian 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. We have pointed out that governmental participation is a material element of the crime against humanity. Only when official organs of sovereignty participated in atrocities and persecutions did those crimes assume international proportions. It can scarcely be said that governmental participation, the proof of which is necessary for conviction, can also be a defense to the charge.

Frank recognition of the following facts is essential. The jurisdictional enactments of the Control Council, the form of the indictment, and the judicial procedure prescribed for this Tribunal are not governed by the familiar rules of American criminal law and procedure. This Tribunal, although composed of American judges schooled in the system and rules of the common law, is sitting by virtue of international authority and can carry with it only the broad principles of justice and fair play which underlie all civilized concepts of law and procedure.

No defendant is specifically charged in the indictment with the murder or abuse of any particular person. If he were, the indictment would, no doubt, name the alleged victim. Simple murder and isolated instances of atrocities do not constitute the gravamen of the charge. Defendants are charged with crimes of such

immensity that mere specific instances of criminality appear insignificant by comparison. The charge, in brief, is that of conscious participation in a nation wide government-organized system of cruelty and injustice, in violation of the laws of war and of humanity, and perpetrated in the name of law by the authority of the Ministry of Justice, and through the instrumentality of the courts. The dagger of the assassin was concealed beneath the robe of the jurist. The record is replete with evidence of specific criminal acts, but they are not the crimes charged in the indictment. They constitute evidence of the intentional participation of the defendants and serve as illustrations of the nature and effect of the greater crimes charged in the indictment. Thus it is that the apparent generality of the indictment was not only necessary but proper. No indictment couched in specific terms and in the manner of the common law could have encompassed within practicable limits the generality of the offense with which these defendants stand charged.

The prosecution has introduced evidence concerning acts which occurred before the outbreak of the war in 1939. Some such acts are relevant upon the charges contained in counts two, three, and four, but as stated by the prosecution, "None of these acts is charged as an independent offense in this particular indictment." We direct our consideration to the issue of guilt or innocence after the outbreak of the war in accordance with the specific limitations of time set forth in counts two, three, and four of the indictment. In measuring the conduct of the individual defendants by the standards of C. C. Law 10, we are also to be guided by article II, paragraph 2 of that law, which provides that a person "is deemed to have committed a crime as defined in paragraph 1 of this article, if he was (*a*) a principal or (*b*) was an accessory to the commission of any such crime or ordered or abetted the same or (*c*) took a consenting part therein or (*d*) was connected with plans or enterprises involving its commission or (*e*) was a member of any organization or group connected with the commission of any such crime * * *."

Before considering the progressive degeneration of the judicial system under Nazi rule, it should be observed that at least on paper the Germans had developed, under the Weimar republic, a civilized and enlightened system of jurisprudence. A few illustrations will suffice. The power of judicial appointment and the independence of the judges was jealously guarded by the individual states within the Reich. The following acts were declared criminal under the provisions of the German criminal code:

The acceptance of bribes or inducements by a judge, offered for the purpose of influencing his decision—Section 334.

Action by an official, who, in the conduct or decision of a case, deliberately makes himself guilty of diverting the law to the disadvantage of one of the parties—Section 336.

The securing of a confession by duress—Section 343.

The act of an official who, in the exercise of his duty in a criminal proceeding, knowingly causes any person to escape penalty provided by law—Section 346.

Action by a superior officer who intentionally induces * * * his subordinate to commit a punishable act in office, or knowingly connives at such a punishable offense on the part of his subordinate—Section 357.

In the Weimar constitution it was provided that "the generally accepted rules of international law are to be considered as binding, integral parts of the law of the German Reich." (Art. 4.)

The Constitution also guaranteed to all Germans—

Equality before the law (Art. 109);
Citizenship, the right of travel and emigration (Arts. 110, 111, and 112);
Freedom of person (Art. 114);
Freedom of speech, assembly, and association (Arts. 118, 123, and 124);
Right of just compensation for property expropriated (Art. 153);
Right of inheritance (Art. 154);

There were, however, in the Weimar constitution the germs of the disease from which it died. In article 48 of the constitution it was provided:

> "The Reich President may, if the public safety and order of the German Reich are considerably disturbed or endangered, take such measures as are necessary to restore public safety and order. If necessary, he may intervene with the help of the armed forces. For this purpose he may temporarily suspend, either partially or wholly, the fundamental rights established in articles 114, 115, 117, 118, 123, 124, and 153."

A review of the evidence will disclose that substantially every principle of justice which was enunciated in the above-mentioned laws and constitutional provisions was after 1933 violated by the Hitler regime.

The first step in the march toward absolutism was of necessity the assumption and consolidation of power. It was deemed essential that the government be authorized to make laws by decree, unhampered by the limitations of the Weimar republic, by the Reichstag, or by the independent action of the several German States (Laender). To accomplish this end on 28 February 1933 a decree was promulgated over the signature of President von Hindenburg, Chancellor Hitler, Reich Minister of the Interior Frick, and Reich Minister of Justice Guertner. Briefly stated, this decree expressly suspended the provisions of the Weimar constitution guaranteeing personal liberty, free speech, press, assembly, association, privacy of communication, freedom of search, and inviolability of property rights. The decree further provided

that the Reich government might, to restore public security, temporarily take over the powers of the highest State authority. It was declared in the preamble that the decree was passed "in virtue of article 48 (2) of the Weimar constitution." This is the article to which we previously referred and which authorized the Reichspraesident to suspend the very provisions which were in fact stricken down by the Hitler decree of 28 February. The decree was reinforced on 24 March 1933 by the act of an intimidated Reichstag. The enactment was subtly drawn to accomplish a double purpose. It provided that "laws decreed by the government may deviate from the constitution", but the act did not stop there; it also provided that "laws of the Reich can be decreed by the government apart from the procedure provided by the Constitution." We quote in part—

> "Article 1.—Laws of the Reich can be decreed, apart from the procedure provided by the constitution of the Reich, also by the government of the Reich. This also applies to the laws mentioned in articles 85, paragraph 2, and 87 of the constitution of the Reich.
>
> "Article 2.—The laws decreed by the government of the Reich may deviate from the constitution of the Reich as far as they do not concern the institution of the Reichstag and the Reich council as such. The rights of the Reichspraesident remain untouched.
>
> "Article 3.—Articles 68 through 77 of the constitution of the Reich do not apply to laws decreed by the government of the Reich."

Though the Enabling Act expressly repealed only a small portion of the constitution, nevertheless that portion which was repealed cleared the procedural way for the nullification of the rest if and when decrees should be promulgated by "the government." On 14 July 1933 a law was passed declaring the Nationalsozialistische Deutsche Arbeiterpartei (NSDAP) to be the only political party and making it a crime to maintain or form any other political party.* Thus, it was made doubly sure that any legislation thereafter enacted by the Reichstag would be in harmony with the will of the government.

Although the process by which the Hitler regime came into power was tainted with illegality and duress, nevertheless the power thus seized was later consolidated and the regime thereafter did receive the organized support of the German people and recognition by foreign powers. On 30 January 1934, more than 10 months after the enactment of the enabling act, and subsequent

* Trial of the Major War Criminals, op. cit., judgment, volume I, page 178.

to the Reichstag election of 12 November 1933, the Reichstag passed an act by unanimous vote providing that "the sovereign powers of the Laender are transferred to the Reich," and further providing that "the Reich government may issue new constitutional laws." The act was regularly signed by Reich President von Hindenburg, and by Reich Chancellor Hitler, and Minister Frick.[1] The provisions of the Enabling Act were renewed by acts of the Reichstag on 30 January 1937 and again on 30 January 1939.

On 14 June 1942, Dr. Lammers, Reich Minister and Chief of the Reich Chancellery, stated that they would "stress the fact that the Fuehrer himself and the Reich cabinet should not be eliminated from the powers of legislation."

The conduct of the defendants must be seen in a context of preparation for aggressive war, and must be interpreted as within the framework of the criminal law and judicial system of the Third Reich. We shall, therefore, next consider the legal and judicial process by which the entire judicial system was transformed into a tool for the propagation of the National Socialist ideology, the extermination of opposition thereto, and the advancement of plans for aggressive war and world conquest. Though the overt acts with which defendants are charged occurred after September 1939, the evidence now to be considered will make clear the conditions under which the defendant acted and will show knowledge, intent, and motive on their part, for in the period of preparation some of the defendants played a leading part in molding the judicial system which they later employed.

Beginning in 1933, there developed side by side two processes by which the Ministry of Justice and the courts were equipped for terroristic functions in support of the Nazi regime. By the first, the power of life and death was ever more broadly vested in the courts. By the second, the penal laws were extended in such inconclusive and indefinite terms as to vest in the judges the widest discretion in the choice of law to be applied, and in the construction of the chosen law in any given case. In 1933, by the law for the "Protection against Violent Political Acts," the death sentence was authorized, though not required, as to a number of crimes "whenever milder penalty has been prescribed hitherto." [2]

On 24 April 1934, the definition of high treason was greatly expanded and the death sentence was authorized, though not required, in numerous instances. The manner in which this law was applied renders it all-important. The following provisions,

[1] 1934 RGBl. I, p. 75.
[2] Law of 4 April 1933, 1933 RGBl. I, page 162.

among others, illustrate the scope of the amended law and the discretionary power of the judge:

"83. Whoever publicly incites to or solicits an undertaking of high treason shall be punished by confinement in a penitentiary not to exceed 10 years.

"Whoever prepares an undertaking of high treason in any other way shall be punished in like manner.

"The death penalty, or confinement in a penitentiary for life, or for not less than 2 years, shall be inflicted:

"(1) if the act was directed toward establishing or maintaining an organized combination for the preparation of high treason or

* * * * * * *

"(3) if the act was directed toward influencing the masses by making or distributing writings, recordings, or pictures, or by the installation of wireless telegraph or telephone, or

"(4) if the act was committed abroad or was committed in such a manner that the offender undertook to import writings, recordings, or pictures from abroad or for the purpose of distribution within the country."*

On 20 December 1934, the government promulgated the following enactment "Law on Treacherous Acts against State and Party and for the Protection of Party Uniforms," which provided in part as follows:

"Chapter 1. Article 1. (1) Unless heavier punishment is sanctioned under the authority of a law previously established, imprisonment not to exceed 2 years shall be imposed upon anybody deliberately making false or grievous statements, fit to injure the welfare or the prestige of the government of the Reich, the National Socialist Workers' Party, or its agencies. If such statements are made or circulated in public, imprisonment for not less than 3 months shall be imposed.

"Article 2. (1) Anyone who makes or circulates statements proving a malicious, baiting or low-minded attitude toward leading personalities of the State or the NSDAP, or toward orders issued by them or toward institutions created by them—fit to undermine the confidence of the people in its political leadership —shall be punished with imprisonment.

"(2) Statements of this kind which are not made in public shall warrant the same punishment—provided the offender figures on his statements eventually being circulated in public."

* Law of 24 April 1934, 1934 RGBl. I, page 341. Most of the laws and decrees mentioned herein are reproduced as parts of document NG–715, Prosecution Exhibit 112. (See footnote on p. 231.)

A decisive step was taken by the "Law to Change the Penal Code," which was promulgated on 28 June 1935 by Adolf Hitler as Fuehrer and Reich Chancellor, and by Dr. Guertner as Reich Minister of Justice. Article 2 of that enactment is as follows:

"Article 2. Whoever commits an act which the law declares as punishable or which deserves punishment according to the fundamental idea of a penal law and the sound concept of the people, shall be punished. If no specific penal law can be directly applied to this act, then it shall be punished according to the law whose underlying principle can be most readily applied to the act."

In substance, this edict constituted a complete repudiation of the rule that criminal statutes should be definite and certain and vested in the judge a wide discretion in which Party political ideology and influence were substituted for the control of law as the guide to judicial decision.

Section 90 (f) of the Penal Code, as enacted on 24 April 1934, provided:

"Whoever publicly, or as a German staying abroad, causes serious danger to the reputation of the German nation by an untrue or grossly inaccurate statement of a factual nature, shall be punished by confinement in a penitentiary."

The act was amended on 20 September 1944 as follows:

"In especially serious cases a German may be punished by death."[1]

By the act of 28 June 1935 it was provided:

"Whoever publicly profanes the German National Socialist Labor Party, its subdivisions, symbols, standards, and banners, its insignia or decorations, or maliciously and with premeditation exposes them to contempt shall be punished by imprisonment.

"The offense shall be prosecuted only upon order of the Reich Minister of Justice who shall issue such order in agreement with the Fuehrer's deputy."[2]

By the law of 28 June 1935 it was provided:

"If the main proceedings show that the defendant committed an act which deserves punishment according to the common sense of the people but which is not declared punishable by the law, then the court must investigate whether the underlying principle of a penal law applies to this act and whether justice

[1] 1944 RGBl. I, p. 225.
[2] 1935 RGBl. I, p. 839.

can be helped to triumph by the proper application of this penal law. (Article 2 of the Penal Code.)" [1]

A decree of 1 December 1936 provides in part as follows:

"Section 1. (1) A German citizen who consciously and unscrupulously, for his own gain or for other low motives, contrary to legal provisions smuggles property abroad or leaves property abroad and thus inflicts serious damage to German economy is to be punished by death. His property will be confiscated. The perpetrator is also punishable, if he commits the misdeed abroad." [2]

On 17 August 1938, more than a year before the invasion of Poland, a decree was promulgated against undermining German military efficiency. It provided in part:

"Section 5. (1) The following shall be guilty of undermining German military efficiency, and shall be punished by death:

"1. Whoever openly solicits or incites others to evade the fulfillment of compulsory military service in the German or an allied armed force, or otherwise openly seeks to paralyze or undermine the will of the German people or an allied nation to self-assertion by bearing arms; * * *." [3]

Under this law the death sentence was mandatory.

By the decree of 1 September 1939 the ears of the German people were stopped lest they hear the truth:

"Section 1.—Deliberate listening to foreign stations is prohibited. Violations are punishable by hard labor. In less severe cases there can be a sentence of imprisonment. The radio receivers used will be confiscated.

"Section 2.—Whoever deliberately spreads news from foreign radio stations which is designed to undermine German military efficiency will be punished by hard labor and in particularly severe cases by death." [4]

It is important to note that discretion as to penalty was vested in the court.

On 5 September 1939, by the Decree Against Public Enemies, it was provided that looting in liberated territory may be punished by hanging. The following additional provisions are of importance because of the arbitrary manner in which the instrument was construed and applied by the courts. The provisions are as follows:

[1] 1935 RGBl. I, p. 844, art. 267a.
[2] 1936 RGBl. I, p. 999.
[3] 1939 RGBl. I, p. 1455.
[4] Ibid., p. 1683.

"Section 2.—Whoever commits a crime or offense against life, limb or property, taking advantage of air raid protection measures, is punishable by hard labor of up to 15 years or for life, and in particularly severe cases punishable by death.

"Section 3.—Whoever commits arson or any other crime of public danger, thereby undermining German military efficiency, will be punished by death.

"Section 4.—Whoever commits a criminal act exploiting the extraordinary conditions caused by war is punishable beyond the regular punishment limits with hard labor of up to 15 years or for life, or is punishable by death if the sound common sense of the people requires it on account of the crime being particularly despicable." [1]

On 25 November 1939 the death penalty was authorized as punishment for intentionally or negligently causing damage to war materials and the like, if it endangers the fighting power of the German armed forces. The death penalty was also authorized in case of anyone who "disturbs or imperils" the ordinary function of an enterprise essential to the defense of the Reich or to the supply of the population.[2]

On 5 December 1939 the death penalty was authorized for various crimes of violence and it was provided that "this decree is also applicable to crimes committed before it became valid".

On 4 September 1941 the Criminal Code was supplemented and changed to provide the death penalty for dangerous habitual criminals and sex criminals "if necessitated for the protection of the national community or by the desire for just expiation". The decree was signed by Adolf Hitler and by the defendant Dr. Schlegelberger in charge of the Reich Ministry of Justice.

By the decree of 5 May 1944, the judges were substantially freed from all restrictions as to the penalty to be invoked in criminal cases. That decree reads as follows:

"With regard to all offenders who are guilty of causing serious prejudice or seriously endangering the conduct of war, or the security of the Reich, through an intentional criminal act, a penalty may be imposed in excess of the regular penal limits up to the statutory maximum for a given type of punishment, or hard labor for a term or for life, or death, if the regular statutory maximum limits are insufficient for expiation of the act according to the sentiment of the people. The same shall also apply to all offenses committed by negligence by which one made himself guilty of a particularly grave prejudice or a par-

[1] Ibid., p. 1679.
[2] 1939 RGBl. I, p. 2319.

ticularly serious danger to the conduct of war, or to the security of the Reich." [1]

On 20 August 1942 Hitler issued the famous decree which marks the culmination of his systematic campaign to change the German judicial system into an instrumentality of the NSDAP. The decree was as follows:

"A strong administration of justice is necessary for the fulfillment of the tasks of the great German Reich. Therefore, I commission and empower the Reich Minister of Justice to establish a National Socialist Administration of Justice and to take all necessary measures in accordance with my directives and instructions made in agreement with the Reich Minister and Chief of the Reich Chancellery and the Leader of the Party Chancellery. He can hereby deviate from any existing law." [2]

The statutes which we have reviewed were merely steps in the process of increased severity of the criminal law and in the development of a loose concept concerning the definition of crime. The latter concept was especially evident in the statutes concerning the "sound sentiment of the people", crime by analogy, and undermining the military efficiency of the nation. In place of the control of law there was substituted the control of National Socialist ideology as a guide to judicial action.

The Draconic laws to which we have referred were upon their face, of general applicability. The discriminations on political, racial, and religious grounds are to be found not in the text, but in the application of the text.

But the Nazis were not content with statutes of a non-discriminatory nature even in view of the discriminatory manner in which they were enforced. Coincidentally with the development of these laws and decrees there arose another body of substantive law which expressly discriminated against minority groups both within and without the Reich, and which formed the basis for racial, religious, and political persecution on a vast scale. On 7 April 1933, a decree by the Reich government provided in part that—

"Article 2. Persons who, according to the Law for the Restoration of the Professional Civil Service of 7 April 1933,[3] are of non-Aryan descent, may be refused permission to practice law, even if there exists none of the reasons enumerated in the Regulations for Lawyers. The same rule applies in cases, as where a lawyer described in section 1, clause 2, wishes to be admitted to another court. * * *"

[1] 1944 RGBl. I, p. 115.
[2] 1942 RGBl. I, p. 535.
[3] 1933 RGBl. I, p. 175.

"Article 3. Persons who are active in the Communistic sense are excluded from the admission to the bar. Admissions already given have to be revoked." [1]

The act was implemented by the power of injunction. The fact that the license to practice law had been canceled was also stated as a ground for the cancellation of employment contracts and office leases.

On 15 September 1935, the Reichstag enacted the "Law for the Protection of German Blood and Honor." We quote—

"Article 1. (1) Marriages of Jews and citizens of German or related blood are prohibited. Marriages which are concluded nevertheless, are void even if they were concluded abroad in order to circumvent this law.

"(2) Only the district attorney can sue for nullification of marriage.

"Article 2. Sexual intercourse (except in marriage) between Jews and German nationals of German or German-related blood is forbidden."

By other laws, as amended from time to time, non-Aryans were almost completely expelled from public service. The number of non-Aryans in schools and higher institutions of learning was restricted.[2] Jews were excluded from the homestead law concerning peasantry.[3] Jewish religious communities were regulated.[4] Jews were excluded from certain industrial enterprises[5] and their rights as tenants were restricted.[6]

By the act of 2 November 1942 it was provided—

"Section 1. A Jew who has his domicile abroad cannot be a citizen of the Protectorate of Bohemia and Moravia. Domicile abroad is established if a Jew was abroad under circumstances which indicated that his tenure there is not of a temporary nature.

"Section 2. A Jew loses his citizenship status in the Protectorate if—

"(a) As of the effective date of this decree, he has an established domicile abroad;

"(b) At a date subsequent to the effective date of this decree, he establishes a domicile abroad."

[1] Ibid., p. 188.
[2] 1933 RGBl. I, p. 225.
[3] Ibid., p. 685.
[4] 1938 RGBl. I, p. 338.
[5] Ibid., p. 1580.
[6] 1939 RGBl. I, p. 864.

And by act of 25 November 1941 it was provided—

"Section 3. (1) The property of the Jew who is losing his nationality under this amendment shall be forfeited for the benefit of the Reich at the moment he loses his nationality. The Reich further confiscates the property of Jews who are stateless at the moment this amendment becomes effective, and who were last of German nationality, if they have or take up their regular residence abroad.

(2) The property thus forfeited shall serve the furthering of all purposes in connection with the solution of the Jewish question.

* * * * * * *

"Section 8. (1) It is for the chief of the Security Police and the SD (of Reich Leader SS) to decide whether the conditions for confiscation of property are given.

(2) The administration and liquidation of the forfeited property is up to the Chief of the Regional Finance Office, Berlin." [1]

The decree of 4 December 1941 "concerning the organization and criminal jurisdiction against Poles and Jews in the Incorporated Eastern Territories",[2] marks perhaps the extreme limit to which the Nazi government carried its statutory and decretal persecution of racial and religious minorities, but it also introduces another element of great importance. We refer to the extension of German laws to occupied territory, to purportedly annexed territory, and to territory of the so-called protectorates. The decree provides—

"(1) Poles and Jews in the Incorporated Eastern Territories are to conduct themselves in conformity with the German laws and with the regulations introduced for them by the German authorities. They are to abstain from any conduct liable to prejudice the sovereignty of the German Reich or the prestige of the German people.

"(2) The death penalty shall be imposed on any Pole or Jew if he commits an act of violence against a German on account of his being of German blood.

"(3) A Pole or Jew shall be sentenced to death, or in less serious cases to imprisonment, if he manifests anti-German sentiments by malicious activities or incitement, particularly by making anti-German utterances, or by removing or defacing official notices of German authorities or offices, or if he, by his

[1] 1942 RGBl. I, p. 722.

[2] This decree was also known as the "decree concerning the administration of penal justice against Poles and Jews in the Incorporated Eastern Territories."

conduct, lowers or prejudices the prestige or the well being of the German Reich or the German people.

"(4) The death penalty, or in less serious cases imprisonment, shall be imposed on any Jew or Pole:

* * * * * * *

"3. If he urges or incites to disobedience to any decree or regulation issued by the German authorities;

"4. If he conspires to commit an act punishable under paragraphs (2), (3) and (4), subsections 1 to 3, or *if he seriously contemplates the carrying out of such an act,* or if he offers himself to commit such an act, or accepts such an offer, or if he obtains credible information of such act, or of the intention of committing it, and fails to notify the authorities or any person threatened thereby at a time when danger can still be averted. [Emphasis added.]

"II. Punishment shall also be imposed on Poles or Jews if they act contrary to German criminal law or commit any act for which they deserve punishment in accordance with the fundamental principles of German criminal law and in view of the interests of the State in the Incorporated Eastern Territories.

"III. * * * (2) The death sentence shall be imposed in all cases where it is prescribed by the law. Moreover, in these cases where the law does not provide for the death sentence, it may and shall be imposed if the offense points to particularly grave for other reasons; the death sentence may also be passed upon juvenile offenders.

* * * * * * *

"XIV. (1) The provisions contained in sections I–IV of this decree apply also to those Poles and Jews who on 1 September 1939 were domiciled or had their residence within the territory of the former Polish State, and who committed criminal offenses in any part of the German Reich other than the Incorporated Eastern Territories. * * *"

It will be observed that the title of the foregoing act refers to "Poles and Jews in the Incorporated Eastern Territories", but Article XIV makes the decree also applicable to acts by Poles and Jews within any part of the German Reich, if on 1 September 1939 they were domiciled within the former Polish State. This section was repeatedly employed by the courts in the prosecution of Poles.

There was promulgated a thirteenth regulation under the Reich citizenship law which illustrates the increasing severity by means

of which the government was attempting to reach a "solution of the Jewish problem" under the impulsion of the progressively adverse military situation. This regulation, under date of 1 July 1943, provides:

"Article 1. (1) Criminal actions committed by Jews shall be punished by the police.

"(2) The provision of the Polish penal laws of 4 December 1941 (RGBl. I, p. 759.) shall no longer apply to Jews.

"Article 2. (1) The property of a Jew shall be confiscated by the Reich after his death.

* * * * * * *

"Article 3. The Reich Minister of the Interior with the concurrence of the participating higher authorities of the Reich shall issue the legal and administrative provisions for the administration and enforcement of this regulation. In doing so he shall determine to what extent the provisions shall apply to Jewish nationals of foreign countries."

By Article 4 it was provided that in the Protectorate of Bohemia and Moravia the regulation shall apply where German administration and German courts have jurisdiction. (1943 RGBl. I, p. 372.)

Not only did the Nazis enact special discriminatory laws against Poles and Jews and political minorities; they also enacted discriminatory laws in favor of members of the Party. By the decree of 17 October 1939, it was provided that "for the area of the Greater German Reich, special jurisdiction in penal matters will be established for—

"1. Professional members of the Reich leadership of the SS.

"2. Professional members of the staffs of those Higher SS and Police Chiefs who possess the authority of issuing orders in those units which have been specially designated under numbers 3 to 6 below:

"3. Members of the SS units for special purposes;

"4. Members of the SS Death Head units (including their reinforcements);

"5. Members of the SS Junker schools;

"6. Members of police units for special purposes."

On 12 March 1938, the German Army invaded Austria. The methods employed "were those of an aggressor." * On the next day Austria was incorporated in the German Reich. As a result of the Munich pact of 29 September 1938, and of threatened invasion, Czechoslovakia was compelled to cede the Sudetenland to

* Trials of the Major War Criminals, op. cit., judgment, volume I, page 194.

Germany,* and on 16 March 1939, Bohemia and Moravia were incorporated in the Reich as a protectorate. On 1 September 1939, Poland was invaded and thereafter occupied and, later on, Germany, by military force, occupied all or portions of Denmark, Norway, Belgium, the Netherlands, Luxembourg, Yugoslavia, Greece, and Russia. These occupations and annexations furnished the motive for an extension into many areas outside the old Reich of the draconic and discriminatory German laws which had been put in force within the old Reich. By the act of 14 April 1939, it was provided:

"Article II, section 6 (2). Persons who are not German nationals are subject to German jurisdiction for offenses—

"(a) to which German criminal law applies,

"(b) if they are prosecuted under a private action provided the action has been brought by a German national.

* * * * * * *

"Section 7. German jurisdiction in the Protectorate of Bohemia and Moravia excludes jurisdiction by the courts of the Protectorate unless otherwise provided."

The decree of 5 September 1939 against public enemies, *supra,* was made "applicable in the Protectorate of Bohemia and Moravia and also for those persons who are not German citizens."

By a decree of 25 November 1939 concerning damage to war material, it is provided in part:

"Section 2. Whoever disturbs or imperils the ordinary function of an enterprise essential to the defense of the Reich or to the supply of the population in that he made a thing serving the enterprise completely or partially unusable or put it out of commission, shall be punished by hard labor or in especially serious cases by death.

* * * * * * *

"Section 6. In the Protectorate of Bohemia and Moravia the provisions of sections 1, 2, * * * and 5 of this decree are valid also for persons who are not nationals of the German state."

The "decree on the extension of the application of criminal law of 6 May 1940" provided in part:

[Article I, section 4] "German criminal law will be applied to the following crimes committed by a foreigner abroad, independently of the laws of the place of commitment:

* Ibid., p. 197.

"1. Crimes committed while holding a German governmental office, as a German soldier or as member of the Reich Labor Service (Reichsarbeitsdienst) or committed against a holder of a German office of the State or the Party, against a German soldier or a member of the Reich Labor Service, while on duty or relating to his duty;

"2. Actions constituting treason or high treason against Germany; * * *."

* * * * * * *

[Article II] "Paragraph 153. * * * A crime committed by a foreigner abroad will be prosecuted by the public prosecutor only if so demanded by the Reich Ministry of Justice. The public prosecutor may abstain from the prosecution of a crime if the same crime has already been punished abroad and if the punishment has been carried out and the sentence to be expected in Germany would, after deducting the time served abroad, not be heavy."

The act of 25 November 1941, *supra*, concerning the confiscation of Jewish property was made applicable in the Protectorate of Bohemia and Moravia and in the Incorporated Eastern Territories.* Of greatest significance in this category was the law against Poles and Jews already cited in another connection. The thirteenth regulation under the Reich Citizenship Law of 1 July 1943, *supra*, was also made applicable within the Protectorate of Bohemia and Moravia "where German administration and German courts have jurisdiction". It was also made applicable to Jews "who are citizens of the Protectorate". (Sec. 4.)

Thus far we have taken note of the substantive criminal law and its extension to occupied and annexed territories, but these laws were not self-executing. For the accomplishment of the ends of aggressive war, the elimination of political opposition and the extermination of Jews in all of Europe, it was deemed necessary to harness the Ministry of Justice and the entire court system for the enforcement of the penal laws in accordance with National Socialist ideology.

By decree of 21 March 1933 Special Courts were established within the district of every court of appeal. Their jurisdiction was rapidly extended. It included the trial of cases arising under the decree relating to the defense against insidious attacks against the government of the national revolution.

The decree of 21 March 1933 provided in part:

"Section 3. (1) The Special Courts shall also be competent

* 1941 RGBl. I, p. 722.

if a crime within their jurisdiction represents also another punishable deed.

"(2) If another punishable act is factually connected with a crime within the jurisdiction of the Special Courts, the proceedings on that other punishable deed against delinquents and participants may be referred to the Special Court by way of connection."

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"Section 9. (1) No hearings relating to the warrant of arrest will be held.

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"Section 10. For the defendant who has not yet chosen counsel, counsel has to be appointed at the time when the date for the trial is fixed.

"Section 11. A preliminary court investigation will not take place. * * *

"Section 12. * * * (4) The term of the summons (section 217 of the Code of Criminal Procedure) is 3 days. It can be shortened to 24 hours.

"Section 13. The Special Court can refuse any offer of evidence, if the court has come to the conviction that the evidence is not necessary for clearing up the case.

"Section 14. The Special Court has to pass sentence even if the trial results in showing the act of which the defendant is accused, as not being under the jurisdiction of the Special Court. This does not apply if the act constitutes a crime or offense under the jurisdiction of the Supreme Court or the courts of appeal; in this case the Special Court has to proceed according to section 270, paragraph 1–2 of the Code of Criminal Procedure.

"Section 16. (1) There is no legal appeal against decisions of the Special Courts.

"(2) Applications for a reopening of the trial are to be decided upon by the criminal chamber of the district court. The reopening of the trial in favor of the defendant will also take place if there are circumstances which point to the necessity of reexamining the case in the ordinary procedure. The stipulation of section 363 of the Code of Criminal Procedure remains unaffected. If the application for the reopening of the trial is

justified, the trial will be ordered to take place before the competent ordinary court."[1]

Special Courts were also vested with jurisdiction under the law for the protection against violent political acts of 4 April 1933 under which the death penalty was authorized.[2]

On 1 September 1939 the Special Courts were given jurisdiction under the law concerning listeners to foreign radio broadcasts, and the death sentence was authorized in certain cases.[3] On 5 September 1939 jurisdiction of the Special Court was extended to cases of looting, and the death sentence was authorized. Jurisdiction was also extended to cases of criminal acts exploiting the extraordinary conditions caused by the war. That act further provided:

[Article 5] "In all trials by Special Courts the verdict must be pronounced at once without observation of time limitations if the perpetrator is caught red-handed or if guilt is otherwise obvious".[4]

On 21 February 1940 the Special Courts were expressly given jurisdiction concerning—

[Article 13] "1. Crime and offenses committed under the law of 20 December 1934 concerning treacherous attacks against State and Party, and concerning protection of Party uniforms;

"2. Crimes under section 239a of the Reich Criminal Code and under the law of 22 June 1938 concerning highway robbery by means of highway traps;

"3. Crimes under the decree [1 September 1939] concerning extraordinary measures in regard to radio;

"4. Crimes and offenses under the war economy decree of 4 September 1939;

"5. Crimes under section 1 of the decree of 5 September 1939 against public enemies;

"6. Crimes under sections 1 and 2 of the decree of 5 December 1939 against violent criminals."[5]

The decree further provided:

[Article 14] (1) "The Special Court also has jurisdiction over other crimes and offenses, if the prosecution is of the opinion that immediate sentencing by the Special Court is indicated by the gravity or the outrageousness of the act, on

[1] 1933 RGBl. I, p. 136.
[2] Ibid., p. 162.
[3] 1939 RGBl. I, p. 1683.
[4] 1939 RGBl. I, p. 1679.
[5] 1940 RGBl. I, p. 405.

account of the thereby-aroused public sentiment or in consideration of serious threat to public order or security."

[Article 23] "(1) In all proceedings before a Special Court the sentence must be passed immediately without observation of any reprieves, if the delinquent was caught in the very act or if his guilt is self-evident otherwise.

"(2) In all other cases the term of summons shall be 24 hours. (Articles 217, 218 of the Reich Code of Criminal Procedure (Reichsstrafprozessordnung))."

[Article 25] "(1) The Special Court must hand down a decision in a case, even if the trial shows that the act with which the accused is charged is of such a nature that the Special Court is not competent to deal with it. If, however, the trial shows that the act comes under the jurisdiction of the People's Court, the Special Court refers the matter to the latter court, by decision; Article 270, section 2, of the Reich Code of Criminal Procedure is applicable accordingly.

[Article 26] "(1) There is no legal appeal against a decision of the Special Court."

[Article 34] "The chief public prosecutor may lodge a petition for nullification with the Supreme Court (Reichsgericht) against a final judgment of a judge of the criminal court of the Special Court, within 1 year from the date of its becoming final, if the judgment is not justified because of an erroneous application of law on the established facts.

[Article 35] "(1) The petition for nullification must be submitted in writing to the Supreme Court. This court will decide thereon by judgment based on a trial. With the consent of the chief public prosecutor it can also reach a decision without trial.

"2. The Supreme Court may order a postponement or an interruption of the execution. It may order arrest or internment even prior to the decision on the petition for nullification. The criminal senate (Strafsenat) composed of three members including the president, will decide thereon without a trial, with reservations as to the regulations of article 124, section 3 of the Reich Code of Criminal Procedure." *

The speed with which the Special Courts acted is of significance. In view of the congested dockets of the Special Courts, Freisler, acting for the Minister of Justice, ordered, "a Special Court is, as a rule, to be considered overloaded if a monthly average of more than forty new indictments has been filed with it."

On 4 December 1941, in the law against Poles and Jews, *supra*, it was provided:

* Id.

"IV. The State prosecutor shall prosecute a Pole or a Jew if he considers that punishment is in the public interest.

"V. (1) Poles and Jews shall be tried by a Special Court or by the district judge.

* * * * * * *

"VI. (1) Every sentence will be enforced without delay. The State prosecutor may, however, appeal from the sentence of a district judge to the court of appeal. The appeal has to be lodged within 2 weeks.

"(2) The right to lodge complaints which are to be heard by the court of appeal is reserved exclusively to the State prosecutor.

"VII. Poles and Jews cannot challenge a German judge on account of alleged partiality.

"VIII. * * * (2) During the preliminary inquiry, the State prosecutor may order the arrest and any other coercive measures permissible.

"IX. Poles and Jews are not sworn in as witnesses in criminal proceedings. If the unsworn deposition made by them before the court is found false, the provisions as prescribed for perjury and false statements shall be applied accordingly.

"X. (1) Only the State prosecutor may apply for the reopening of a case. In a case tried before a Special Court, the decision concerning an application for the reopening of the proceedings rests with this court.

"(2) The right to lodge a plea of nullity rests with the State prosecutor general. The decision on the plea rests with the court of appeal.

"XI. Poles and Jews are not entitled to act as prosecutors either in a principal or a subsidiary capacity.

"XII. The court and the State prosecutor shall conduct proceedings within their discretion and according to the principles of the German law of procedure. They may, however, deviate from the provisions of the German law on the organization of courts and on criminal procedure, whenever this may appear to them advisable for the rapid and more efficient conduct of proceedings.

* * * * * * *

"XV. Within the meaning of this decree, the term 'Poles' includes 'Schutzangehoerige' or those who are stateless." *

* 1941 RGBl. I, p. 759.

It will be noted that the procedural rules became progressively more summary and severe as the military situation became progressively more critical.

A major development in the Nazification of the judicial system appears in the establishment of the "People's Court" which was subdivided into a number of senates or departments. We quote:

"When the Supreme Court acquitted three of the four defendants charged with complicity in the Reichstag fire, its jurisdiction in cases of treason was thereafter taken away and given to a newly established 'People's Court' consisting of two judges and five officials of the Party." [1]

The act of 24 April 1934 which established the highly flexible definitions of high treason also provided new judicial machinery for enforcement.

"Article III, section 1. (1) For the trial of cases of high treason the People's Court is established.

"(2) Decisions of the People's Court are made by five members during the trial, by three members outside the trial. This includes the president. The president and one further member must be qualified judges. Several senates may be established." [2]

In section 3 (1) of article III it is provided that "the People's Court is competent for the investigation and decision in the first and last instance in cases of high treason * * *", and in other specified cases.

"Article III, section 3. (2) The People's Court is also competent in such cases where crimes or offenses subject to its competence constitute at the same time another punishable act.

"(3) If another punishable act is in factual connection with a crime or offense subject to the jurisdiction of the People's Court, the trial against the perpetrators and participants of the other punishable act may be brought before the People's Court by way of combination of the respective cases."

* * * * * * *

"[Article III] section 5. (2) Against the decisions of the People's Court no appeal is permitted."

On 1 December 1936, the jurisdiction of the People's Court was extended to include violation of the law against economic sabotage. (*supra.*)

On 14 April 1939, the system was extended to Bohemia and Moravia. We quote:

[1] Trial of the Major War Criminals, op. cit., volume I, page 179.
[2] 1934 RGBl. I, p. 341.

"[Section 1] (2) Furthermore, the Supreme Reich Court and the People's Court will carry out jurisdiction for the Protectorate Bohemia and Moravia." [1]

The extent of jurisdiction was defined as follows:

"Section 6. (1) German nationals are subject to German jurisdiction in the Protectorate of Bohemia and Moravia.

"(2) Persons who are not German nationals are subject to German jurisdiction for offenses—

"*1.* to which German criminal law applies,

"*2.* if they are prosecuted under a private action provided the action has been brought by a German national.

* * * * * * *

"Section 7. German jurisdiction in the Protectorate of Bohemia and Moravia excludes jurisdiction by the courts of the Protectorate unless otherwise provided.

"Section 8. The German courts in the Protectorate of Bohemia and Moravia administer justice in the name of the German people." [2]

By the law of 16 September 1939, provision was made for extraordinary appeal against final judgments. We quote in part:

"Article 2, section 3. (1) Against legally valid sentences in criminal proceedings the senior Reich prosecutor at the Reich Supreme Court can file an appeal within one year after they have been pronounced, if, because of serious misgiving, concerning the justness of the sentence, he considers a new trial and a new decision in the cases necessary.

"(2) On the basis of the appeal, the Special Penal Senate of the Reich Supreme Court will try the cases a second time.

"(3) If the first sentence was passed by the People's Court, the appeal is to be filed by the senior Reich prosecutor at the People's Court, and the second trial is to be held by the Special Senate of the People's Court. The same applies to the sentences of courts of appeal in cases which the senior Reich prosecutor at the People's Court had transferred to the public prosecutor attached to the court of appeals, or which the People's Court had transferred for trial and sentencing to the courts of appeal.

* * * * * * *

"Section 5. (1) The Special Senate of the People's Court consists of the president and of four members." [3]

[1] 1939 RGBl. I, p. 752.
[2] Id.
[3] Ibid., p. 1841.

On 21 February 1940 the jurisdiction of the People's Court was redefined and again extended to cover high treason, treason, severe cases of damaging war material, failure to report an intended crime, crimes under section 5 (1) of the decree of 28 February 1933 concerning protection of people and State; crimes of economic sabotage, crime of undermining German military efficiency, and others.

On 6 May 1940 a broad decree was issued concerning the jurisdiction of German courts for the "territory of the Greater German Reich." That decree provided:

"German criminal law will be applied to the crime of a German national, no matter whether it is committed in Germany or abroad. For a crime committed abroad, which according to the laws of the place of commitment is not punishable, German criminal law will not be applied, unless such action would constitute a crime according to the sound sentiment for justice of the German people on account of the particular conditions prevailing at the place of commitment." *

* * * * * * *

"Paragraph 4. German criminal law will be applied also in case of crimes committed by a foreigner in Germany.

"German criminal law will be applied to crimes committed by a foreigner abroad, if they are punishable according to the penal code of the territory where they are committed, or if such territory is not subject to any jurisdiction and if—

"1. the criminal has obtained German nationality after the crime, or

"2. the crime is directed against the German people or a German national, or

"3. the criminal is apprehended in Germany and is not extradited, although the nature of his crime would permit an extradition.

"German criminal law will be applied to the following crimes committed by a foreigner abroad, independently of the laws of the place of commitment:

"1. Crimes committed while holding a German governmental office, as a German soldier or as a member of the Reich Labor Service (Reichsarbeitsdienst) or committed against a holder of a German office or the State or the Party, against a German soldier or a member of the Reich Labor Service, while on duty or relating to his duty;

"2. Actions constituting treason or high treason against Germany," and in other special cases.

* 1940 RGBl. I, p. 754.

Certain additional provisions intimately affecting the rights of accused persons deserve special mention.

"Section 10. For the defendant, who has not yet chosen counsel, counsel has to be appointed at the time when the date for the trial is fixed.

"Section 11. A preliminary court investigation will not take place. * * *" [1]

By a decree of the Reich Minister of Justice, Dr. Thierack, on 13 December 1944, it was provided:

"Article 2, paragraph 12. Limited admittance of defense counsel.

"(1) In any one criminal case, several lawyers or professional representatives may not act side by side as chosen counsel for one defendant.

"(2) The rules about obligatory representation by defense counsel do not apply. The presiding judge appoints a defense counsel for the whole or part of the proceedings if the difficulty of the material or legal problems require assistance by a defense counsel, or if the defendant, in due consideration of his personality, is unable to defend himself personally. * * *" [2]

On 16 February 1934 it was provided that:

"Article 2. The president of the Reich has the prerogatives for *nulle prosequi* and clemency (formerly held by the States).

"Amnesties can be promulgated only by Reich law." [3]

This centralization of the clemency powers marks a radical departure from the system which prevailed prior to 1933 and was the means by which the will of Hitler became a dominating force in the Ministry of Justice and in the courts. Other provisions are as follows:

"Even if the judgment has been contested only by the defendant or his legal representative, or by the prosecution in his favor, it can be changed against the interests of the defendant.[4]

"In penal matters for which the People's Court, the superior district court, or the court of assizes are competent, preexamination is conducted upon application of the prosecution, if, after due consideration, the prosecution thinks it necessary.

"In other penal matters as well, preexamination takes place on application of the prosecution. The prosecution should make

[1] 1933 RGBl. I, p. 136.
[2] 1944 RGBl. I, p. 339.
[3] 1934 RGBl. I, p. 91.
[4] [Article 1, 4, b] Law of 28 June 1935; 1935 RGBl. I, page 844.

such an application only if unusual circumstances make it necessary to have a judge conduct such preexamination." [1]

An illuminating comment on the law is made by a German text writer.

"A criminal case on which verdict has been passed must not again become the subject of another criminal proceeding. This exclusive effect pertains to the subject of the case both as regards the crime and the criminal. * * * According to the findings of the German supreme court and to the prevailing theory in accord with these findings, the effect of *ne bis in idem* includes the history of the case submitted to the court for verdict. * * * This theory, however, leads to unbearable consequences. In order to avoid these unbearable consequences some courts, recently, have permitted the breach of the principle against double jeopardy in exceptional cases where jeopardy of a second trial is necessitated by the sound sense of justice. * * *" [2]

On 21 March 1942 Adolf Hitler promulgated a decree regarding the simplification of the administration of justice. We quote the following excerpts:

"In penal cases, * * * the formal opening of the main proceeding must be eliminated. * * * (Sec. I.)

"Indictments and judicial decisions must be more tersely written by restricting them to the absolutely necessary. (Sec. II.)

"The cooperation of professional associate judges in judicial decisions must be restricted. (Sec. III.)

"I commission the Reich Minister of Justice, in agreement with the Reich Minister and Chief of the Reich Chancellery and with the Chief of the Party Chancellery, to issue the legal provisions necessary for the execution of this decree. I empower the Reich Minister of Justice to make the necessary administrative provisions and to decide any doubtful questions by administrative means. (Sec. VI.)"

On 13 August 1942 a decree was issued by the defendant Schlegelberger as Reich Minister of Justice in charge of the Ministry—

"Article 4. * * * Decisions by the criminal court, the Special Court, and the criminal senate of the circuit courts of appeal may be made solely by the president or his regular deputy, if he considers the cooperation of his associates dispensable in view of the simplicity of the nature and the legal status of the case, and if the public prosecutor agrees.

[1] Ibid., article 4, 1, a.

[2] "German Criminal Procedure," by Heinrich Henkel, (Hamburg 1948) pages 440–442.

"Article 5. Main proceeding without public prosecutor—In the proceeding before the district judge, the public prosecutor may renounce his participation in the main proceeding.

"Article 7 (2). The validity of an objection is decided on by the president of the deciding court. The admissibility of an appeal is decided on by the president of the court of appeal (Berufungsstrafkammer); he is also authorized to bring about a decision of the court. These decisions are not subject to any proof, and are incontestable.

"Article 7 (3). Further objections will not be admitted."

We have already quoted at length from the decree of 4 December 1941 concerning the organization of criminal jurisdiction against Poles and Jews in the Incorporated Eastern Territories. That decree also contained provisions for the establishment of martial law from which we quote:

"Article XIII (1). Subject to the consent of the Reich Minister of the Interior and the Reich Minister of Justice, the Reich governor may, until further notice, enforce martial law in the Incorporated Eastern Territories, either in the whole area under his jurisdiction or in parts thereof, upon Poles and Jews guilty of grave excesses against the Germans or of other offenses which seriously endanger the German work of reconstruction.

"(2) The courts established under martial law impose the death sentence. They may, however, dispense with punishment and refer the case to the Secret State Police (Gestapo)."

A final step in the development of summary criminal procedure was taken on 15 February 1945 by a decree of the Reich Minister of Justice, Dr. Thierack. The decree provided:

"II. 1. The court martial consists of a judge of a criminal court as president and of a member of the political leader corps, or of a leader of another structural division of the NSDAP and an officer of the Wehrmacht, the Waffen SS, or the police, as associate judges. * * *

"III. 1. The courts martial have jurisdiction for all kinds of crimes endangering the German fighting power or undermining the people's military efficiency. * * *

"IV. 1. The sentence of the court martial will be either death, acquittal, or commitment to the regular court. The consent of the Reich defense commissar is required. He gives orders for the time, place, and kind of execution. * * * "*

* 1945 RGBl. I, p. 30.

Pursuant to a decree of the Fuehrer of 16 March 1939, the defendant Schlegelberger, as Reich Minister of Justice in charge, together with the Minister of the Interior and the Chief of the Armed Forces, Keitel, issued a decree which reads in part as follows:

"Section 1. In case of direct attack by a non-German citizen against the SS or the German Police or against any of their members, the Reich Leader of the SS and the Chief of the German Police in the Reich Ministry of the Interior may establish the jurisdiction of a combined SS court and police court, by declaring that special interests of parts of the SS or of the Police require that judgment be given by an SS and police court.

"This declaration shall be sent to the Reich Protector of Bohemia and Moravia. The SS and police court, which shall have jurisdiction in individual cases, shall be specified by the Reich Leader of the SS and Chief of the German Police in the Reich Ministry of the Interior.

"Section 2. If the offense directly injures the interests of the armed forces, the Reich Leader of the SS and chief of the German Police in the Reich Ministry of the Interior, and the chief of the Supreme Command of the Armed Forces shall reach an agreement as to whether the case shall be prosecuted by an SS and police court or by a military court.[1]

"Article II. Exemption of the Reich court from being bound to precedent sentence: The Reich Court as the highest German tribunal must consider it its duty to effect an interpretation of the law which takes into account the change of ideology and of legal concepts which the new State has brought about. In order to be able to accomplish this task without having to show consideration for the jurisdiction of the past brought about by other ideology and other legal concepts, it is ruled as follows:

"When a decision is made about a legal question, the Reich Court can deviate from a decision laid down before this law went into effect." [2]

THE LAW IN ACTION

We pass now from the foregoing incomplete summary of Nazi legislation to a consideration of the law in action, and of the influence of the "Fuehrer principle" as it affected the officials of the Ministry of Justice, prosecutors, and judges. Two basic principles controlled conduct within the Ministry of Justice. The first concerned the absolute power of Hitler in person or by delegated authority to enact, enforce, and adjudicate law. The second con-

[1] 1942 RGBl. I, p. 475.

[2] Law of 28 June 1935; 1935 RGBl. I, p. 844.

cerned the incontestability of such law. Both principles were expounded by the learned Professor Jahrreiss, a witness for all of the defendants. Concerning the first principle, Dr. Jahrreiss said:

"If now in the European meaning one asks about legal restrictions, and first of all one asks about restrictions of the German law, one will have to say that restrictions under German law did not exist for Hitler. He was *legibus solutus* in the same meaning in which Louis XIV claimed that for himself in France. Anybody who said something different expresses a wish that does not describe the actual legal facts."

Concerning the second principle, Jahrreiss supported the opinion of Gerhard Anschuetz, "crown jurist of the Weimar Republic", who holds that if German laws were enacted by regular procedure, judicial authorities were without power to challenge them on constitutional or ethical grounds. Under the Nazi system, and even prior thereto, German judges were also bound to apply German law even when in violation of the principles of international law. As stated by Professor Jahrreiss:

"To express it differently, whether the law has been passed by the State in such a way that it was inconsistent with international law on purpose or not, that could not play any part at all; and that was the legal state of affairs, regrettable as it may be."

This, however, is not to deny the superior authority of international law. Again we quote a statement of extraordinary candor by Professor Jahrreiss:

"On the other hand, certainly there were legal restrictions for Hitler under international law. * * * He was bound by international law. Therefore, he could commit acts violating international law. Therefore, he could issue orders violating international law to the Germans."

The conclusion to be drawn from the evidence presented by the defendants themselves is clear: In German legal theory Hitler's law was a shield to those who acted under it, but before a tribunal authorized to enforce international law, Hitler's decrees were a protection neither to the Fuehrer himself nor to his subordinates, if in violation of the law of the community of nations.

In German legal theory, Hitler was not only the supreme legislator, he was also the supreme judge. On 26 April 1942 Hitler addressed the Reichstag in part as follows:

"I do expect one thing: That the nation gives me the right to intervene immediately and to take action myself wherever a person has failed to render unqualified obedience. * * *"

"I therefore ask the German Reichstag to confirm expressly that I have the legal right to keep everybody to his duty and

to cashier or remove from office or position without regard for his person, or his established rights, whoever, in my view and according to my considered opinion, has failed to do his duty."

"* * * From now on, I shall intervene in these cases and remove from office those judges who evidently do not understand the demand of the hour."

On the same day the Greater German Reichstag resolved in part as follows:

"* * * the Fuehrer must have all the rights postulated by him which serve to further or achieve victory. Therefore—without being bound by existing legal regulations—in his capacity as leader of the nation, Supreme Commander of the Armed Forces, governmental chief and supreme executive chief, as supreme justice*, and leader of the Party—the Fuehrer must be in a position to force with all means at his disposal every German, if necessary, whether he be common soldier or officer, low or high official or judge, leading or subordinate official of the Party, worker or employee, to fulfill his duties. In case of violation of these duties, the Fuehrer is entitled after conscientious examination, regardless of so-called well-deserved rights, to mete out due punishment, and to remove the offender from his post, rank and position, without introducing prescribed procedures."

The assumption by Hitler of supreme governmental power in all departments did not represent a new development based on the emergency of war. The declaration of the Reichstag was only an echo of Hitler's declaration of 13 July 1934. After the mass murders of that date (the Roehm purge) which were committed by Hitler's express orders, he said:

"Whenever someone reproaches me with not having used the ordinary court for their sentencing, I can only say: 'In this hour I am responsible for the fate of the German nation and hence the supreme law lord* of the German people.'"

The conception of Hitler as the supreme judge was supported by the defendant Rothenberger. We quote (*NG–075, Pros. Ex. 27*):

"However, something entirely different has occurred; with the Fuehrer a man has risen within the German people who awakens the oldest, long forgotten times. Here is a man who in his position represents the ideal of the judge in its perfect sense, and the German people elected him for their judge—first of all, of course, as 'judge' over their fate in general, but also as 'supreme magistrate* and judge.'"

* The three expressions "supreme justice," "supreme law lord" and "supreme magistrate" are three different translations of the German term "Oberster Gerichtsherr."

In the same document the defendant Rothenberger expounded the National Socialist theory of judicial independence. He said:

"Upon the fact that the judge can use his own discretion is founded the magic of the word 'judge.' "

He asserted that "every private and Party official must abstain from all interference or influence upon the judgment," but this statement appears to be mere window-dressing, for after his assertion that a judge "must judge like the Fuehrer", he said:

"In order to guarantee this, a direct liaison officer without any intermediate agency must be established between the Fuehrer and the German judge, that is, also in the form of a judge, the supreme judge in Germany, the 'Judge of the Fuehrer'. He is to convey to the German judge the will of the Fuehrer by authentic explanation of the laws and regulations. At the same time he must upon the request of the judge give binding information in current trials concerning fundamental political, economic, or legal problems which cannot be surveyed by the individual judge."

Thus, it becomes clear that the Nazi theory of the judicial independence was based upon the supreme independence of the Fuehrer, which was to be channelized through the proposed liaison officer from Fuehrer to judge.

On 13 November 1934, Goering, in an address before the Academy of German Law, expressed similar sentiments concerning the position of Hitler.

"Gentlemen, for the German nation this matter was settled by the words of the judge in this hour, the Fuehrer, who stated that in this hour of uttermost danger he alone, the Fuehrer elected by the people, was the supreme and only judge of the German nation."

The defendant Schlegelberger, on 10 March 1936 said:

"It should be emphasized, however, that in the sphere of the law, also, it is the Fuehrer and he alone who sets the pace of development."

To the same effect we quote Reich Minister of Justice Dr. Thierack, who, on 5 January 1943 said:

"So also with us the conviction has grown in these 10 years in which the Fuehrer has led the German people that the Fuehrer is the chief justice and the supreme judge of the German people."

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On 17 February 1943 the defendant Under Secretary Dr. Rothenberger summed up his legal philosophy with the words (*NG–415, Pros. Ex. 26*):

"The judge is on principle bound by the law. The laws are the orders of the Fuehrer."

As will be seen, the foregoing pronouncement by the leaders in the field of Nazi jurisprudence were not mere idle theories. Hitler did, in fact, exercise the right assumed by him to act as supreme judge, and in that capacity in many instances he controlled the decision of the individual criminal cases.

The evidence demonstrates that Hitler and his top-ranking associates were by no means content with the issuance of general directives for the guidance of the judicial process. They tenaciously insisted upon the right to interfere in individual criminal sentences. In discussing the right to refuse confirmation of sentences imposed by criminal courts, Martin Bormann, as Chief of the Party Chancellery, wrote to Dr. Lammers, Chief of the Reich Chancellery, as follows (*NG–102, Pros. Ex. 75*):

"When the Fuehrer has expressly requested the right of direct interference over all formal legal provisions, this is emphasizing the very importance of the modification of a judicial sentence."

The Ministry of Justice was acutely conscious of the interference by Hitler in the administration of criminal law. On 10 March 1941 Schlegelberger wrote to Reich Minister Lammers in part as follows (*NG–152, Pros. Ex. 63*):

"It has come to my knowledge that just recently a number of sentences passed have roused the strong disapproval of the Fuehrer. I do not know exactly which sentences are concerned, but I have ascertained for myself that now and then sentences are pronounced, which are quite untenable. In such cases I shall act with the utmost energy and decision. It is, however, of vital importance for justice and its standing in the Reich, that the head of the Ministry of Justice should know to which sentences the Fuehrer objects, * * *."

On the same date Schlegelberger wrote to Hitler in part as follows (*NG–152, Pros. Ex. 63*):

"In the course of the verdicts pronounced daily, there are still judgments which do not entirely comply with the necessary requirements. In such cases I will take the necessary steps. * * *

"Apart from this it is *desirable to educate the judges more and more to a correct way of thinking, conscious of the national destiny.* For this purpose it would be invaluable, if you, my Fuehrer, could let me know if a verdict does not meet with your approval. The judges are responsible to you, my Fuehrer; they are conscious of this responsibility, and are firmly resolved to discharge their duties accordingly. * * * Heil, my Fuehrer!" [Emphasis added.]

Hitler not only complied with the foregoing request, but proceeded beyond it. Upon his personal orders persons who had been sentenced to prison terms were turned over to the Gestapo for execution. We quote briefly from the testimony of Dr. Hans Gramm, who for many years was personal Referent to the defendant Schlegelberger, and who testified in his behalf.

"Q. Do you know anything about transfers of condemned persons to the police, or to the Gestapo?

"A. I know that it frequently occurred that Hitler gave orders to the police to call for people who had been sentenced to prison terms. To be sure, it was an order from Hitler directed to the police to the effect that the police had to take such and such a man into their custody. These orders had rather short limits. As a rule, there was only a time limit of 24 hours before execution by the police, after which the police had to report that it had been executed. These transfers, as far as I can remember, took place only during the war." (*Tr. pp. 4717–4718.*)

This procedure was well-known in the Ministry of Justice. Gramm was informed by the defendant Schlegelberger that the previous Reich Minister of Justice, Dr. Guertner, had protested to Dr. Lammers against this procedure and had received the reply—

"That the courts could not stand up to the special requirements of the war, and that therefore these transfers would have to continue."

The only net result of the protest was that "from that time on in every individual case when such a transfer had been ordered, the Ministry of Justice was informed about that."

The witness, Dr. Lammers, former Chief of the Reich Chancellery, whose hostility toward the prosecution and evasiveness were obvious, conceded that the practice was continued under Schlegelberger, though Lammers stated that Schlegelberger never agreed to it.

By reference to case histories we will illustrate three different methods by which Hitler, through the Ministry of Justice, imposed

his will in disregard of judicial proceedings. One, Schlitt, had been sentenced to a prison term, as a result of which Schlegelberger received a telephone call from Hitler protesting the sentence. In response the defendant Schlegelberger on 24 March 1942 wrote in part as follows (*NG–152, Pros. Ex. 63*):

"I entirely agree with your demand, my Fuehrer, for very severe punishment for crime, and I assure you that the judges honestly wish to comply with your demand. Constant instructions in order to strengthen them in this intention and the increase of threats of legal punishment have resulted in a considerable decrease of the number of sentences to which objections have been made from this point of view, out of a total annual number of more than 300,000.

"I shall continue to try to reduce this number still more, and if necessary, I shall not shrink from personal measures, as before.

"In the criminal case against the building technician, Ewald Schlitt, from Wilhelmshaven, I have applied through the public prosecutor for an extraordinary plea for nullification against the sentence, at the special senate of the Reich Court. I will inform you of the verdict of the special senate immediately it has been given."

On 6 May 1942, Schlegelberger informed Hitler (*NG–102, Pros. Ex. 75*) that the 10-year sentence against Schlitt was "quashed within 10 days;" and that "Schlitt was sentenced to death and executed at once."

In the case against Anton Scharff, the sentence of 10 years' penal servitude had been imposed. Thereupon, on 25 May 1941, Bormann wrote to Dr. Lammers (*NG–611, Pros. Ex. 64*): "The Fuehrer believes this sentence entirely incomprehensible * * *. The Fuehrer requests that you inform State Secretary Schlegelberger again of his point of view."

On 28 June 1941, defendant Schlegelberger wrote Dr. Lammers (*NG–611, Pros. Ex. 64*): "I am very obliged to the Fuehrer for informing me, on my request, of his conception of atonements of black-out crimes in reference to the sentence of the Munich Special Court against Anton Scharff.

"I shall reinstruct the presidents of the courts of appeal and the chief public prosecutors of this conception of the Fuehrer as soon as possible."

As a final illustration of a general practice, we refer to the case of the Jew Luftgas, who had been sentenced to 2½ years imprisonment for hoarding eggs. On 25 October 1941, Lammers notified Schlegelberger: "The Fuehrer wishes that Luftgas be sentenced

to death." On 29 October 1941, Schlegelberger wrote Lammers: "* * * I have handed over to the Gestapo for the purpose of execution the Jew Markus Luftgas who had been sentenced to 2½ years of imprisonment * * *".

Although Hitler's personal intervention in criminal cases was a matter of common occurrence, his chief control over the judiciary was exercised by the delegation of his power to the Reich Minister of Justice, who on 20 August 1942 was expressly authorized "to deviate from any existing law."

Among those of the Ministry of Justice who joined in the constant pressure upon the judges in favor of more severe or more discriminatory administration of justice, we find Thierack, Schlegelberger, Klemm, Rothenberger, and Joel. Neither the threat of removal nor the sporadic control of criminal justice in individual cases was sufficient to satisfy the requirements of the Ministry of Justice. As stated by the defendant Rothaug, "only during 1942, after Thierack took over the Ministry, the 'guidance' of justice was begun. * * * There was an attempt to guide the administration of justice uniformly from above."

In September 1942 Thierack commenced the systematic distribution to the German judges of Richterbriefe. The first letter to the judges under date of 1 October 1942 called their attention to the fact that Hitler was the supreme judge and that "leadership and judgeship have related characters." We quote (*NG–298, Pros. Ex. 81*):

> "A corps of judges like this will not slavishly use the crutches of law. It will not anxiously search for support by the law, but, with a satisfaction in its responsibility, it will find within the limits of the law the decision which is the most satisfactory for the life of the community."

In the Judges' Letters Thierack discussed particular decisions which had been made in the various courts and which failed to conform to National Socialist ideology. As an illustration of the type of guidance which was furnished by the Ministry of Justice to the German judiciary, we cite a few instances from the Richterbriefe.

A letter to the judges of 1 October 1942 discusses a case decided in a district court on 24 November 1941. A special coffee ration had been distributed to the population of a certain town. A number of Jews applied for the coffee ration, but did not receive it, being "excluded from the distribution *per se*". The food authorities imposed fines upon the Jews for making the unsuccessful application. In 500 cases the Jews appealed to the court and the judge informed the food authorities that the imposition of a fine could

not be upheld for legal reasons, one of which was the statute of limitations. In deciding favorably to the Jews, the court wrote a lengthy opinion stating that the interpretation on the part of the food authorities was absolutely incompatible with the established facts. We quote, without comment, the discussion of the Reich Minister of Justice concerning the manner in which the case was decided (*NG–298, Pros. Ex. 81*) :

> "The ruling of the district court, in form and content matter, borders on embarrassing a German administrative authority to the advantage of Jewry. The judge should have asked himself the question: What is the reaction of the Jew to this 20-page long ruling, which certifies that he and the 500 other Jews are right and that he won over a German authority, and does not devote one word to the reaction of our own people to this insolent and arrogant conduct of the Jews. Even if the judge was convinced that the food office had arrived at a wrong judgment of the legal position, and if he could not make up his mind to wait with his decision until the question, if necessary, was clarified by the higher authorities, he should have chosen a form for his ruling which under any circumstances avoided harming the prestige of the food office and thus putting the Jew expressly in the right toward it."

One of the Richterbriefe also discusses the case of a Jew who, after the "Aryanization of his firm," attempted to get funds transferred to Holland without a permit. He also attempted to conceal some of his assets. Concerning this case the judges of Germany received the following "guidance" (*NG–298, Pros. Ex. 81*) :

> "The court applies the same criteria for the award of punishment as it would if it were dealing with a German fellow citizen as defendant. This cannot be sanctioned. The Jew is the enemy of the German people, who has plotted, stirred up, and prolonged this war. In doing so, he has brought unspeakable misery upon our people.
>
> "Not only is he of a different race, but he is also of inferior race. Justice, which must not measure different matters by the same standard, demands that just this racial aspect must be considered in the award of punishment."

Space does not permit the citation of other instances of this form of perverted political guidance of the courts. Notwithstanding solemn protestations on the part of the minister that the independence of the judge was not to be affected, the evidence satisfies us beyond a reasonable doubt that the purpose of the judicial guidance was sinister and was known to be such by the Ministry of Justice and by the judges who received the directions.

If the letters [the Judges' Letters] had been written in good faith with the honest purpose of aiding independent judges in the performance of their duties, there would have been no occasion for the carefully guarded secrecy with which the letters were distributed. A letter of 17 November 1942 instructs the judges that the letters are to be "carefully locked up to avoid that they get into the hands of unauthorized persons. The receivers are subject to official secrecy as far as the contents of the judges' letters are concerned."

In a letter of 17 November 1942 Thierack instructs the judges that "in cases where judges and prosecutors are suspected of political unreliability they are to be excluded in a suitable manner from the list of subscribers to the Judges' Letters."

Not being content with regimenting the judges and chief prosecutors and making them subservient to the National Socialist administration of justice, Dr. Thierack next took up the regimentation of the lawyers. On 11 March 1943 he wrote to the various judges and prosecutors announcing the proposed distribution of confidential lawyers' letters. An examination of those letters convinces the Tribunal that the actual, though undeclared purpose, was to suggest to defense counsel that they avoid any criticism of National Socialist justice and refrain from too much ardor in the defense of persons charged with political crimes.

Not only did Thierack exert direct influence upon the judges, but he employed as his representative the most sinister, brutal, and bloody judge in the entire German judicial system. In a letter to Freisler, president of the People's Court, Thierack said that the judgment of the People's Court must be "in harmony with the leadership of the State". He urges Freisler to have every charge submitted to him and to recognize the cases in which it was necessary "in confidential and convincing discussion with the judge competent for the verdict to emphasize what is necessary from the point of view of the State." He continues:

> "As a general rule, the judge of the People's Court must get used to regarding the ideas and intentions of the State leadership as the primary factor and the individual fate which depends on him as only a secondary factor. * * *"

He continues:

> "I will try to illustrate this with individual cases.
>
> "1. If a Jew—and a leading Jew at that—is charged with high treason—even if he is only an accomplice therein, he has behind him the hate and the will of Jewry to exterminate the German people. As a rule this will therefore be *high treason* and must be punished by the death penalty."

He concludes with the following admonition to Freisler, which appears to have been wholly unnecessary:

"In case you should ever be in doubt as to which line to follow or which political necessities to take into consideration, please address yourself to me in all confidence."

It will be recalled that on 26 April 1942 Hitler stated that he would remove from office "those judges who evidently do not understand the demand of the hour." The effect of this pronouncement upon such judges as still retained ideals of judicial independence can scarcely be overestimated. The defendant Rothenberger stated it was "absolutely crushing."

In a private letter to his brother, the defendant Oeschey expressed his view of the situation created by Hitler's interference in the following words:

"After the well known Fuehrer speech things developed in a frightful manner. I was never a supporter of the stubborn doctrine of the independence of the judge which granted the judge within the frame of the law the position of a public servant, only subordinated to his conscience but otherwise 'neutral', that is, politically completely independent. * * * Now it is an absurdity to tell the judge in an individual case which is subject to his decision how he has to decide. Such a system would make the judge superfluous; such things have now come to pass. Naturally it was not done in an open manner; but even the most camouflaged form could not hide the fact that a directive was to be given. Thereby the office of judge is naturally abolished and the proceedings in a trial become a farce. I will not discuss who bears the guilt of such a development."

The threat alone of the removal was sufficient to impair the independence of the judges, but the evidence discloses that measures were actually carried out for the removal or transfer of judges who proved unsatisfactory from the Party standpoint. On 29 March 1941 Schlegelberger received a letter from the chief of the Reich Chancellery protesting against the sentence which had been imposed against the Polish farmhand Wojciesk. The court at Lueneburg had recognized some extenuating circumstances in the case. Schlegelberger was advised as follows:

"The Fuehrer urges you immediately to take the steps necessary to preclude repetition in other courts of the view of the Lueneberg court."

On 1 April 1941 Schlegelberger wrote to the Chief of the Reich Chancellery informing him that "by means of a circular with the order for immediate transmittal to all judges and public prosecutors, I brought the mistake in the viewpoint as it is shown in this

passage of the court's statement to the knowledge of the penal justice without delay. I consider it impossible that such an incident will occur again."

Schlegelberger ordered the responsible president of the appellate court and the judges concerned in the case to report to him on the next day, and on the third day of April 1941 he advised as follows:

"* * * I beg to inform you that the presiding judge of the criminal division which passed the sentence in the case of the Polish farmhand Wolay Wojciesk, is no longer chairman, and the two associate judges have been replaced by other associate judges."

There is substantial evidence to the effect that the witness Ostermeier, who was a judge on the Special Court in Nuernberg, was removed from his office because of his lenient attitude in criminal cases.

In a letter addressed to the Chief of the Reich Chancellery and to the head of the Party Chancellery on 20 October 1942, Thierack discussed the necessity of the removal or the transfer of officials in the Ministry of Justice who are "not suited for the new tasks" and adds that it may become necessary "in some particular cases to transfer or retire such judges as cannot be kept in their present positions." He therefore asked approval "so that in urgent cases judges and officials of the Reich administration of justice may be transferred by me to other positions * * * or may be retired by me."

On 3 March 1942 Bormann gave his approval in general terms to Thierack's proposal. A like approval was given by Dr. Lammers on 13 November 1942.

In connection with the discussion of removals, we find a list of proposed staff reductions in which seventy-five judges and prosecutors are named. Among the reasons stated for reduction we find the following: persons of Jewish ancestry, 4; persons having a Jewish wife, 4; lack of cooperation with Party, 4; religious grounds, 1; not a Party member, 20; pro-Jewish or pro-Pole, 4.

The conception of the national leadership of the Reich concerning the function of the law under the influence of the Party ideology must also be briefly noted.

On 22 July 1942 Reich Minister Dr. Goebbels addressed the members of the People's Court. The speech was reported in part as follows (*NG–417, Pros. Ex. 23*):

"While making his decisions the judge had to proceed less from the law than from the basic idea that the offender was to

be eliminated from the community. During a war it was not so much a matter of whether a judgment was just or unjust but only whether the decision was expedient. The State must ward off its internal foes in the most efficient way and wipe them out entirely. The idea that the judge must be convinced of the defendant's guilt must be discarded completely. The purpose of the administration of the law was not in the first place retaliation or even improvement but maintenance of the State. One must not proceed from the law but from the resolution that the man must be wiped out."

On 14 September 1935 Hans Frank, Reichsleiter of the Nazi Party and president of the Academy of German law, said (*NG–777, Pros. Ex. 19*):

"By means of the law of 18 June 1935, the liberalist foundation of the old penal code 'no penalty without a law' was definitely abandoned and replaced by the postulate, 'no crime without punishment', which corresponds to our conception of the law.

"In the future, criminal behavior, even if it does not fall under formal penal precepts, will receive the deserved punishment if such behavior is considered punishable according to the healthy feelings of the people."

This is the Hans Frank (since hanged) who at his trial testified concerning the racial persecution in which he had participated. He said:

"A thousand years will pass and this guilt of Germany will still not be erased."

On 10 March 1936 the defendant Schlegelberger said (*NG–538, Pros. Ex. 21*):

"In the sphere of criminal law the road to a creation of justice in harmony with the moral concepts of the new Reich has been opened up by a new wording of section 2 of the criminal code, whereby a person is also to be punished even if his deed is not punishable according to the law, but if he deserves punishment in accordance with the basic concepts of criminal law and the sound instincts of the people. This new definition became necessary because of the rigidity of the norm in force hitherto."

Reich Minister Thierack on 5 January 1943 said (*NG–275, Pros Ex. 25*):

"The inner law of the guardian of justice is national socialism; the written law is only to be an aid to the interpretation of National Socialist ideas."

In the words of the defendant Rothenberger the project was "to 'organize' Europe anew and to create a new world philosophy." Again, he said (*NG–075, Pros. Ex. 27*) :

> "* * * this reaction of 'antagonism toward law' is justified because the *present moment* absolutely demands a rigid restriction of the power of law. He who is striding gigantically toward a new world order cannot move in the limitation of an orderly administration of justice."

Strangely enough we find the Nazi judicial system condemned by a judge who in practice was its most fanatical adherent. The defendant Rothaug testified as follows:

> "As of every other civil servant, of the judge there was demanded not only obedience but also loyalty and an inner connection with the doctrine of the State. The change-over of the judiciary to that different intellectual level was attempted *via* the political factor of the administration of justice, and that was when things came to grief; and it was then that the notorious 'back door' which I have mentioned, took effect."

After discussing the extraordinary legal remedies by which final judgments in criminal cases were set aside by means of the nullification plea and the extraordinary objection, Rothaug said:

> "As far as that went no objections could be made. What was more dangerous was the influence by means of Judges' Letters and the guidance of jurisdiction."

To the domination by Hitler and the political "guidance" of the Ministry of Justice must be added the direct pressure of Party functionaries and police officials. The record is replete with testimony of specific instances of interference in the administration of justice by officials of Party and police. But for the demonstration of the viciousness and universality of the practice it is only necessary to cite the words of the defendants themselves.

The defendant Rothenberger describes the manner in which the "administration of justice was burdened by the Party and by the SS", and referred in his testimony to the "thousand little Hitlers who every day jeopardized the independence of the individual judge."

The defendant Schlegelberger spoke with more caution:

> "If in a trial, testimonials of political conduct were submitted for the characterization of the accused, it has to be left to the judge's dexterity to avoid conflict with the department which furnishes the testimonial of political conduct."

The defendant Lautz testified concerning attempted interference

with his duties by the SS. We have already quoted the opinion of the defendant Oeschey as expressed in a letter to his brother.

A reliable witness, Dr. Hanns Anschuetz, testified:

> "After the issuance of the German Civil Service Code, strong pressure was brought to bear upon all officials, including judges, to join the NSDAP, or not to reject requests to join; otherwise there existed the danger that they might be retired or dismissed. But once a Party member, a judge was under Party discipline and Party jurisdiction, which dominated his entire life as official and as private person."

The witness Wilhelm Oehlicker, formerly a justice official and at present judge in Hamburg, testified, that, "the longer the war proceeded, in my opinion the more and more they (Party officials) tried to interfere with the courts and influence the courts directly."

The final degradation of the judiciary is disclosed in a secret communication by Ministerial Director Letz of the Reich Ministry of Justice to Dr. Vollmer, also a ministerial director in the department. Not only were the judges "guided" and at times coerced; they were spied upon. We quote:

> "Moreover, I know from documents, which the minister produces from time to time out of his private files, that the Security Service takes up special problems of the administration of justice with thoroughness and makes summarized situation reports about them. As far as I am informed, a member of the Security Service is attached to each judicial authority. This member is obliged to give information under the seal of secrecy. This procedure is secret and the person who gives the information is not named. In this way we get, so to say, anonymous reports. Reasons given for this procedure are of State political interest. As long as the direct interests of the State security are concerned, nothing can be said against it, especially in wartime."

In view of the conclusive proof of the sinister influences which were in constant interplay between Hitler, his ministers, the Ministry of Justice, the Party, the Gestapo, and the courts, we see no merit in the suggestion that Nazi judges are entitled to the benefit of the Anglo-American doctrine of judicial immunity. The doctrine that judges are not personally liable for their judicial actions is based on the concept of an independent judiciary administering impartial justice. Furthermore, it has never prevented the prosecution of a judge for malfeasance in office. If the evidence cited *supra* does not demonstrate the utter destruction of judicial independence and impartiality, then we "never writ nor no man ever proved." The function of the Nazi courts was judicial only

in a limited sense. They more closely resembled administrative tribunals acting under directives from above in a quasi-judicial manner.

In operation the Nazi system forced the judges into one of two categories. In the first we find the judges who still retained ideals of judicial independence and who administered justice with a measure of impartiality and moderation. Judgments which they rendered were set aside by the employment of the nullity plea and the extraordinary objection. The defendants they sentenced were frequently transferred to the Gestapo on completion of prison terms and were then shot or sent to concentration camps. The judges themselves were threatened and criticized and sometimes removed from office. In the other category were the judges who with fanatical zeal enforced the will of the Party with such severity that they experienced no difficulties and little interference from party officials. To this group the defendants Rothaug and Oeschey belonged.

We turn to a consideration and classification of the evidence. The prosecution has introduced captured documents in great number which establish the Draconic character of the Nazi criminal laws and prove that the death penalty was imposed by courts in thousands of cases. Cases in which the extreme penalty was imposed may in large measure be classified in the following groups:

1. Cases against habitual criminals.

2. Cases of looting in the devastated areas of Germany; committed after air raids and under cover of black-out.

3. Crimes against the war economy—rationing, hoarding, and the like.

4. Crimes amounting to an undermining of the defensive strength of the nation; defeatist remarks, criticisms of Hitler, and the like.

5. Crimes of treason and high treason.

6. Crimes of various types committed by Poles, Jews, and other foreigners.

7. Crimes committed under the Nacht und Nebel program, and similar procedures.

Consideration will next be given to the first four groups as above set forth. The Tribunal is keenly aware of the danger of incorporating in the judgment as law its own moral convictions or even those of the Anglo-American legal world. This we will not do. We may and do condemn the Draconic laws and express abhorrence at the limitations imposed by the Nazi regime upon freedom of speech and action, but the question still remains unanswered:

"Do those Draconic laws or the decisions rendered under them constitute war crimes or crimes against humanity?"

Concerning the punishment of habitual criminals, we think the answer is clear. In many civilized states statutory provisions require the courts to impose sentences of life imprisonment upon proof of conviction of three or more felonies. We are unable to say in one breath that life imprisonment for habitual criminals is a salutary and reasonable punishment in America in peace times, but that the imposition of the death penalty was a crime against humanity in Germany when the nation was in the throes of war. The same considerations apply largely in the case of looting. Every nation recognizes the absolute necessity of more stringent enforcement of the criminal law in times of great emergency. Anyone who has seen the utter devastation of the great cities of Germany must realize that the safety of the civilian population demanded that the werewolves who roamed the streets of the burning cities, robbing the dead, and plundering the ruined homes should be severely punished. The same considerations apply, though in a lesser degree, to prosecutions to hoarders and violators of war economy decrees.

Questions of far greater difficulty are involved when we consider the cases involving punishment for undermining military efficiency. The limitations on freedom of speech which were imposed in the enforcement of these laws are revolting to our sense of justice. A court would have no hesitation in condemning them under any free constitution, including that of the Weimar republic, if the limitations were applied in time of peace; but even under the protection of the Constitution of the United States a citizen is not wholly free to attack the Government or to interfere with its military aims in time of war. In the face of a real and present danger, freedom of speech may be somewhat restricted even in America. Can we then say that in the throes of total war and in the presence of impending disaster those officials who enforced these savage laws in a last desperate effort to stave off defeat were guilty of crimes against humanity?

It is persuasively urged that the fact that Germany was waging a criminal war of aggression colors all of these acts with the dye of criminality. To those who planned the war of aggression and who were charged with and were guilty of the crime against the peace as defined in the IMT Charter, this argument is conclusive, but these defendants are not charged with crimes against the peace nor has it been proven here that they knew that the war which they were supporting on the home front was based upon a criminal conspiracy or was *per se* a violation of international law. The lying propaganda of Hitler and Goebbels concealed even

from many public officials the criminal plans of the inner circle of aggressors. If we should adopt the view that by reason of the fact that the war was a criminal war of aggression every act which would have been legal in a defensive war was illegal in this one, we would be forced to the conclusion that every soldier who marched under orders into occupied territory or who fought in the homeland was a criminal and a murderer. The rules of land warfare upon which the prosecution has relied would not be the measure of conduct and the pronouncement of guilt in any case would become a mere formality. In the opinion of the Tribunal the territory occupied and annexed by Germany after September 1939 never became a part of Germany, but for that conclusion we need not rest upon the doctrine that the invasion was a crime against the peace. Such purported annexations in the course of hostilities while armies are in the field are provisional only, and dependent upon the final successful outcome of the war. If the war succeeds, no one questions the validity of the annexation. If it fails, the attempt to annex becomes abortive. In view of our clear duty to move with caution in the recently charted field of international affairs, we conclude that the domestic laws and judgments in Germany which limited free speech in the emergency of war cannot be condemned as crimes against humanity merely by invoking the doctrine of aggressive war. All of the laws to which we have referred could be and were applied in a discriminatory manner and in the case of many, the Ministry of Justice and the courts enforced them by arbitrary and brutal means, shocking to the conscience of mankind and punishable here. We merely hold that under the particular facts of this case we cannot convict any defendant merely because of the fact, without more, that laws of the first four types were passed or enforced.

A different situation is presented when we consider the cases which fall within types 5, 6, and 7.

TREASON AND HIGH TREASON

We have expressed the opinion that the purported annexation of territory in the East which occurred in the course of war and while opposing armies were still in the field was invalid and that in point of law such territory never became a part of the Reich, but merely remained in German military control under belligerent occupancy. On 27 October 1939 the Polish Ambassador at Washington informed the Secretary of State that the German Reich had decreed the annexation of part of the territory of the Polish republic. In acknowledging the receipt of this information, Secretary Hull stated that he had "taken note of the Polish government's declaration that it considers this act as illegal and therefore

null and void." [1] The foregoing fact alone demonstrates that the Polish Government was still in existence and was recognized by the Government of the United States. Sir Arnold D. McNair expressed a principle which we believe to be incontestable in the following words:

> "A purported incorporation of occupied territory by a military occupant into his own kingdom during the war is illegal and ought not to receive any recognition. * * *" [2]

We recognize that in territory under belligerent occupation the military authorities of the occupant may, under the laws and customs of war, punish local residents who engage in fifth column activities hostile to the occupant. It must be conceded that the right to punish such activities depends upon the specific acts charged and not upon the name by which these acts are described. It must also be conceded that Poles who voluntarily entered the Alt [old] Reich could, under the laws of war, be punished for the violation of nondiscriminatory German penal statutes.

These considerations, however, do not justify the action of the Reich prosecutors who in numerous cases charged Poles with high treason under the following circumstances: Poles were charged with attempting to escape from the Reich. The indictments in these cases alleged that the defendants were guilty of attempting, by violence or threat of violence, to detach from the Reich territory belonging to the Reich, contrary to the express provisions of section 80 of the law of 24 April 1934. The territory which defendants were charged with attempting to detach from the Reich consisted of portions of Poland, which the Reich had illegally attempted to annex. If the theory of the German prosecutors in these cases were carried to its logical conclusion it would mean that every Polish soldier from the occupied territories fighting for the restoration to Poland of territory belonging to it would be guilty of high treason against the Reich and on capture, could be shot. The theory of the Reich prosecutors carries with it its own refutation.

Prosecution in these cases represented an unwarrantable extention of the concept of high treason, which constituted in our opinion a war crime and a crime against humanity. The wrong done in such prosecutions was not merely in misnaming the offense of attempting to escape from the Reich; the wrong was in falsely naming the act high treason and thereby invoking the death penalty for a minor offense.

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[1] Department of State Bulletin, 4 November 1939, page 458, cited in Hyde's International Law, Volume 1 (2d rev. ed.), page 391.

[2] "Legal Effects of War" (2d ed.) (Cambridge, 1940), footnote on page 320.

C. C. Law 10, article II, paragraph 1(*d*), provides:

"1. Each of the following acts is recognized as a crime:

* * * * * * *

"(*d*) Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal."

Article 9 of the IMT Charter provides:

"At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization."

Article 10 of the IMT Charter is as follows:

"In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned."

Concerning the effect of the last quoted section, we quote from the opinion of the IMT in the case of United States, et al., *vs.* Goering, et al., as follows:

"Article 10 of the Charter makes clear that the declaration of criminality against an accused organization is final and cannot be challenged in any subsequent criminal proceeding against a member of the organization." *

We quote further from the opinion in that case:

"In effect, therefore, a member of an organization which the Tribunal has declared to be criminal may be subsequently convicted of the crime of membership and be punished for that crime by death. This is not to assume that international or military courts which will try these individuals will not exercise appropriate standards of justice. This is a far reaching and novel procedure. Its application, unless properly safeguarded, may produce great injustice."

* * * * * * *

"A criminal organization is analogous to a criminal conspiracy in that the essence of both is cooperation for criminal

* Trial of the Major War Criminals, op cit., volume I, page 255.

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purposes. There must be a group bound together and organized for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter. Since the declaration with respect to the organizations and groups will, as has been pointed out, fix the criminality of its members, that definition should exclude persons who had no knowledge of the criminal purposes or acts of the organization and those who were drafted by the state for membership, unless they were personally implicated in the commission of acts declared criminal by article 6 of the Charter as members of the organization. Membership alone is not enough to come within the scope of these declarations." [1]

The Tribunal in that case recommended uniformity of treatment so far as practicable in the administration of this law, recognizing, however, that discretion in sentencing is vested in the courts. Certain groups of the Leadership Corps, the SS, the Gestapo, the SD, were declared to be criminal organizations by the judgment of the first International Military Tribunal. The test to be applied in determining the guilt of individual members of a criminal organization is repeatedly stated in the opinion of the First International Military Tribunal. The test is as follows: Those members of an organization which has been declared criminal "who became or remained members of the organization with knowledge that it was being used for the commission of acts declared criminal by article 6 of the Charter, or who were personally implicated as members of the organization in the commission of such crimes" are declared punishable.

Certain categories of the Leadership Corps are defined in the First International Military Tribunal judgment as criminal organizations. We quote:

"The Gauleiter, the Kreisleiter, and the Ortsgruppenleiter participated, to one degree or another, in these criminal programs. The Reichsleitung as the staff organization of the Party is also responsible for these criminal programs as well as the heads of the various staff organizations of the Gauleiter and Kreisleiter. The decision of the Tribunal on these staff organizations includes only the Amtsleiter who were heads of offices on the staffs of the Reichsleitung, Gauleitung, and Kreisleitung. With respect to other staff officers and Party organizations attached to the Leadership Corps other than the Amtsleiter referred to above, the Tribunal will follow the suggestion of the prosecution in excluding them from the declaration." [2]

[1] Ibid., p. 256.
[2] Ibid., p. 261.

In like manner certain categories of the SD were defined as criminal organizations. Again, we quote:

> "In dealing with the SD the Tribunal includes Aemter III, VI, and VII of the RSHA, and all other members of the SD, including all local representatives and agents, honorary or otherwise, whether they were technically members of the SS or not, but not including honorary informers who were not members of the SS and members of the Abwehr who were transferred to the SD." [1]

In like manner certain categories of the SS were declared to constitute criminal organizations:

> "In dealing with the SS the Tribunal includes all persons who had been officially accepted as members of the SS including the members of the Allgemeine SS, members of the Waffen SS, members of the SS Totenkopf-Verbaende, and the members of any of the different police forces who were members of the SS. The Tribunal does not include the so-called SS riding units." [2]

C. C. Law 10 provides that we are bound by the findings as to the criminal nature of these groups or organizations. However, it should be added that the criminality of these groups and organizations is also established by the evidence which has been received in the pending case. Certain of the defendants are charged in the indictment with membership in the following groups or organizations which have been declared and are now found to be criminal, to wit: The Leadership Corps, the SD, and the SS. In passing upon these charges against the respective defendants, the Tribunal will apply the tests of criminality set forth above.

CRIMES UNDER THE NIGHT AND FOG DECREE [NACHT UND NEBEL ERLASS]

Paragraph 13 of count two of the indictment charges in substance that the Ministry of Justice participated with the OKW and the Gestapo in the execution of the Hitler decree of Night and Fog whereby civilians of occupied countries accused of alleged crimes in resistance activities against German occupying forces were spirited away for secret trial by special courts of the Ministry of Justice within the Reich; that the victim's whereabouts, trial, and subsequent disposition were kept completely secret, thus serving the dual purpose of terrorizing the victim's relatives and associates and barring recourse to evidence, witnesses, or counsel for defense. If the accused was acquitted, or if convicted, after serving his sentence, he was handed over to the Gestapo for

[1] Ibid., pp. 267–268.
[2] Ibid., p. 273.

"protective custody" for the duration of the war. These proceedings resulted in the torture, ill treatment, and murder of thousands of persons. These crimes and offenses are alleged to be war crimes in violation of certain established international rules and customs of warfare and as recognized in C. C. Law 10.

Paragraph 25 of count three of the indictment incorporates by reference paragraph 13 of count two of the indictment and alleges that the same acts, offenses, and crimes are crimes against humanity as defined by C. C. Law 10. The same facts were introduced to prove both the war crimes and crimes against humanity and the evidence will be so considered by us.

Paragraph 13 of count two of the indictment which particularly describes the Hitler NN plan or scheme, charges the defendants Altstoetter, von Ammon, Engert, Joel, Klemm, Mettgenberg, and Schlegelberger with "special responsibility for and participation in these crimes", which are alleged to be war crimes.

Paragraph 8 of count two of the indictment charges all of the defendants with having committed the war crimes set forth in paragraphs 9 to 18 inclusive of count two, in that they were principals in, accessories to, ordered, abetted, took a consenting part in, and were connected with plans and enterprises involving the commission of atrocities and offenses against persons, including but not limited to murder, illegal imprisonment, brutalities, atrocities, transportation of civilians, and other inhumane acts which were set out in paragraphs 9 to 18 inclusive of the indictment as war crimes against the civilian population in occupied territories.

Paragraph 20 of count three of the indictment charges all of the defendants with having committed the same acts as contained in paragraph 8 of count two as being crimes against humanity. Paragraphs 21 to 30 inclusive of count three refer to and adopt the facts alleged in paragraphs 9 to 18 inclusive of count two, and thus all defendants are charged with having committed crimes against humanity upon the same allegations of facts as are contained in paragraphs 9 to 18 inclusive of count two.

In the foregoing manner all of the defendants are charged with having participated in the execution or carrying out of the Hitler NN decree and procedure either as war crimes or as crimes against humanity, and all defendants are charged with having committed numerous other acts which constitute war crimes and crimes against humanity against the civilian population of occupied countries during the war period between 1 September 1939 and April 1945.

The Night and Fog decree arose as the plan or scheme of Hitler to combat so-called resistance movements in occupied terri-

tories. Its enforcement brought about a systematic rule of violence, brutality, outrage, and terror against the civilian populations of territories overrun and occupied by the Nazi armed forces. The IMT treated the crimes committed under the Night and Fog decree as war crimes and found as follows:

"The territories occupied by Germany were administered in violation of the laws of war. The evidence is quite overwhelming of a systematic rule of violence, brutality, and terror. On 7 December 1941 Hitler issued the directive since known as the 'Nacht und Nebel Erlass' (Night and Fog decree), under which persons who committed offenses against the Reich or the German forces in occupied territories, except where the death sentence was certain, were to be taken secretly to Germany and handed over to the SIPO and SD for trial and punishment in Germany. This decree was signed by the defendant Keitel. After these civilians arrived in Germany, no word of them was permitted to reach the country from which they came, or their relatives; even in cases when they died awaiting trial the families were not informed, the purpose being to create anxiety in the minds of the families of the arrested person. Hitler's purpose in issuing this decree was stated by the defendant Keitel in a covering letter, dated 12 December 1941, to be as follows:

" 'Efficient and enduring intimidation can only be achieved either by capital punishment or by measures by which the relatives of the criminal and the population do not know the fate of the criminal. This aim is achieved when the criminal is transferred to Germany.'

* * * * * * *

"The brutal suppression of all opposition to the German occupation was not confined to severe measures against suspected members of resistance movements themselves, but was also extended to their families." [1]

The Tribunal also found that:

"One of the most notorious means of terrorizing the people in occupied territories was the use of the concentration camps." [2]

Reference is here made to the detailed description by the IMT judgment of the manner of operation of concentration camps and to the apalling cruelties and horrors found to have been committed therein. Such concentration camps were used extensively for the NN prisoners in the execution of the Night and Fog decree as will be later shown.

[1] Ibid., pp. 232–233.
[2] Ibid., p. 234.

The IMT further found that the manner of arrest and imprisonment of Night and Fog prisoners before they were transferred to Germany was illegal, as follows:

> "The local units of the Security Police and SD continued their work in the occupied territories after they had ceased to be an area of operations. The Security Police and SD engaged in widespread arrests of the civilian population of these occupied countries, imprisoned many of them under inhumane conditions, and subjected them to brutal third degree methods, and sent many of them to concentration camps. Local units of the Security Police and SD were also involved in the shooting of hostages, the imprisonment of relatives, the execution of persons charged as terrorists and saboteurs without a trial, and the enforcement of the Nacht und Nebel decree under which persons charged with a type of offenses believed to endanger the security of the occupying forces were either executed within a week or secretly removed to Germany without being permitted to communicate with their family and friends." *

The foregoing quotations from the IMT judgment will suffice to show the illegality and cruelty of the entire NN plan or scheme. The transfer of NN prisoners to Germany and the enforcement of the plan or scheme did not cleanse it of its iniquity or render it legal in any respect.

The evidence herein adduced sustains the foregoing findings and conclusions of the IMT. In fact the same documents, or copies thereof, referred to and quoted from in the IMT judgment were introduced in evidence in this case. In addition, a large number of captured documents and oral testimony were introduced showing the origin and purpose of the Night and Fog plan or scheme, and showing without dispute that certain of the defendants with full knowledge of the illegality of the plan or scheme under international law of war and with full knowledge of the intended terrorism, cruelty, and other inhumane principles of the plan or scheme became either a principal, or aided and abetted, or took a consenting part in, or were connected with the execution of the illegal, cruel, and inhumane plan or scheme.

Hitler's decree was signed by Keitel on 7 December 1941 and was enclosed in Keitel's covering letter of 12 December 1941, which was referred to and quoted from in the IMT judgment. The Hitler decree states that since the opening of the Russian campaign Communist and anti-German elements have increased their assaults against the Reich and the occupation power in the occupied territories and that the most severe measures should be

* Ibid., p. 266.

directed against these malefactors "to intimidate them". The decree further declares in substance (*1733–PS, Pros. Ex. 303*):

"1. Criminal acts committed by non-German civilians directed against the Reich or occupation forces endangering their safety or striking power should require the application of the death penalty in principle.

"2. Such criminal acts will be tried in occupied territories only when it appears probable that the death sentence will be passed and carried out without delay. Otherwise the offenders will be carried to Germany.

"3. Offenders taken to Germany are subject to court martial procedures there only in case that particular military concern should require it. German and foreign agencies will declare upon inquiries of such offenders that the state of the proceedings would not allow further information.

"4. Commanders in chief in occupied territories and the justiciaries within their jurisdiction will be held personally responsible for the execution of this decree.

"5. The chief of the OKW will decide in which of the occupied territories this decree will be applied. He is authorized to furnish explanations and further information and to issue directives for its execution."

In addition to the Hitler decree there were also enclosed in Keitel's letter of 12 December 1941 the "First Decree" of directives concerning the prosecution of crimes against the Reich or occupation power in occupied territories under the Hitler decree. This first Decree was signed by Keitel and was marked "Secret." It contains seven sections relating to the crimes intended to be prosecuted under the Hitler decree and the manner and place of trials and execution of sentences. Section I of the first decree declares that the directive will be as a rule applicable in cases of: (*671–PS, Pros. Ex. 304.*)

1. Assault with intent to kill.
2. Espionage.
3. Sabotage.
4. Communist activity.
5. Crimes likely to disturb the peace.
6. Favoritism toward the enemy, the following means: Smuggling of men and women; the attempt to enlist in an enemy army; and the support of members of the enemy army (parachutists, etc.).
7. Illegal possession of arms.

Section II of the secret decree declares that the culprits are not to be tried in occupied territories unless it is probable that a death sentence will be pronounced, and it must be possible to carry out the execution of the death sentence at once; in general, a week after the capture of the culprit. It further states:

"Special political scruples against the immediate execution of the death sentence should not exist."

Section III of the first directive declares that the judge in agreement with the intelligence office of the Wehrmacht decides whether the condition for a trial in occupied territories exists.

Section IV declares that the culprits who are to be taken to Germany will be subjected there to military court proceedings if the OKW or the superior commanding officer declares decisions according to section III (above) that special military reasons require the military proceedings. In such instances the culprits are to be designated "prisoners of the Wehrmacht" to the Secret Field Police. If such declaration is not made, the order that the culprit is to be taken to Germany will be treated as transferring according to the intentions of the decree.

Section V declares that "the judicial proceedings in Germany will be carried out under strictest exclusion of the public because of the danger for the State's security. Foreign witnesses may be questioned at the main proceedings only with the permission of the Wehrmacht."

Section VI of the first decree declares that former decrees concerning the situation in Norway and concerning Communists and rebel movements in the occupied territories are superseded by these directives and executive order.

Section VII of the secret decree declares that the directives will become effective 3 weeks after they are signed and that the directives will be applied in all occupied territories with the exception of Denmark until further notice. The orders issued for the newly occupied Eastern territories are not affected by these directives. The order was expressly made effective in Norway, Holland, France, Bohemia, Moravia, and the Ukraine occupied areas. In actual operation, Belgium and all other of the western occupied countries came within the decree.

The Hitler decree was sent to the Reich Minister of Justice on 12 December 1941 endorsed for the attention of defendant Schlegelberger. On the same day (12 December 1941) Keitel informed other ministries of Hitler's decree, directing that all such information proceedings were to be conducted in absolute secrecy.

On 16 December 1941, officials of the Ministry of Justice (Schaefer and Grau, associates of defendant Mettgenberg in

Department III) drafted a proposed order for the execution of the Hitler NN decree by the Ministry of Justice, the courts, and the Reich prosecution. This was forwarded to General Lehmann, head of the OKW legal department for his approval.

Other correspondence took place between the Reich Ministry of Justice and the OKW relating to the final draft of the Night and Fog order. This correspondence occurred between 16 December and 25 December 1941. It related to the reservation of the competency of the Ministry of Justice or Under Secretary of State Freisler in the execution of the Hitler decree. These reservations were incorporated in a circular decree dated 6 February 1942, supplementing NN regulations as follows (*NG–232, Pros. Ex. 308*):

"Circular Decree:

"On the execution of the executive decree of 6 February 1942, relating to the directives issued by the Fuehrer and Supreme Commander of the Wehrmacht for the prosecution of criminal acts against the Reich or the occupation power in the occupied territories.

"For the further execution of the directives mentioned before I ordain:

"1. Competent for the handling of the cases transferred to ordinary courts including their eventual retrial are: the Special Court and the chief prosecutor in Cologne as far as they originate from the occupied Belgian and Netherland territories, the Special Court and the chief prosecutor in Dortmund; as far as they originate from the occupied Norwegian territories, the Special Court and the chief prosecutor in Kiel; for the rest, the Special Court and the attorney general at the county court, Berlin. In special cases I reserve for myself the decision of competence for each individual case.

"2. The chief prosecutor will inform me of the indictment, the intended plea, and the sentence as well as of his intention to refrain from any accusation in a specific case.

"3. The choice of a defense counsel will require the agreement of the presiding judge who makes his decision only with the consent of the prosecutor. The agreement may be withdrawn.

"4. Warrants of arrests will be suspended only with my consent. If such is intended, the prosecutor will report to me beforehand. He will furthermore ask for my decision before using foreign evidence or before agreeing to its being used by the tribunal.

"5. Inquiries concerning the accused person or the pending trial from other sources than those Wehrmacht and police agencies dealing with the case will be answered by merely stating that * * * is arrested and the state of the trial does not allow further information."

This supplementary decree was signed for Dr. Freisler by chief secretary of the ministerial office.

The letter of the same Dr. Freisler to Minister of Justice Thierack dated 14 October 1942, shows that in accordance with his promise to Thierack he had conducted preliminary proceedings through Reich departmental officials and with Lehmann, Chief of the Legal Division of the OKW, concerning the matter of the Ministry of Justice taking over the Night and Fog proceedings under the Hitler decree. Such top secret negotiations had lasted for several months. The last conference was held on 7 February 1942. On that day the final decree was drafted, approved, and was "the decree of 7 February 1942, signed by Schlegelberger" as Acting Minister of Justice. Defendant Schlegelberger testified that he signed the decree. He thereby brought about the enforcement by the Ministry of Justice, the courts, and the prosecutors of a systematic rule of violence, brutality, outrage, and terror against the civilian population of territories overrun by the Nazi armed forces resulting in the ill-treatment, death, or imprisonment of thousands of civilians of occupied territories.

The taking over of the enforcement of the Hitler NN decree was based solely upon the afore-mentioned secret agreement, plan, or scheme. All of the defendants who entered into the plan or scheme, or who took part in enforcing or carrying it out knew that its enforcement violated international law of war. They also knew, which was evident from the language of the decree, that it was a hard, cruel, and inhumane plan or scheme and was intended to serve as a terroristic measure in aid of the military operations and the waging of war by the Nazi regime. We will at this point let some of those who originated the plan or scheme or who took part in its execution relate its history and its illegal, cruel, and inhumane purposes.

Rudolf Lehmann, who was Chief of the Legal Division of the OKW, testified concerning the Nacht und Nebel Decree of 7 December 1941. He stated that even before the beginning of the war and more particularly after the beginning of the war, there was a controversy between Hitler and his generals on the one part and between Hitler and the Gestapo on the other part as to the part which should be performed by the military department of justice. He testified:

"Hitler held it against the administration of justice by the armed forces and within the armed forces that they did not sufficiently support his manner of conducting the war."

He further testified that Hitler had—

"Used the expression that the military justice indeed sabotaged his conduct of war. These reproaches first emanated from the Polish campaign. There the military justice—the justice administration of the armed forces—was reprimanded that it had not acted sufficiently severe against members of bands. The next reprimands of that kind occurred during the French campaign."

Lehmann further testified that Keitel had passed on to him a directive which he had received from Hitler in October of 1941. This directive was quite long in which Hitler referred to the resistance movement in France, which he stated was a tremendous danger for the German troops and that new means would have to be found to combat this danger.

There was therefore a discussion of the resistance movement. The army was opposed to the plan because it involved them in violations of international law of war. It was then suggested in the discussion that the Gestapo should be given that power. But even in this Hitler's ideas were overruled. It was at this point that he, Lehmann, suggested that the matters—

"Should continue to be dealt with by judges, and since the aversion of Hitler against the armed forces justice was known, it could be assumed that he would still prefer civilian courts than us."

Lehmann further testified that Hitler—

"Attributed a higher political reliability to civilian justice later because later he took all political criminal cases away from us and gave it to civilian justice."

At this point Lehmann discussed the matter with Under Secretary Freisler because Freisler dealt with the criminal cases in the Ministry. He was told by Freisler that the matter would have to be taken up with Schlegelberger. Lehmann further testified:

"I discussed with him the proposition that the cases which the military courts in France would not keep should be taken over and dealt with by and tried by the civilian justice administration. I can only say that Freisler told me that first he had to think it over; and secondly, he had to discuss it with Under Secretary Schlegelberger who was at that time in charge of the Ministry. * * * Freisler told me that he had to ask the man who was in charge of the Ministry, the acting minister * * * for permission and authority on behalf of the

Ministry of Justice to try the Nacht und Nebel cases. * * * As I was informed about the routine in the Ministry, Schlegelberger, who was then acting Minister of Justice, was in my opinion the only person who could consent to take over these Nacht und Nebel cases by the Ministry of Justice."

Lehmann further testified:

"I have stated that * * * the plan had to be rejected for manifold reasons—for reasons of international law, for reasons of justice, and policy of justice, and primarily, because I said the administration of justice should never do anything secretly. I put to him, 'What kind of suspicion would have to arise against our administration of justice if these people, inhabitants of other countries, brought to Germany, would disappear without a trace'? In my mind, and in the minds of all others concerned, everything revolted against this particular part of the plan, which seemed to us to have much more grave consequence than the question of who should, in the end, deal with it. That was also the opinion of the leading jurists of the armed forces * * *."

Defendant Mettgenberg held the position of Ministerialdirigent in Departments III and IV of the Reich Ministry of Justice. In Department III, for penal legislation, he dealt with international law, formulating secret, general, and circular directives. He handled Night and Fog cases and knew the purpose and procedure used in such cases, and that the decree was based upon the Fuehrer's order of 7 December 1941 to the OKW. In his affidavit Mettgenberg states (*NG–696, Pros. Ex. 336*):

"The 'Night and Fog' section within my subdivision, was headed by Ministerial Counsellor von Ammon. This matter was added to my subdivision because of its international character. I know, of course, that a Fuehrer decree to the OKW was the basis for this 'Night and Fog' procedure and that an agreement had been reached between the OKW and the Gestapo, that the OKW had also established relations with the Minister of Justice and that the handling of this matter was regulated accordingly.

"I was not present at the original discussion with Freisler, in which the 'Night and Fog' matters were first discussed on the basis of the Fuehrer decree. If I had been present at this discussion, and if I had had an occasion to present my opinion, I would, at any rate, have spoken against the taking over of the 'Night and Fog' matters by the justice administration. It went against my training as a public servant to have the administration of justice misused for things which were bound to be incompatible with its basic principles.

"Whenever Mr. von Ammon had doubts concerning the handling of individual cases, we talked these questions over together, and when they had major importance, referred them to higher officials for decision. When he had no doubts, he could decide all matters himself. We got these cases originally from the Wehrmacht and later from the Gestapo. The distribution of these cases to the competent Special Courts or to the People's Court, von Ammon decided independently. Von Ammon also had to review the indictments and sentences and to obtain the minister's decision concerning the execution of death sentences. The question posed by the exclusion of foreign means of evidence was a legal problem of the first order. Since it had been prescribed from above, the Ministry of Justice had no freedom of disposition in this matter. This is another one of the reasons why we should not have taken over these things."

Defendant von Ammon was ministerial councillor in Mettgenberg's subdivision in charge of the Night and Fog matters. The two acted together on doubtful matters and referred difficult questions to competent officials in the Reich Ministry of Justice and the Party Chancellery, since both of these offices had to give their "agreement" in cases of malicious attacks upon the Reich or Nazi Party, or in Night and Fog cases, which came originally from the Wehrmacht, and later from the Gestapo, and jurisdiction of which were assigned to Special Courts at several places in Germany and to the People's Court at Berlin by defendant von Ammon. In his affidavit he states (*NG–486, Pros. Ex. 337*) :

"The decree of 7 February 1942, signed by Schlegelberger, contained, among others, the following provisions: Foreign witnesses could be heard in these special cases only with the approval of the public prosecutor, since it was to be avoided that the fate of NN prisoners became known outside of Germany.

"The presiding judges of the courts concerned had to notify the public prosecutor if they intended to deviate from their notion for a sentence. Freisler noted in this connection that this constituted the utmost limit of what could be asked of the courts. The special nature of this procedure made it necessary to make such provisions.

"Later, when Thierack entered the Reich Ministry of Justice, he changed the decree in such a manner that the courts no longer had to declare their dissenting views to the public prosecutor, but that the acquitted NN prisoners or those who had served their sentences had to be handed over by the court authorities to the Gestapo for protective custody. Under Secretary of State Schlegelberger himself was not present at the conference, but Under State Secretary Freisler left the con-

ference briefly in order to secure the signature of Schlegelberger.

"I must admit that, in dealing with these matters, I did not particularly feel at ease. It was my intention to get the best out of this thing and to emphasize humanitarian considerations as much as possible in these hard measures. I have seen from the first Nuernberg trials that the court has declared the 'Night and Fog' decree as being against international law and that Keitel, too, declared that he had been aware of the illegal nature of this decree. Freisler, though, represented it to us in such a manner as to create the impression that the decree was very hard but altogether admissible."

Mettgenberg and von Ammon were sent to the Netherlands occupied territory because some German courts set up there were receiving Night and Fog cases in violation of the decree that they should be transferred to Germany. They held a conference at The Hague with the highest military justice authorities and the heads of the German courts in the Netherlands, which resulted in a report of the matter to the OKW at Berlin, which agreed with Mettgenberg and von Ammon that—

"The same procedure should be used in the Netherlands as in other occupied territories, that is, that all Night and Fog matters should be transferred to Germany."

With respect to the effectiveness and cruelty of the NN decree, the defendant von Ammon commented thus:

"The essential point of the NN procedure, in my estimation, consisted of the fact that the NN prisoners disappeared from the occupied territories and that their subsequent fate remained unknown."

The distribution of the NN cases to the several competent Special Courts and the People's Court was decided upon by defendant von Ammon. A report of 9 September 1942, signed by von Ammon, addressed to defendant Rothenberger, to be submitted to the Minister of Justice and the defendant Mettgenberg, stated that there are pending in Special Courts Night and Fog cases as follows: At Kiel, nine cases with 262 accused; at Essen, 180 cases with 863 accused; and at Cologne, 177 cases with 331 accused. By November 1943 there were turned over at Kiel, 12 cases with 442 accused; at Essen, 474 cases with 2,613 accused; and at Cologne, 1,169 cases with 2,185 accused.

A note dated Berlin, 26 September 1942, for the attention of defendant Rothenberger, signed by defendant von Ammon, stated that by order of the Reich Minister the hitherto—

"Exclusive jurisdiction of the Special Courts over NN cases is to some extent to be replaced by the People's Court of justice."

A letter dated 14 October 1942 to Minister of Justice Thierack from Freisler, then president of the People's Court, states that he understood that a conference held on 14 October 1942 extended the jurisdiction of the People's Court over NN cases. Freisler states that he conducted the preliminary proceedings with Ministerial Director Lehmann of the OKW with regard to the Ministry of Justice taking over the Night and Fog proceedings. He explains that the Night and Fog proceedings were top secret and no file or records were made in order to be quite sure that under no circumstances should any information be obtained by the outside world with regard to the fate of the alien prisoners. He also emphasizes the fact that under no circumstances could any other sentence than the one proposed by the public prosecutor be passed and to make sure of this in the technical routine it was decided that—

"1. The prosecutor should be entitled to withdraw the charges until the pronouncement of the sentence.

"2. The court was to be instructed to give the prosecutor another chance to give his point of view, in case their view should diverge from his."

Freisler further states:

"In fulfillment of my promise I deemed it necessary to inform you of this, dear sir, as these facts were not permitted to be recorded in the files and are probably unknown in the department."

By his supplemental directive of 28 October 1942, Thierack made note of the fact that the "jurisdiction of the People's Court (No. 1, 1 and 2 of the additional circular directives of 14 October 1942)" had been extended to NN cases. Thierack's letter, dated 25 October 1942 to defendant Lautz, copy to von Ammon, established and expanded jurisdiction of the People's Court over NN cases.

Thereafter the People's Court handled many Night and Fog cases, convicting the accused in secret sessions with no records whatsoever made of any evidence adduced and no record was made of the sentence pronounced. The defendant von Ammon testified that about one-half of the Night and Fog prisoners tried by the People's Court were executed.

Later NN cases were sent to German Special Courts at Breslau and Katowice, Poland, and to Silesia and other places as will be shown herein.

The use of concentration camps for NN prisoners was shown by a letter dated 18 August 1942, signed by Gluecks, SS Brigadefuehrer and General Major of the SS, which contained enclosures for information and execution by officials in charge of concentration camps, including Mauthausen, Auschwitz, Flossenbuerg, Dachau, Ravensbrueck, Buchenwald, and numerous others. The letter states that such prisoners will be transferred under the Keitel decree from the occupied countries to Germany for transfer to Special Courts. Should that for any reason be impossible, the accused will be put into one of the above-named concentration camps. Those in charge of the camps were instructed that absolute secrecy of such prisoners' detention was to be maintained including the prevention of any means of communication with the outside world either before or after the trial.

The following is illustrative of inhumane prison conditions for NN prisoners. The affidavit of Ludwig Schirmer, warden in the prison at Ebrach, confirmed by his oral testimony, states:

"The Ebrach prison which was used for criminal convicts had a capacity of 595 prisoners. In 1944, however, the prison became overcrowded and finally held a maximum of from 1,400 to 1,600 prisoners in 1945.

"This crowding had been caused by numerous NN prisoners from France and Belgium. Among them was the French General Vaillant who died in the prison of old age and of a heart disease. Owing to the overcrowding of the penitentiary, it was impossible to avoid the frequent outbreak of diseases, such as pulmonary tuberculosis, consumption, and, of course many cases of undernourishment. The very poor medical care was a serious disadvantage; the doctor showed up only two or three times a week. Sixty-two inmates died during the last months of the war. Many of them, of course, came in already sick. During the last months, a criminal convict was employed as physician. He was a morphinomaniac and a man of very low character.

"Although there were stocks of food at hand, the feeding of prisoners was bad; people got only soup and turnips for weeks. NN prisoners were crowded together, four in a single cell. From time to time a certain number of the prisoners was transferred to the concentration camp."

The affidavit of Josef Prey, head guard at the Amberg prison, confirmed by his oral testimony, states that foreigners, Jews, and NN prisoners at Amberg prison, which had a capacity of 900 to 1,100 were incarcerated there. Yet shortly before the collapse there were 2,000 prisoners of whom 800 to 900 prisoners were Polish,

and NN prisoners who included Frenchmen, Dutchmen, and Belgians. From time to time by secret decree prisoners were transferred to the concentration camps at Mauthausen. Defendant Engert, the official representative of the department of justice, visited and officially inspected the prison and knew of these conditions.

By his affidavit Engert states that Thierack told him the Night and Fog prisoners had to be treated with special precaution, not allowed any correspondence, locked up hermitically from the outer world, and that care should be taken that their real names remain unknown to the lower prison personnel. Engert further states that these orders were the result of the Fuehrer decree of 7 December 1941 and that Thierack told him the Night and Fog prisoners were accused of resistance and violence against the armed forces. He did not know what became of these NN prisoners at the various prison camps. He did know that an agreement existed with the Gestapo that the bodies of Night and Fog prisoners should be given to them for secret burial. It was shown by other testimony that defendant Engert was ministerial director, who handled and investigated the Night and Fog prisoners and that he was in charge of the task of transferring prisoners and knew their nationality and the character of crime charged against them.

On 14 June 1944 defendant von Ammon wrote Bormann, Chief of the Party Chancellery, a letter sent by way of defendant Mettgenberg, requesting permission of the Fuehrer to inform NN women held under death sentence of the fact that such sentence has been reprieved, since he considers it to be unnecessarily cruel to keep these "condemned women" in suspense for years as to whether their death sentence will be carried out.

Mrs. Solf, the widow of a former distinguished German cabinet officer and ambassador, testified that she was tried and held as a political prisoner of the Nazi regime for several years in Ravensbrueck concentration camp and other prisons where a large number of foreign women were imprisoned. Concerning the ill-treatment of these women and the prison conditions under which they were incarcerated, Mrs. Solf testified:

> "As to the prisoners who were with me at Ravensbrueck, as far as I can remember there was only an Italian woman of Belgian descent who was treated well, better than we were. However, in the penitentiary of Cottbus, as well as in the prison of Moabit, I met many foreigners. In the penitentiary of Cottbus, there alone were 300 French women who were sentenced to death, and five Dutch women sentenced to death who after a week or two were pardoned to penitentiary terms and whom

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I saw in the courtyard. The 300 French women sentenced to death were sent to Ravensbrueck at the end of November 1944. The night before they were transported they had to sleep on a bare stone floor. One of the auxiliary wardens, who was also an interpreter for them and who had a great deal of courage and a kind heart, came to me in order to ask us political prisoners to give them our blankets, which we certainly did."

She further testified:

"I know and have seen for myself that, for instance, in Moabit, some of the brutal wardens kicked them and shouted at them for reasons which seemed very, very unjust because these women did not understand what they were supposed to do."

The Night and Fog decree was from time to time implemented by several plans or schemes, which were enforced by the defendants. One plan or scheme was the transfer of alleged resistance prisoners or persons from occupied territories who had served their sentences or had been acquitted to concentration camps in Germany where they were held incommunicado and were never heard from again. Another scheme was the transfer of the inhabitants of occupied territories to concentration camps in Germany as a substitute for a court trial. Defendant Engert made such an order.

Trials under NN Decree

The evidence establishes beyond a reasonable doubt that in the execution of the Hitler NN decree the Nazi regime's Ministry of Justice, Special Courts, and public prosecutors agreed to and acted together with the OKW and Gestapo in causing to be arrested, transported to Germany, tried, sentenced to death and executed, or imprisoned under the most cruel and inhumane conditions in prisons and concentration camps, thousands of the civilian population of the countries overrun and occupied by the Nazi regime's military forces during the prosecution of its criminal and aggressive war.

The trials of the accused NN persons did not approach even a semblance of fair trial or justice. The accused NN persons were arrested and secretly transported to Germany and other countries for trial. They were held incommunicado. In many instances they were denied the right to introduce evidence, to be confronted by witnesses against them, or to present witnesses in their own behalf. They were tried secretly and denied the right of counsel of their own choice, and occasionally denied the aid of any counsel. No indictment was served in many instances and the accused

learned only a few moments before the trial of the nature of the alleged crime for which he was to be tried. The entire proceedings from beginning to end were secret and no public record was allowed to be made of them. These facts are proved by captured documents and evidence adduced on the trial, to some of which we now advert.

The first trial of NN cases took place at Essen. A letter from the prosecutor, dated 20 August 1942, addressed to the Reich Minister of Justice, was received on 27 August 1942, states that five defendants were to be tried and that two of them were to get prison terms and that—

> "In the remaining cases the death sentence is to be ordered and inquiries made whether they should be executed by the guillotine."

These sentences were later pronounced.

In response to several inquiries from prosecutors at Special Courts in Essen, Kiel, and Cologne citing pending NN cases, the defendants Mettgenberg and von Ammon replied that, in view of the regulation for the keeping of NN trials absolutely secret, defense counsel chosen by NN defendants would not be permitted.

In these same inquiries, it is stated that if defense counsel were carefully selected from those who were recognized as unconditionally reliable, pro-State and judicially efficient lawyers, no difficulty should arise with respect to the secrecy of such proceedings. It is suggested that if an attorney should inquire concerning representation of an NN defendant, he should be informed that it is not permissible to investigate whether or not there was any proceeding pending against the accused. This inquiry related to 16 NN French defendants who were to be tried at Cologne. Other evidence introduced in the case showed that this practice was followed.

The foreign countries department of the Wehrmacht High Command reported to defendant von Ammon on 15 October 1942 a list of 224 alleged spies arrested in France in the execution of what was known as "Action porto", of whom 220 had already been transported to Germany. Inquiry was made whether these prisoners should be regarded as coming under Hitler's NN Decree. A later directive issued 6 March 1943, which was initialed by defendant Mettgenberg and sent to the SS Chief Himmler, states that orders and regulations covering NN prisoners in general will be applied to "porto action" groups. The circular decree states further that in case of death of "porto action" prisoners, the same procedure is followed with respect to secrecy as is followed in NN cases, and that the estates of "porto action" prisoners are to

be retained by the penal institution for the time being, and that relatives are not to be informed about the death of such prisoners, especially not of their execution.

A letter dated 9 February 1943, Berlin, to the president of the People's Court, chief public prosecutor at Kiel and Cologne, and Chief Public Prosecutor at Hamm, states that for the purpose of carrying out the Night and Fog decree or directive (*NG–253, Pros. Ex. 317*):

> "In trials (before the Landesgericht), in which according to the regulations, defense counsel has to be provided for the defendant, the regulation may be ignored when the president of the court can conscientiously state that the character of the accused and the nature of the charge make the presence of a defense counsel superfluous."

In connection with the foregoing matter, a secret note to defendant von Ammon, dated 18 January 1941, suggests that a regulation concerning counsel for NN prisoners should be drafted. A letter dated 4 January 1943 states that in accordance with the power granted under the Fuehrer's order of 7 December 1941 (*NG–253, Pros. Ex. 317*):

> "Article IV, paragraph 32 of the Competence Decree of 21 February 1940 (relating to appointment of defense counsel) is cancelled. The president of the court will order defendant to be represented only if he is unable to defend himself or for any special reason it seems desirable that defendant should be represented."

A letter dated 21 April 1943, Berlin, by Thierack, Minister of Justice, states that (*NG–256, Pros. Ex. 320*):

> "Your ordinance of 21 December 1942 decreed that in criminal cases concerning criminal actions against the Reich and the occupation authority in the occupied territories, defense counsel of one's own choice should not be approved of on principle."

A letter by Thierack to the president of the People's Court, Berlin, dated 13 May 1943, states that (*NG–256, Pros. Ex. 320*):

> "The directives given by the Fuehrer on 7 December 1941 for the prosecution of criminal actions committed against the Reich or the occupation authorities in the occupied territories are applicable, according to their meaning and their tenor, to foreigners only, and not to German nationals or provisional Germans."

A draft of an extensive secret order or directives of the Reich Minister of Justice, dated 6 March 1943, covering secret NN procedure was sent to and initialed by or for heads of Ministry De-

partments III and IV (the defendant Mettgenberg), Department V (headed by defendant Engert), [initialed by Marx] and Department VI (headed by defendant Altstoetter). The directives instructed all so concerned to take further measures "in order not to endanger necessary top secrecy of NN procedure". Separate copies of this order, dated 6 March 1943, were sent to the aforementioned ministry departments, including Department VI, headed by defendant Altstoetter, who admits having seen and executed the directives, to defendant von Ammon and to, among others, the chief Reich prosecutor at the People's Court (defendant Lautz); the attorneys general in Celle, Duesseldorf, Frankfurt on Main, Hamburg, Hamm, Kiel, and Cologne; and the attorney general at the Prussian Court of Appeal; and for the attention of presidents of the People's Court, district courts of appeal at Hamm, Kiel, and Cologne, and the Prussian court of appeal at Berlin. Among the measures of secrecy included in the order or directives were the following (*NG–269, Pros. Ex. 319*):

"The cards used for investigations for the Reich criminal statistics need not be filled in. Likewise, notification of the penal records office will be discontinued until further notice. However, sentences will have to be registered in lists or on a card index in order to make possible an entry into the penal records in due course.

"In case of death, especially in cases of execution of NN prisoners, as well as in cases of female NN prisoners giving birth to a child, the registrar must be notified as prescribed by law. However, the following remark has to be added:

" 'By order of the Reich Minister of the Interior, the entry into the death (birth) registry must bear an endorsement, saying that examination of the papers, furnishing of information and of certified copies of death (birth) certificates is only admissible with the consent of the Reich Minister of Justice.' "

Department VI headed by defendant Altstoetter handled matters relating to registration of deaths and births. The order further provides:

"Farewell letters by NN prisoners as well as other letters must not be mailed. They have to be forwarded to the prosecution who will keep them until further notice.

"If an NN prisoner who has been sentenced to death and informed of the forthcoming execution of the death sentence desires spiritual assistance by the prison padre, this will be granted. If necessary, the padre must be sworn to secrecy.

"The relatives will not be informed of the death and especially of the execution of an NN prisoner. The press will not be

informed of the execution of a death sentence, nor must the execution of a death sentence be publicly announced by posters.

"The bodies of executed NN prisoners or prisoners who died from other causes have to be turned over to the State Police for burial. Reference must be made to the existing regulations on secrecy. It must be pointed out especially that the graves of NN prisoners must not be marked with the names of the deceased.

"The bodies must not be used for teaching or research purposes.

"Legacies of NN prisoners who have been executed or died from other causes must be kept at the prison where the sentence was served."

Later, in some instances the right to spiritual assistance was denied and a later directive authorized the turning over of bodies of NN persons to institutes for experimental purposes.

A letter dated 3 June 1943, from the Reich Ministry of Justice to the People's Court justices and the Chief Public Prosecutors, initialed by defendant Mettgenberg, deals with the subject of trials under the NN decree of foreigners who were nationals of other countries than those occupied by the Nazi forces. The difficulty obviously involved a violation of international law as to such nationals of other countries. In particular, the difficulty arose as to the regulation for the maintenance of secrecy of such trials and whether the secrecy with regard to NN cases should apply. The reply was that they were to be tried in accordance with the circular decrees of 6 February 1942 and 14 October 1942, and the regulations issued for the amendment of these circular decrees to be entitled "NN Prisoners Taken by Mistake". This decree provides that if the trial of such foreigners could not be carried out separately from the trial of the nationals of the occupied countries for reasons pertaining to the presentation of evidence, then the trials were to be strictly in accordance with the provisions of NN procedure; otherwise said foreign nationals would obtain knowledge of the course of the trial against their accomplices.

A note signed by the defendant von Ammon, dated 7 October 1943, states that NN prisoners were often ignorant of charges against them until a few moments before the trial. He further states that Chief Reich Public Prosecutor Lautz asked him whether there were any objections to the translation of the indictment into the language of the defendant, which would then be handed to him. Defendant von Ammon replied that there would be no objection to the proceeding and stated (*NG–281, Pros. Ex. 323*):

"It proved rather awkward that defendants learned the details of their charges only during the trial. Also, the interpreta-

tion by defense counsel is not always sufficient because their French mostly is not good enough and defendants were brought to the place of trial only shortly before it was held."

The same difficulty arose as to Czech defendants.

A report on a conference with respect to new procedure in treatment of Night and Fog cases originating in the Netherlands, signed "von Ammon" and "Mettgenberg, 9 November 1943", addressed to Ministerial Director Engert and others, states that while returning from The Hague to Berlin the undersigned representative of the Reich Ministry of Justice held on 5 November as scheduled, a conference with the head officials of the court of appeals at Hamm and that defendant Joel thought the housing of NN prisoners, also such of Dutch nationality, at Papenburg, would be possible and unobjectionable. This was later carried out.

A secret letter dated 29 December 1943, addressed to defendant von Ammon from the presiding judge and chief prosecutor of Hamm Court of Appeals notified von Ammon of an imminent conference concerning transfer of the NN trials to the NN Special Courts at Oppeln and Katowice.

A letter from Breslau dated 10 January 1944, signed by Dr. Sturm, asks that ministerial councillor, defendant von Ammon, be available for a meeting at Breslau between 15 and 31 January 1944 to discuss routine proceedings for handling NN cases.

A letter addressed to the German commander of the French occupied zone states that effective from 15 November 1943 all cases of crimes committed against the Reich or the occupation forces in occupied French zones hitherto submitted to the ordinary legal authorities were to be taken over by the Special Court and attorney general in Cologne and Breslau.

The defendant von Ammon attended conferences with public prosecutors in Breslau and Katowice (Poland) on 18 and 19 February 1944, concerning housing of NN prisoners and possibility of transferring NN cases from the Netherlands, Belgium, and northern France to Special Courts in Poland for trial; von Ammon reported the results of these conferences in detail to, among others, the defendant Klemm (under secretary) and personally wrote on his report that he had secured appropriate Gauleiter's concurrence to the proposed transfer. Shortly thereafter the Ministry of Justice issued a decree endorsed to the defendant Mettgenberg for signature, and submitted twice to von Ammon, for information and cosignature, whereby these Dutch, Belgian, and northern French NN cases were to be transferred to Silesia for trial. In response to this decree, von Ammon was personally notified that the defendant Joel (then general public prosecutor at Hamm)

feared objections from the Wehrmacht because of the longer transportation involved in the transfer.

A directive by the Reich Minister of Justice with respect to treatment of NN prisoners, dated Berlin, 21 January 1944, initialed by defendant von Ammon, to the president of the People's Court, to the Reich Leader SS, Reich prosecutor of the People's Court (defendant Lautz), to the Chief Public Prosecutor at Hamm (defendant Joel), and others, states that when an NN prisoner had been acquitted by a general court, if it appears that the accused is innocent or if his guilt has not been established sufficiently, then he has to be handed over to the Secret Police. The directive further states:

> "If in the main trial of an NN proceeding it appears that the accused is innocent or if his guilt has not been sufficiently established, then he is to be handed over to the Secret State Police; the public prosecutor informs the Secret State Police about his opinion whether the accused can be released and return into the occupied territories, or whether he is to be kept under detention. The Secret State Police decide which further actions are to be taken.
>
> "Accused who were acquitted, or whose proceedings were closed in the main trial, or who served a sentence during the war, are to be handed over to the Secret State Police for detention for the duration of the war."

A letter dated 21 January 1944, Berlin, to the OKW and the Judge Advocate General Department, dispatched 22 January 1944 (copy to Dr. Mettgenberg with request for approval) complains of lack of coordination in NN cases between military courts and justice officials. This complaint relates primarily to transfer of NN cases.

In answer to the objections to the transfer of NN cases arising in France from Cologne to Breslau, dated 18 January 1944, the defendants Mettgenberg and von Ammon insisted that the transfer is necessary and directed its accomplishment. Three days later a letter endorsed by Mettgenberg informed Himmler that this transfer of NN cases had taken place.

On 24 April 1944 von Ammon reported in detail on a trip he made to Paris previously referred to. This official visit served particularly to obtain information of the security situation in France and to determine whether the NN procedures of the Breslau Special Court were approved by the army. This meeting occurred in the office of the Chief Justice of the German Military Governor of Paris, General von Stuelpnagel. Von Ammon submitted this report both to Klemm and Mettgenberg who initialed it.

A letter from Hamm (Westphalia), 26 January 1944, to the Reich Minister Thierack, signed by defendant Joel, suggests the speeding up of proceedings to avoid delays in NN cases, and suggests that:

"The Chief Public Prosecutor submits record to the chief Reich prosecutor only if, according to previous experience or according to directives laid down by the chief Reich prosecutor, it is to be expected that he will take over, or partly take over the case.

"As a rule, even now when the draft of the indictment is submitted for approval to the Reich Minister of Justice, the records are not enclosed. The decision rests with me, to whom the documents are brought by courier."

A note signed by Dr. Reicholt, 20 April 1944, copy to defendant von Ammon, expresses the same difficulty experienced by defendant Joel and asks that Chief Public Prosecutor at the People's Court decide quickly which of the accused persons he wanted to keep so that they may be transferred as quickly as possible.

The foregoing requests for speed in handling NN cases were due to disturbances caused by air raids. The Reich Minister of Justice replied, 26 April 1944, that in the main "the delay in the proceedings is unavoidable."

Defendant von Ammon reported on a conference with German occupying forces of Belgium and northern France, held in Oppeln on 29 and 30 June 1944. Von Ammon stated that since the Allied invasion had not caused undue tension as yet, it was unnecessary at that time to make penalties in NN cases more severe. This report was initialed by defendant Mettgenberg.

Disposition of NN Cases

A statistical survey of NN cases as of 1 November 1943 made to Ministerial Director Dr. Vollmer, Berlin, 22 November 1943, shows cases and sentences passed on NN prisoners as follows:

1. Turned over by the Wehrmacht authorities to senior public prosecutors at Kiel, 12 cases with 442 defendants; at Essen, 474 cases with 2,613 defendants; at Cologne, 1,169 cases with 2,185 defendants.

2. Charges filed by senior public prosecutors as follows: At Kiel, nine cases with 175 defendants; at Essen, 254 cases with 860 defendants; at Cologne, 173 cases with 257 defendants; by chief public prosecutor at the People's Court (Lautz), 111 cases with 494 defendants.

3. Sentences passed by Special Courts at Kiel, eight on 168 defendants; at Essen, 221 cases with 475 defendants; at Cologne,

128 cases with 183 defendants; at People's Court, 84 cases with 304 defendants.

The defendant von Ammon testified that about one-half of all defendants tried by the People's Court were given the death penalty and were executed. The foregoing documents show that defendant Lautz was Chief Public Prosecutor at the People's Court at the time the 304 sentences were pronounced in the Night and Fog cases.

A similar survey, 5 months later (30 April 1944), shows that a total of 8,639 NN defendants transferred to the various Special Courts and the People's Court in Germany, 3,624 were indicted, and 1,793 were sentenced. Defendant von Ammon initialed this survey.

The foregoing statistical reports as to time are obviously incomplete. They do not show the number of NN cases tried at Breslau, Katowice, and other places. The foregoing documents show that at these places great difficulty was experienced because of lack of prisons for the large number of NN prisoners who were sent to these areas. Nor do they show the number of NN prisoners committed to concentration camps without trial. They do not show the number of residue NN prisoners who were at the end of the control of NN matters by the Minister of Justice committed to concentration camps and never heard from thereafter.

Use of NN Prisoners in Armament Industry

In file of reports for the years 1943 and 1944 of NN cases still pending in the Ministry of Justice, the attorney general at Katowice (Poland) stated to the Ministry of Justice the following (*NG–264, Pros. Ex. 334*) :

> "NN prisoners held within the jurisdiction of the Court of Appeal of Katowice are already employed to a large extent in the armament industry, regardless of whether they are being held for questioning or punishment. They are quartered there in special camps at or near the place of the respective industrial enterprise. In this way it is intended, if possible, to place all NN prisoners at the disposal of the armament industry.
>
> "It has been disclosed that the NN prisoners already employed in the armament industry, as for instance the 400-odd prisoners working in Laband, have done a very good job and excel in particular as skilled workers. The armament industry therefore wants to retain the employed NN prisoners also after their acquittal or after they have served their sentence.
>
> "I ask for a decision on whether and, if so, how that demand can be complied with. Considerable doubts arise from the fact that there is no legal right to confine them further and that

the judicial authorities would thus take preventive police measures. There is the question, however, whether the situation of the Reich does not justify even such extraordinary measures."

This request was handled by defendant von Ammon, who endorsed it as follows:

"Submitted * * * first to Department V (headed by defendant Engert) with the request for an opinion. If you have no objections I intend to contact the RSHA in accordance with the report of the attorney general at Katowice."

Clemency in the NN Cases

As Under Secretary, defendant Klemm was required to pass upon clemency matters either while acting with or in the absence of the Minister of Justice. He admits passing upon clemency pleas in NN death cases and refusing all of them. Fourteen documents concerning NN matters passed through defendant Klemm after he became under secretary of State. He knew of the transfer of NN cases from Essen to Silesia and knew of "routine" NN matters which passed through his department.

In the fall of 1944 Hitler ordered the discontinuance of the NN proceedings by the justice and the OKW courts and transferred the entire problem to the Gestapo the NN prisoners being handed over to the Gestapo at the same time. In later conferences attended by defendant von Ammon, the Ministry of Justice agreed to and later actually carried out the transfer by committing them from the Ministry's prisons to the Gestapo's custody. Defendant Lautz was ordered to suspend People's Court proceedings against NN prisoners and transfer them to the Gestapo. The witness Hecker stated that those NN prisoners of the Berlin district, of which he had knowledge, were sent to Oranienburg.

The final order of the Ministry of Justice committing all NN prisoners on hand to the Gestapo and the concentration camps was one of extreme cruelty.

The foregoing documents and the undisputed facts show that Hitler and the high ranking officials of the armed forces and of the Nazi Party, including several Reich Ministers of Justice and other high officials in the Ministry of Justice, judges of the Nazi regime's courts, the public prosecutors at such courts, either agreed upon, consented to, took a consenting part in, ordered, or abetted, were connected with the Hitler NN plan, scheme, or enterprise involving the commission of war crimes and crimes against humanity during the waging of the recent war against the Allied nations and other neighboring nations of Germany.

The foregoing documents and facts show without dispute that several of the defendants participated to one degree or another

either as a principal; or ordered, or abetted, took a consenting part in, or were connected with the execution or carrying out of the Hitler NN scheme or plan. The defendants so participating will be later discussed in the summation of the evidence.

The Night and Fog decree originated with Hitler as a plan or scheme to combat alleged resistance movements against the German occupation forces but it was early extended by the Ministry of Justice to include offenses against the German Reich. Often the offenses had nothing to do with the security of the armed forces in the occupied territories. Many of them occurred after military operations had ceased and in areas where there were no military operations. The first secret decree of the Ministry of Justice for the execution or carrying out of the NN decree provided for:

"1. The prosecution of criminal offenses against the Reich or;
"2. The occupation troops in occupied areas."

It declared that the directive will be as a rule applicable to the seven above listed general types of offenses or crimes, including "Communist activity". The term "Communist activity" is general and political in nature. The evidence shows that political prisoners in occupied territories were tried and sentenced to death under the NN proceedings. Pertinent here with respect to the so-called resistance activities is the finding of the IMT that:

> "The local units of the Security Police and SD continued their work in the occupied territories after they had ceased to be an area of operations. The Security Police and SD engaged in widespread arrests of the civilian population of these occupied countries, imprisoned many of them under inhumane conditions, subjected them to brutal third degree methods, and sent many of them to concentration camps. Local units of the Security Police and SD were also involved in the shooting of hostages, the imprisonment of relatives, the execution of persons charged as terrorists, [and saboteurs without a trial], and the enforcement of the 'Nacht und Nebel' decrees under which persons charged with a type of offense believed to endanger the security of the occupying forces were either executed within a week or secretly removed to Germany without being permitted to communicate with their family and friends." *

Defendant Schlegelberger explained the fundamental purpose of the NN decree to be a deterrent "through cutting off of the prisoners from every contact with the outside world". He further explained "that the NN prisoners were expected and were to be

* Trial of the Major War Criminals, op. cit., Volume I, page 266.

tried materially according to the same regulations which would have been applied to them by the courts martial in the occupied territories" and that accordingly, "the rules of procedure had been curtailed to the utmost extent."

The enforcement of the directives under the Hitler NN plan or scheme became a means of instrumentality by which the most complete control and coercion of a lot of the people of occupied territories were affected and under which thousands of the civilian population of occupied areas were imprisoned, terrorized, and murdered. The enforcement and administration of the NN directives resulted in the commission of war crimes and crimes against humanity in violation of the international law of war and international common law relating to recognized human rights, and of article II, paragraphs 1(*b*) and (*c*) of Control Council Law No. 10.

During the war, in addition to deporting millions of inhabitants of occupied territories for slave labor and other purposes, Hitler's Night and Fog program was instituted for the deportation to Germany of many thousands of inhabitants of occupied territories for the purpose of making them disappear without trace and so that their subsequent fate remain secret. This practice created an atmosphere of constant fear and anxiety among their relatives, friends, and the population of the occupied territories.

The report of the Paris Conference of 1919, referred to above, listed 32 crimes as constituting "the most striking list of crimes as has ever been drawn up, to the eternal shame of those who committed them." This list of crimes was considered and recognized by the Versailles Treaty and was later recognized as international law in the manner hereinabove indicated. Among the crimes so listed was the "deportation of civilians" from enemy occupied territories.

Control Council Law No. 10 in illustrating acts constituting violations of laws or customs of war, recognizes as war crimes the "deportation to slave labour or for any other purpose of civilian population from occupied territory." (Art. II, 1(*b*).) C. C. Law 10 [Article II] paragraph 1(*c*) also recognizes as crimes against humanity the "enslavement, deportation, imprisonment * * * against any civilian population."

The IMT held that the deportation of inhabitants from occupied territories for the purpose of "efficient and enduring intimidation" constituted a violation of the laws and customs of war. The deportation for the purpose of "efficient and enduring intimidation" is likewise condemned by C. C. Law 10, under the provision inhibiting "deportation * * * for any other purpose, of civilian population from occupied territory."

Also among the list of 32 crimes contained in the Conference Report of 1919 are "murder and massacre, and systematic terrorism". C. C. Law 10 makes deportation of civilian population "for any purpose" a crime recognized as coming within the jurisdiction of the law. The admitted purpose of the Night and Fog decree was to provide an "efficient and enduring intimidation" of the population of occupied territories. The IMT held that the Hitler NN decree was "a systematic rule of violence, brutality, and terror", and was therefore in violation of the laws of war as a terroristic measure.

The evidence shows that many of the Night and Fog prisoners who were deported to Germany were not charged with serious offenses and were given comparatively light sentences or acquitted. This shows that they were not a menace to the occupying forces and were not dangerous in the eyes of the German justices who tried them. But they were kept secretly and not permitted to communicate in any manner with their friends and relatives. This is inhumane treatment. It was meted out not only to the prisoners themselves but to their friends and relatives back home who were in constant distress of mind as to their whereabouts and fate. The families were deprived of the support of the husband, thus causing suffering and hunger. The purpose of the spiriting away of persons under the Night and Fog decree was to deliberately create constant fear and anxiety among the families, friends, and relatives as to the fate of the deportees. Thus, cruel punishment was meted out to the families and friends without any charge or claim that they actually did anything in violation of any occupation rule of the army or of any crime against the Reich.

It is clear that mental cruelty may be inflicted as well as physical cruelty. Such was the express purpose of the NN decree, and thousands of innocent persons were so penalized by its enforcement.

The foregoing documents show without dispute that the NN victim was held incommunicado and the rest of the population only knew that a relative or citizen had disappeared in the night and fog; hence, the name of the decree. If relatives or friends inquired, they were given no information. If diplomats or lawyers inquired concerning the fate of an NN prisoner, they were told that the state of the record did not admit of any further inquiry or information. The population, relatives, or friends were not informed for what character of offense the victim had been arrested. Thus, they had no guide or standard by which to avoid committing the same offense as the unfortunate victims had committed which necessarily created in their minds terror and dread that a like fate awaited them.

Throughout the whole Night and Fog program ran this element of utter secrecy. This secrecy of the proceedings was a particularly obnoxious form of terroristic measure and was without parallel in the annals of history. It could have been promulgated only by the cruel Nazi regime which sought to control and terrorize the civilian population of the countries overrun by its aggressive war. There was no proof that the deportation of the civilian population from the occupied territories was necessary to protect the security of the occupant forces. The NN plan or scheme fit perfectly into the larger plan or scheme of transportation of millions of persons from occupied territories to Germany.

C. C. Law 10 makes deportation of the civilian population for any purpose an offense. The international law of war has for a long period of time protected the civilian population of any territory or country occupied by an enemy war force. This law finds its source in the unwritten international law as established by the customs and usages of the civilized nations of the world. Under international law the inhabitants of an occupied area or territory are entitled to certain rights which must be respected by the invader occupant.

This law of military occupation has been in existence for a long period of time. It was officially interpreted and applied nearly a half century ago by the President of the United States of America during the war with Spain in 1898. By General Order No. 101, 18 July 1898 (U. S. Foreign Relations, p. 783), the President declared that the inhabitants of the occupied territory "are entitled to the security in their persons and property and in all their private rights and relations." He further declared that it was the duty of the commander of the Army of Occupation "to protect them in their homes, in their employments, and in their personal and religious rights," and that "the municipal laws of the conquered territory, such as affect private rights of persons and property and provide for punishment of crime, are continued in force" and are "to be administered by the ordinary tribunals, substantially as they were before the occupation." The President referred to the fact that these humane standards of warfare had previously been established by the laws and customs of war, which were later codified by the Hague Conventions of 1899 and 1907, and which constituted the effort of the civilized participating nations to diminish the evils of war by the limitation of the power of the invading occupant over the people and by placing the inhabitants of the occupied area or territory "under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience."

A similar order was issued during the first war with Germany by the President of the United States of America when the American Expeditionary Forces entered the Rhineland in November 1918. (General Order No. 218, 28 November 1918.) At the conclusion of this occupancy, the German Government expressed its appreciation of the conduct of the American occupying forces.

But Germany soon forgot these humane standards of warfare, as is shown by the undisputed evidence. The general policy of the Nazi regime was to terrorize and in some instances to exterminate the civilian populations of occupied territories.

Pertinent here is the finding of the IMT that:

> "In an order issued by the defendant Keitel on 23 July 1941, and drafted by the defendant Jodl, it was stated that:
>
> " 'In view of the vast size of the occupied areas in the East, the forces available for establishing security in these areas will be sufficient only if all resistance is punished, not by legal prosecution of the guilty, but by the spreading of such terror by the armed forces as is alone appropriate to eradicate every inclination to resist among the population * * *. Commanders must find the means of keeping order by applying suitable Draconian measures'." *

Both Keitel and Jodl were sentenced to death by the IMT and later executed. It was the same Keitel who had issued, over his own signature, the Hitler NN decree which provided that (*NG 669–PS, Pros. Ex. 305*) :

> "Efficient and enduring intimidation can only be achieved either by capital punishment or by measures by which the relatives of the criminal and the population do not know the fate of the criminal. This aim is achieved when the criminal is transferred to Germany."

Beyond dispute the foregoing decrees were inspired by the same thought and purpose and represent the general policy of the Nazi regime in the prosecution of its aggressive war. This general policy was to terrorize, torture, and in some occupied areas to exterminate the civilian population. The undisputed evidence in this case shows that Germany violated during the recent war every principle of the law of military occupation. Not only under NN proceedings but in all occupations she immediately, upon occupation of invaded areas and territories, set aside the laws and courts of the occupied territories. She abolished the courts of the occupied lands and set up courts manned by members of the Nazi totalitarian regime and system. These laws of occupation were cruel and extreme beyond belief and were enforced by the Nazi courts

* Ibid., pp. 235–236.

in a cruel and ruthless manner against the inhabitants of the occupied territories, resulting in grave outrages against humanity, against human rights and morality and religion, and against international law, and against the law as declared by C. C. Law 10, by authority of which this Court exercises its jurisdiction in the instant case. The evidence adduced herein provides undeniable and positive proof of the ill-treatment of the subjugated people by the Nazi Ministry of Justice and prosecutors to such an extent that jurists as well as civilians of civilized nations who respect human rights and human personality and dignity can hardly believe that the Nazi judicial system could possibly have been so cruel and ruthless in their treatment of the population of occupied areas and territories.

The foregoing procedure under the NN decree was clearly in violation of the following provisions sanctioned by the Hague Regulations:

"*Article 5.*—Prisoners of war * * * cannot be confined except as an indispensable measure of safety and only while the circumstances which necessitate the measure continue to exist.

"*Article 23(h).*—* * * It is expressly forbidden * * * to declare abolished, suspended, or inadmissible in a court of law the rights and actions [of the nationals] of the hostile party.

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

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

Both the international rules of war and C. C. Law 10 inhibit the torture of civilians by the occupying forces. Under the Night and Fog decree civilians were secretly transported to concentration camps and were imprisoned under the most inhumane conditions as was shown by the above statements from captured documents. They were starved and ill-treated while in concentration camps and prisons. Thus, the Night and Fog decree violated these express inhibitions of international law of war as well as the express provisions of C. C. Law 10.

Such imprisonment and ill-treatment was also in violation of the rule prescribed by the Conference of Paris of 1919 which prohibits the "internment of civilians under inhumane conditions".

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The Night and Fog decree was in violation of the international law as recognized by the Paris Conference of 1919 in that the NN prisoners were deported to Germany and forced to labor in the munitions plants of the enemy power.

The foregoing documents establish beyond dispute that they were so employed in munitions plants with the sanction and approval of the Reich Ministry of Justice under the approval of the defendant von Ammon.

The extent of activity and the criminality of the defendants who participated in the execution and carrying out of the Night and Fog decree will be discussed under the summation of the evidence relating to each such defendant. Each defendant has pleaded in effect as a defense the act of State as well as superior orders in justification or mitigation of any crime he may have committed in the execution of the Night and Fog decree. The basis for individual liability for crimes committed and the law relating thereto was clearly and ably declared by the IMT judgment which reads as follows:

> "It was submitted that international law is concerned with the actions of sovereign states, and provides no punishment for individuals; and further, that where the act in question is an act of state, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, both these submissions must be rejected. That international law imposes duties and liabilities upon individuals as well as upon States has long been recognized. In the recent case of *Ex parte Quirin* (1942 317 U. S. 1), before the Supreme Court of the United States, persons were charged during the war with landing in the United States for purposes of spying and sabotage. The late Chief Justice Stone, speaking for the Court, said:
>
> " 'From the very beginning of its history this Court has applied the law of war as including that part of the law of nations which prescribes for the conduct of war, the status, rights, and duties of enemy nations as well as enemy individuals.'
>
> "He went on to give a list of cases tried by the Courts, where individual offenders were charged with offenses against the laws of nations, and particularly the laws of war. Many other authorities could be cited, but enough has been said to show that individuals can be punished for violations of international law. Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." *

* Ibid., pp. 222–223.

The record contains innumerable acts of persecution of individual Poles and Jews, but to consider these cases as isolated and unrelated instances of perversion of justice would be to overlook the very essence of the offense charged in the indictment. The defendants are not now charged with conspiracy as a separate and substantive offense, but it is alleged that they participated in carrying out a governmental plan and program for the persecution and extermination of Jews and Poles, a plan which transcended territorial boundaries as well as the bounds of human decency. Some of the defendants took part in the enactment of laws and decrees the purpose of which was the extermination of Poles and Jews in Germany and throughout Europe. Others, in executive positions, actively participated in the enforcement of those laws and in atrocities, illegal even under German law, in furtherance of the declared national purpose. Others, as judges, distorted and then applied the laws and decrees against Poles and Jews as such in disregard of every principle of judicial behavior. The overt acts of the several defendants must be seen and understood as deliberate contributions toward the effectuation of the policy of the Party and State. The discriminatory laws themselves formed the subject matter of war crimes and crimes against humanity with which the defendants are charged. The material facts which must be proved in any case are (1) the fact of the great pattern or plan of racial persecution and extermination; and (2) specific conduct of the individual defendant in furtherance of the plan. This is but an application of general concepts of criminal law. The person who persuades another to commit murder, the person who furnishes the lethal weapon for the purpose of its commission, and the person who pulls the trigger are all principals or accessories to the crime.

We turn to the national pattern or plan for racial extermination.

Fundamentally, the program was one for the actual extermination of Jews and Poles, either by means of killing or by confinement in concentration camps, which merely made death slower and more painful. But lesser forms of racial persecution were universally practiced by governmental authority and constituted an integral part in the general policy of the Reich. We have already noted the decree by which Jews were excluded from the legal profession. Intermarriage between Jews and persons of German blood was prohibited. Sexual intercourse between Jews and German nationals was punished with extreme severity by the courts. By other decrees Jews were almost completely expelled from public service, from educational institutions, and from many business enterprises. Upon the death of a Jew his property was

confiscated. Under the provisions for confiscation under the 11th amendment to the German Citizenship Law, *supra*, the decision as to confiscation of the property of living Jews was left to the chief of the Security Police and the SD. The law against Poles and Jews cited *supra* (4 December 1941) was rigorously enforced. Poles and Jews convicted of specific crimes were subjected to different types of punishment from that imposed upon Germans who had committed the same crimes. Their rights as defendants in court were severely circumscribed. Courts were empowered to impose death sentences on Poles and Jews even where such punishment was not prescribed by law, if the evidence showed "particularly objectionable motives". And, finally, the police were given *carte blanche* to punish all "criminal" acts committed by Jews without any employment of the judicial process. From the great mass of evidence we can only cite a few illustrations of the character and operation of the program.

On 30 January 1939 in an address before the Reichstag, Hitler, who was at that very time perfecting his plot for aggressive war, said:

> "If the international Jewish financiers within and without Europe succeed in plunging the nations once more into a world war, then the result will not be the Bolshevization of the world and thereby the victory of Jewry, but the obliteration of the Jewish race in Europe."

We quote from the writings of Alfred Rosenberg (since hanged), "High Priest of the Nazi Racial Theory and Herald of the Master Race:"

> "A new faith is arising today—the myth of the blood, the faith to defend with the blood the divine essence of man. The faith, embodied in clearest knowledge, that the Nordic blood represents that mysterium which has replaced and overcome the old sacraments." *

The Rosenberg philosophy strongly supported the program of the Nazi Party, which reads as follows:

> "None but members of the nation (Volk) may be citizens of the State. None but those of German blood, whatever their creed, may be members of the nation. No Jew, therefore, may be a member of the nation."

It was to implement this program that the discriminatory laws against Poles and Jews were enacted as hereinabove set forth.

* Rosenberg, *Der Mythus des 20. Jahrhunderts*, (Munich 1935), page 114 (1st Ed., 1930), cited in National Socialism, Department of State Publication 1864 (U. S. Government Printing Office, Washington 1943), page 81.

A directive of the Reich Ministry of Justice, signed by Freisler, dated 7 August 1942, addressed to prosecutors and judges, set forth the broad general purposes which were to govern the application of the law against Poles and Jews and the specific application of that law in the trial of cases. We quote (*NG–744, Pros. Ex. 500*):

"The penal law ordinance of 4 December 1941 concerning Poles was intended not only to serve as a criminal law against Poles and Jews, but beyond that also to provide general principles for the German administration of law to adopt in all its judicial dealings with Poles and Jews, irrespective of the role which the Poles and Jews play in the individual proceedings. The regulations of article IX for instance, according to which Poles and Jews are not to be sworn in, apply to proceedings against Germans as well. * * *

"1. Proceedings against Germans should be carried on whenever possible without calling Poles and Jews as witnesses. If, however, such a testimony cannot be evaded, the Pole or Jew must not appear as a witness against the German during the main trial. He must always be interrogated by a judge who has been appointed or requested to do so, * * *.

"2. Evidence given by Poles and Jews during proceedings against Germans must be received with the utmost caution especially in those cases where other evidence is lacking."

On 13 October 1942 the Reich Minister of Justice Thierack wrote to Reichsleiter Bormann, in part as follows (*NG–558, Pros. Ex. 143*):

"With a view to freeing the German people of Poles, Russians, Jews, and gypsies, and with a view to making the eastern territories which have been incorporated into the Reich available for settlements for German nationals, I intend to turn over criminal proceedings against Poles, Russians, Jews, and gypsies to the Reich Leader SS. In so doing I base myself on the principle that the administration of justice can only make a small contribution to the extermination of members of these peoples. The justice administration undoubtedly pronounces very severe sentences on such persons, but that is not enough to constitute any material contribution toward the realization of the above-mentioned aim."

On 18 September 1942 a conference was held among Thierack, Himmler, Bormann, Rothenberger, and others. The notes of the conference, signed by Thierack, disclose that the subjects of discussion included "special treatment" at the hands of the police in cases where judicial sentences were not severe enough. Among

other points agreed upon between Bormann, Himmler, and Thierack, were the following (*654–PS, Pros. Ex. 39*):

"The Reich Minister of Justice will decide whether and when special treatment at the hands of the police is to be applied. * * *

"The delivery of asocial elements while serving penal sentences to the Reich Leader of SS to be worked to death. Persons under security detention, Jews, gypsies, Russians, and Ukrainians, Poles with more than 3-year sentences, Czechs and Germans with more than 8-year sentences will be turned over without exception according to the decision of the Reich Minister for Justice. First of all the worst asocial elements among those just mentioned are to be handed over. I shall inform the Fuehrer of this through Reichsleiter Bormann. * * *

"It is agreed that, in consideration of the intended aims of the government for the clearing up of the eastern problems, in future Jews, Poles, gypsies, Russians, Ukrainians are no longer to be judged by the ordinary courts, so far as punishable offenses are concerned, but are to be dealt with by the Reich Leader SS. * * *"

The defendant Rothenberger testified that he was not present when these agreements were made. However that may be, it is clear that they came to his notice shortly thereafter.

Of special significance is the record concerning the establishment of penal laws for Poles and Jews in the annexed eastern territories. On 17 April 1941 the defendant Schlegelberger addressed a letter to the Reich Minister and chief of the Reich Chancellery. In it he states that as soon as the Special Courts were introduced in the eastern territories under the decree of 5 September 1939 he tried to make those "courts with their particularly prompt and energetic procedure centers for combating all Polish and Jewish crime." He states that "the procedure of compulsory prosecution was rescinded, at is seems intolerable that Poles and Jews should in this way compel the German prosecutor to issue an indictment." Poles and Jews were also prohibited from raising private actions and accessory actions. He further states:

"On being informed of the Fuehrer's intention to discriminate in the sphere of penal law between the Poles (and probably the Jews as well), and the Germans, I prepared, after preliminary discussions with the presidents of the courts of appeal and the attorney generals of the annexed eastern territories, the attached draft concerning the administration of the penal laws against Poles and Jews in the annexed eastern territories and in the territory of the former Free City of Danzig."

Again, he says:

"So far I have been in agreement with the opinion held by the Fuehrer's deputy, on the fact that a Pole is less sensitive to the imposition of an ordinary prison sentence. Therefore, I had taken administrative measures to ensure that Poles and Jews be separated from other prisoners and that their imprisonment be rendered more severe. Number 3 goes still farther and substitutes for the terms of imprisonment and hard labor prescribed by Reich law other prison sentences of a new kind, viz, the prison camp and the more rigorous prison camp."

Speaking of the proposed draft prepared by him, Schlegelberger said:

"The part concerned with procedure contains first the special regulations existing up to now of the preliminary decree. In addition, a Pole and a Jew sentenced by a German court is not to be allowed in the future any legal remedy against the judgment; neither will he have a right of appeal, or be allowed to ask that the case be reopened. All sentences will take effect immediately. In future, Poles and Jews will also no longer be allowed to object to German judges on the grounds of prejudice; nor will they be able to take an oath. Coercive measures against them are permissible under easier conditions."

A memorandum dated 22 April 1941, bearing the same file number as the letter of Schlegelberger, states that Schlegelberger has transmitted the proposed draft, and adds:

"The draft establishes a draconic special criminal law for Poles and Jews, giving a wide range for the interpretations of the facts of the case, with the death penalty applicable throughout. The conditions of imprisonment are also much more severe than provided for in the German criminal law."

The note further states:

"The Minister of Justice differs only in two points from the suggestions of the Fuehrer's deputy."

It then states that the Fuehrer's deputy considered it more appropriate to authorize the Reich governors to introduce the special criminal law, whereas the Minister of Justice provides for its introduction by a Reich decree. The second difference of opinion was somewhat to the credit of the defendant Schlegelberger. The Fuehrer's deputy considered the introduction of corporal punishment appropriate, and the Minister of Justice refused to agree.

On 3 August 1942 the Reich Minister of Justice sent a draft of the proposed ordinance to a number of high officials, including the Reich Minister of Interior and the Reich Minister for Popular Enlightenment and Propaganda. The letter was signed "By order:

Freisler." Freisler was at that time State Secretary in the Reich Ministry of Justice. The letter contained this significant statement:

"I have emphasized the importance in war of this ordinance because it indirectly serves national defense."

The enclosed draft provided that Jews should not be entitled to make use of the right of appeal, revision, or complaint against decisions in criminal cases, and could not appeal to the courts for a decision against sentences inflicted by the police. It also provided that in cases where an appeal had already been filed it should be considered cancelled.

On 13 August 1942 the Reich Minister of Interior wrote to the Reich Minister of Justice, requesting that the draft be extended so as to restrict the right of Jews to appeal in administrative as well as criminal cases. On the same day the defendant Schlegelberger wrote to the Reich Minister for Popular Enlightenment and Propaganda concerning the addition to the draft as suggested by the Reich Minister of the Interior. We quote:

"I declare that I have no objections against an extension of my draft to matters of administrative law and to decisions by administrative authorities."

He then suggested an additional provision to the effect that Jews should be forbidden to testify on oath, but that they might be prosecuted as for perjury though no oath is to be taken.

On 8 March 1943 the Chief of the Security Police and the SD, Kaltenbrunner,* wrote to Minister of the Interior Frick urging immediate passage of the proposed ordinance. The following reasons were given:

"1. Previous evacuations of Jews have been restricted to Jews who were not married to non-Jews. In consequence, the numbers of Jews who have remained in the interior is quite considerable. As the ordinance would also include these Jews as well, the measures it plans are not objectless.

"2. The provision of article 7 of the ordinance according to which, at the death of a Jew, his fortune escheats in its entirety to the Reich, results in the accumulation of considerably less work for the State Police. At the present time the procedure used by the State Police in handling the confiscation of such Jewish inheritances must frequently be modified to suit each special case."

He adds that the provision for the transfer of Jews to the police is based on an agreement between Himmler and Thierack, who

* Ernst Kaltenbrunner, a defendant before the IMT, was sentenced to death. See Trial of the Major War Criminals, op. cit., volume I, page 365.

had by that time succeeded Schlegelberger as Reich Minister of Justice.

On 21 April 1943 a memorandum for the files of the Reich Chancellery reports a conference of State secretaries on the proposed ordinance at which the defendant Rothenberger was present. The conference came to the conclusion that certain modifications should be made. The final result of the prolonged discussion was the enactment of the 13th regulation under the Reich Citizenship Law of 1 July 1943, which was signed by Frick, Bormann, and Thierack. It will be recalled that that regulation, *supra*, provided that criminal actions committed by Jews should be punished by the police; that the property of a Jew should be confiscated after his death. These and other provisions were also made effective in the Protectorate of Bohemia and Moravia where German courts had jurisdiction.

With few exceptions Jews were wholly excluded from the administration of justice. In a speech before the NSDAP congress on 14 September 1934, Hans Frank stated:

> "It is unbearable to us to permit Jews to play any role whatsoever in the German administration of justice. * * * It will therefore be our firm aim to exclude Jews increasingly from the administration of the law as time goes on."

On another occasion Frank, as president of the Academy for German Law, directed: "For all future time it will be impossible that Jews will act in the name of German Law. * * *"

In an order reminiscent of the "burning of the books" in medieval days, Frank also directed that the works of Jewish authors should be removed from all public or study libraries whenever possible.

On 5 April 1933 the defendant Barnickel made an entry in his diary:

> "Today it is said in the newspaper that in Berlin there are about 3,500 attorneys and more than half of them are Jewish. Only 35 of them are to be admitted as lawyers. * * * To exclude these Jewish attorneys from one day to the next means terrible brutality."

The defense witness, Fritz Wallentin, stated that in general all non-Aryan judges were removed from the administration of penal justice very soon after 30 January 1933. The evacuation of Jews to the East for extermination was in full swing at least as early as November 1941, and continued through the war years thereafter. As an illustration of the nature of this program as carried out throughout the Reich, we cite the report of the Secret State Police Main Office, Nuernberg-Fuerth; Branch Office Wuerzburg. This

report refers to the deportation from a comparatively small area around the city of Wuerzburg and shows evacuation of Jews to the east in the following numbers: On 27 July 1941, 202 persons; on 24 March 1942, 208 persons; on 25 April 1942, 850 persons; on 10 September 1942 (to Theresienstadt) 177 persons; on 23 September 1942 (to Theresienstadt) 562 persons; on 17 June 1943 (to Theresienstadt) seven persons; on 17 June 1943, 57 Jews were evacuated to the East. The report continues: "With this last transport, all the Jews who had to be evacuated according to instructions issued have left Main-Franken." The report shows that the total number of 2,063 Jews were evacuated from the Main-Franken area alone. The furniture, clothing and laundry items left by the Jews were given to the finance offices of Main-Franken and turned into cash by them.

Even before transfers to the Gestapo had been substituted for judicial procedure the position of a Pole or a Jew who was tried by the courts was not a happy one. The right of self defense on the part of a Pole was specifically limited. Poles and Jews could not challenge a German judge for prejudice. Other limitations upon the right of appeal and the like are set forth, *supra* (law against Poles and Jews, 4 December 1941).

On 22 July 1942 Reich Minister Goebbels stated that "it was an untenable situation that still today a Jew could protest against the charge of the president of the police, who was an old Party member and a high SS Leader. The Jew should not be granted any legal remedy at all nor any right of protest."

The defendant Lautz testified that according to the provisions of decree which antedated the war and by reason of the general regulations of the law in every case it had to be pointed out in the indictment if the person was a Jew or of mixed race.

On 23 January 1943 the Oberlandesgericht president at Koenigsberg wrote to the Minister of Justice concerning defense of Poles before tribunals in Incorporated Eastern Territories. We quote:

> "The decree of 21 May 1942 * * * states that in accordance with the order on penal justice in Poland of 4 December 1941 attorneys are not (to) undertake the defense of Polish persons before tribunals in the Incorporated Eastern Territories. This decree has been received with satisfaction by all the judges and prosecutors in the whole of my district."

These directives by the authorities in the Reich under Hitler were not mere idle threats. The policies and laws were rigorously enforced. We quote from a sworn statement of former defendant Karl Engert as follows:

> "The handing over to the Gestapo of Jews, Poles, and gypsies was not under my supervision, but under that of Mr. Hecker,

who worked under me in my division. However, he was not responsible to me, but directly to the Minister Thierack."
Again he said:

"About 12,000 inmates of the correction houses were assigned for transfer to the Gestapo. * * * Out of the total 12,000 my division assigned 3,000 for transfer in 1942. How many Jews, Poles, and gypsies were assigned I do not know; that must be in the statistics."

Reich Minister Goebbels, in an address to the judges of the People's Court, on 22 July 1942, stated that "if still more than 40,000 Jews, whom we considered enemies of the State, could go freely about in Berlin, this was solely due to the lack of sufficient means of transportation. Otherwise the Jews would have been in the East long ago."

Between 9 and 11 November 1938, a pogrom was carried out against the Jews throughout the Reich, and upon direct orders from Berlin. Defense witness Peter Eiffe testified that he heard rumors of the proposed pogrom on the night of 8 November and called at the Ministry of Propaganda where he was told that "somebody has let the cat out of the bag again." During the 3-day period Jewish property was destroyed throughout the Reich and thousands of Jews were arrested.

In Berlin the destruction of Jewish property was particularly great. To cap the climax on 12 November 1938, Field Marshal Goering issued the following decree:*

"Article I.—All damage done due to the indignation of the people at the incitement of international Jewry against Nationalist Socialist Germany carried out on the 8, 9, and 10 November 1938, on Jewish enterprises and living quarters is to be removed by the Jewish owners immediately.

"Article II.—The costs of restoration are to be borne by the owner of the Jewish business concerned * * *.

"Section 2.—Insurance claims of Jews of German nationality will be confiscated in favor of the Reich."

For this purpose a fine of one billion marks was imposed upon the Jews. The witness Schulz, who was an attorney in Berlin, acted in behalf of Frau Liebermann, the widow of the internationally known artist, Max Liebermann. Frau Liebermann was at that time 80 years old and the share of the fine imposed upon her was 280,000 marks. Ultimately orders were issued for her deportation to the East. She, however, died, either from heart failure or poison, as she descended the steps to be carried away. Defense

* 1938 RGBl. I, p. 1581.

witness Schulz* also testified concerning other methods of Jewish persecution. He said:

"* * * When a Jew wanted to emigrate, I had much to do with it. He had to pay the Reich escape tax, that was so and so much percent of his property and then a large amount was taken away from him by assessing his property very high. After all of that was done and the day he went to the passport office in order to get his clearance, his passport, and get his visa then he was told that now he still had to go to the notary, Dr. Stege, and had to deposit a voluntary fee to promote the emigration of the Jews, and that is where he paid the balance, and then left with his personal satchel, with his little valise."

Speaking of the "asocial" persons, Dr. Thierack, on 5 January 1943, at a mass meeting of the NSDAP, stated (*NG–275, Pros. Ex. 25*):

"I have seen to it that these people shall no longer be employed for any sort of work that is not dangerous. The most dangerous tasks are just the thing that is for them. Now, today, when thousands of these people are carrying supplies in the far north or building roads, I cannot help it if some of them die, but at least they are of some use."

The Roman Catholic chaplain at Amberg prison stated under oath that a large proportion of the inmates of that prison were Poles who had been sentenced under the "Poles' Act." Many of them died from undernourishment. They were forced to eat potato peelings and hunt through rubbish heaps for eatable refuse. From this prison "asocial elements" were picked out and sent in batches to the Mauthausen concentration camp. All of the first batch was said to have perished. Among the prisoners were Jews who had been sentenced for race pollution.

The witness Hecker stated under oath that after Thierack's "doubtful decree" concerning the transfer of Jews, Poles, and gypsies, prisoners in protective custody, and asocial elements from the justice prisons to the RSHA in the autumn of 1942, the Jews as a whole were immediately handed over. The work was carried out by Department V of the Ministry of Justice. Lists were prepared monthly and sent to Minister Thierack through the chief of the department.

On 22 October 1942 a directive (*648–PS, Pros. Ex. 264*) under the letterhead of the Reich Minister of Justice was issued to various prosecuting officers in which it was stated that "by agreement with the Reich Leader SS, lawfully sentenced prisoners confined in penal institutions will be transferred to the custody

* Complete testimony of defense witness Hans Heinrich Schulz is recorded in the mimeographed transcript, 25 September 1947. (Tr. pp. 9530–9552.)

of the Reich Leader SS." Those designated for transfer to the SS included "Jews, men and women, detained under arrest, protective custody, or in the workhouse; * * * and Poles, residing in the former Polish state territory on 1 September 1939, men and women, sentenced to penal camps or subsequently turned over for penal execution, if sentence is above 3 years, * * *. With completion of the transfer to the police, the penal term is considered interrupted. Transfer to the police is to be reported to the penal authority and in cases of custody to the superior executive authority, with the information that the interruption of the penal term has been ordered by the Reich Ministry of Justice." The directive is signed "Dr. Crohne."

A secret directive dated Berlin, 5 November 1942, was issued to the heads of the SS and to the police services, in which it was stated (*L–316, Pros. Ex. 265*):

> "Re: Jurisdiction over Poles and eastern nationals.
>
> "I. The Reich Leader SS has come to an arrangement with the Reich Minister of Justice Thierack whereby the justice waives the execution of the usual penal procedure against Poles and eastern nationals. These persons of alien race are in future to be handed over to the police. Jews and gypsies are to be treated in the same way. This agreement has been approved by the Fuehrer.
>
> "II. This agreement is based on the following considerations: Poles and eastern nationals are alien and racially inferior people living in the German Reich territory."

The order continues:

> "Such considerations which may be right for adjudicating a punishable offense committed by a German are however wrong for adjudicating a punishable offense committed by a person of alien race. * * * As a result of this, the administration of penal law for persons of alien race must be transferred from the hands of the administrators of justice into the hands of the police."

On 24 September 1942 the defendant Joel prepared a secret report concerning the Reich Marshal's plans for action in the Occupied Eastern Territories. The report states that "the Reich Marshal is looking for daring fellows who will be employed in the East for special purposes and who will be able to carry out tasks of creating confusion behind the lines." The suggestion was that "poachers" and "fanatical members of smuggling gangs who take part in gun battles on the frontiers," should be employed for this purpose. A copy of the report was sent to State Secretary Rothenberger for his attention and was submitted in connection with a

proposed conference to be held on 9 October 1942. Minutes of a conference of 9 October 1942, signed by Dr. Crohne, incorporate the substance of Joel's report, and state that the poachers have already been turned over to the Reich Leader SS for special duties. The report recommends that the district attorneys be given the task of obtaining the convicts for this special service, and provides further (*662–PS, Pros. Ex. 263*):

"*Delivery of asocial convicts.*—Persons in penal institutions designated as asocial persons by judicial decision are to be turned over to the Reich Leader SS.

"1. *Persons in custody for reasons of security.*—Persons in custody for reasons of security who are in German penal institutions will be put at the disposal of the Reich Leader SS. The execution of sentence will be regarded as interrupted by the delivery. * * *

"*b.* Whether women are also to be delivered is still doubtful. * * * In this regard it will have to be a fundamental point from the beginning that in the case of female Poles, Jews, and gypsies no doubt about the delivery can exist.

"*c.* Foreigners are not affected. Poles, Russians, Ukrainians, Jews, and gypsies do not rank as foreigners. * * *.

"2. *Jews, gypsies, Russians, and Ukrainians* will be delivered to the Reich Leader SS without exception.

"3. *Poles.*—Ethnic Poles who are subject to the Polish criminal law regulations, or have been delivered to the Polish penal authorities, and who have more than 3 years' sentence to serve, will be delivered to the Reich Leader SS.

"Poles with smaller sentences will remain in the custody of the prison system. After serving their sentences they will be reported by name to the police just the same."

It will be observed that the decisions concerning special treatment for Poles and Jews which were reached at this conference of 9 October 1942 antedate by almost 9 months the enactment of the 13th regulation concerning the Reich Citizenship Law of 1 July 1943 which provided "that criminal actions committed by Jews shall be punished by the police."

On 1 April 1943 a letter from the Reich Ministry of Justice to the public prosecutors of the courts of appeal and others stated that the "Reich Security Office has directed by the decree of 11 March 1943 as follows:

"*a.* Jews, who in accordance with number VI of the guiding principles, are released from a penal institution, are to be taken by the State police (chief) office competent for the district in which the penal institution is located, for the rest of their lives

to the concentration camps Auschwitz or Lublin in accordance with the regulations for protective custody that have been issued. The same applies to Jews who in the future are released from a penal institution after serving a sentence of confinement.

"*b.* Poles, who in accordance with number VI of the guiding principles, are released from a penal institution, are to be taken by the State police (chief) office competent for the district in which the penal institution is located, for the duration of the war to a concentration camp in accordance with the regulations on protective custody that have been issued.

"The same applies in the future to Poles who after serving a term of imprisonment of more than 6 months are to be discharged by a penal institution."

It was stated that the ruling replaces previous orders. The instrument is stamped "Reich Ministry of Justice" and is signed by Dr. Eichler.

As a crowning example of fanatical imbecility, we cite the following document issued in April 1943 which was sent to the desk of the defendant Rothenberger for his attention and was initialed by him (*NG–1656, Pros. Ex. 535*):

"The Reich Minister of Justice
"Information for the Fuehrer
"1943 No.

"After the birth of her child a full-blooded Jewess sold her mother's milk to a pediatrician and concealed that she was a Jewess. With this milk babies of German blood were fed in a nursing home for children. The accused will be charged with deception. The buyers of the milk have suffered damage, for mother's milk from a Jewess cannot be regarded as food for German children. The impudent behavior of the accused is an insult as well. Relevant charges, however, have not been applied for, so that the parents, who are unaware of the true facts, need not subsequently be worried.

"I shall discuss with the Reich health leader the racial-hygienic aspect of the case.

"Berlin, April 1943".

The witness Lammers, former Chief of the Reich Chancellery, testified as follows:*

"Q. * * * Now, you answered Dr. Kubuschok that the subject of sterilization of half-Jews was an alternative to their being moved to the East and that it had been raised by half-Jews themselves in 1942 or prior thereto.

* Complete testimony of defense witness Hans Heinrich Lammers is recorded in the mimeographed transcript 22 July 1947, pages 5582–5620.

"A. Yes. I said so."

He testified further that the half-Jews were not subject to any compulsion. He was apparently of the opinion that a person was a free agent if he had a choice between sterilization and deportation to a concentration camp.

It will be recalled that the law of 4 December 1941 against Poles and Jews applied to the "Incorporated Eastern Territories." Those territories were seized in the course of criminal aggressive war, but aside from the fact it is clear, as we have indicated, *supra,* that the purported annexation was premature and invalid under the laws and customs of war. The so-called annexed territories in Poland were in reality nothing more than territory under belligerent occupation of the military forces of Germany. The extension to and application in these territories of the discriminatory law against Poles and Jews was in furtherance of the avowed purpose of racial persecution and extermination. In the passing and enforcement of that law the occupying power in our opinion violated the provisions of the Hague Convention from which we quote:

> "Until a more complete code of the laws of war has been issued, the high contracting parties deem it expedient to declare that, in cases not included in the regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."

Other relevant portions are as follows:

> "*Article 43.*—The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.
>
> "*Article 46.*—Family honor and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated." (*Hague Convention No. IV of 18 October 1907* 36 Stat. 2277; Treaty Series No. 539; Mallory Treaties, Vol. 2, page 2269.)

The prosecutions which were proposed by Lautz cannot be justified upon any honest claim of military necessity. As a lawyer of ability, he must have known that the proposed procedure was in violation of international law.

Although the authorities are not in accord as to the proper construction of article 23h of the regulations annexed to the

Hague Convention of 1907, we are of the opinion that the introduction and enforcement of the law against Poles and Jews in occupied Poland resulted in a violation of that provision which is as follows:

"It is forbidden to declare abolished, suspended, or inadmissible in a court of law the right and actions of the nationals of the hostile party." *

The evidence discloses that the transfer of persons to concentration camps was done even before the war and on direct orders of Hitler. Dr. Lammers, Chief of the Reich Chancellery, on 8 August 1939, notified the Reich Minister of Justice that "the Fuehrer has given an order that all dispensable persons in security detention are to be put at the disposal of the Reich Leader SS immediately." The same procedure was employed as to persons who had never been convicted.

On 24 January 1939, a conference was held at which reports were received from eight different court districts. The subject was "Protective Custody after Serving Term of Imprisonment, after Acquittal, after Release from Imprisonment on Remand." Among the cases reported were those of defendants who were taken into custody by the police in the court room immediately after their acquittal. Others were taken by the police in cases where there had been a refusal to issue a warrant of arrest. The report on the Hamburg situation by the defendant Rothenberger states that the number of persons taken into protective custody has increased. Rothenberger reports that in six cases Jewish women had been taken into protective custody because of sexual intercourse with Aryans. He quotes the State Police file as follows:

"1. Protective custody, 'to make the punishment finally effective' * * *.

"2. Protective custody, 'to make the served sentences still more effective' * * *.

"3. Protective custody, 'because of the big number of previous convictions'.

"4. Protective custody 'to prevent prejudicing the course of justice through the interference of lawyers as defense counsel'."

The report on the conference ends as follows:

"The Minister concludes the discussion by indicating that it is to be the task of the chief presidents to see that arrests in the court room by the State Police are avoided, and recommends for the rest to maintain the connection with the State Police."

The report is signed by the defendant Klemm.

* Hyde, op. cit., volume III (2d rev. ed.), page 1714.

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Former defendant Engert as vice president of the People's Court, and Thierack, the president of the People's Court, protested in July and August 1940 against the trial of minor cases in the People's Court as not being compatible with the dignity of the tribunal and suggested that the defendants in such cases should be transferred to a concentration camp. As Thierack put it—

> "However right it is to exterminate harshly and uproot all the seeds of insurrection, as for example we see them in Bohemia and Moravia, it is wrong for every follower, even the smallest, to be given the honor of appearing for trial and being judged for high treason before a People's Court or, failing that, before an appellate court. In order to deal with these small cases and even with the smallest, the culprits should surely be shown that German sovereignty will not put up with their behavior and that it will take action accordingly. But that can also be done in a different way and I think in a more advantageous one, than through the tedious and also very expensive and ponderous channels of court procedure. I have therefore no objection whatsoever, if all the small hangers-on who are somehow connected with the high treason plans which have been woven by others are brought to their senses by being transferred to a concentration camp for some time."

As early as 29 January 1941 the senior public prosecutor at Hamm wrote to the Reich Minister of Justice, for the attention of State Secretary Schlegelberger (*NG–685, Pros. Ex. 259*):

> "Upon inquiry, the Reich Trustee for Labor for the economic territory of Westphalia-Lower Rhine has informed me that 'in accordance with an agreement between the Reich Minister for Labor and the Reich Leader SS as Chief of the German Police, breach of work contracts by Poles are to be punished by the Secret State Police with protective custody or concentration camps. The meaning of this step'—so writes this Reich trustee —'is that in the case of Poles the strictest measures are to be taken at once * * *'. For this reason we made it a point in my office to transfer the cases involving breaches of work contracts by Polish civilian workers, to the Gestapo (Secret State Police) for further action."

The same letter informs the defendant Schlegelberger of uncertainty which has arisen in the treatment of Polish civilians because in some cases the courts would sentence to 2 or 3 years imprisonment while the State Police may pronounce the death sentence for the same crime.

While the part played by the Ministry of Justice in the extermi-

nation of Poles and Jews was small compared to the mass extermination of millions by the SS and Gestapo in concentration camps, nevertheless the courts contributed greatly to the "final solution" of the problem. From a secret report from the office of the Reich Minister of Justice to the judges and prosecutors, including the defendant Lautz, it appears that 189 persons were sentenced under the law for the protection of German blood and honor in 1941, and 109 in 1942. In the year 1942, 61,836 persons were convicted under the law against Poles and Jews. This figure includes persons convicted in the Incorporated Eastern Territories, and also convictions for crimes committed in "other districts of the German Reich by Jews and Poles who on 1 September 1939 had their residence or permanent place of abode in territory of the former Polish state." These figures, of course, do not include any cases in which Jews were convicted of other crimes in which the law of 4 December 1941 was not involved.

The defendants contend that they were unaware of the atrocities committed by the Gestapo and in concentration camps. This contention is subject to serious question. Dr. Behl testified that he considered it impossible that anyone, particularly in Berlin, should have been ignorant of the brutalities of the SS and the Gestapo. He said: "In Berlin it would have been hardly possible for anybody not to know about it, and certainly not for anybody who was a lawyer and who dealt with the administration of justice." He testified specifically that he could not imagine that any person in the Ministry of Justice, or in the Party Chancellery, or as a practicing attorney or a judge of a Special (or) People's Court could be in ignorance of the facts of common knowledge concerning the treatment of prisoners in concentration camps. It has been repeatedly urged by and in behalf of various defendants that they remained in the Ministry of Justice because they feared that if they should retire, control of the matters pertaining to the Ministry of Justice would be transferred to Himmler and the Gestapo. In short, they claim that they were withstanding the evil encroachments of Himmler upon the justice administration, and yet we are asked to believe that they were ignorant of the character of the forces which they say they were opposing. We concur in the finding of the first Tribunal in the case of United States et al. *vs.* Goering, et al., concerning the use of concentration camps. We quote:

> "Their original purpose was to imprison without trial all those persons who were opposed to the government, or who were in any way obnoxious to German authority. With the aid of a secret police force, this practice was widely extended, and in

course of time concentration camps became places of organized and systematic murder where millions of people were destroyed.

* * * * * * *

"A certain number of the concentration camps were equipped with gas chambers for the wholesale destruction of the inmates, and with furnaces for the burning of the bodies. Some of them were in fact used for the extermination of Jews as part of the 'final solution' of the Jewish problem.

* * * * * * *

"In Poland and the Soviet Union these crimes were part of a plan to get rid of whole native populations by expulsion and annihilation, in order that their territory could be used for colonization by Germans. Hitler had written in 'Mein Kampf' on these lines, and the plan was clearly stated by Himmler in July 1942, when he wrote:

" 'It is not our task to Germanize the East in the old sense, that is to teach the people there the German language and the German law, but to see to it that only people of purely Germanic blood live in the East'." *

A large proportion of all of the Jews in Germany were transported to the east. Millions of persons disappeared from Germany and the occupied territory without a trace. They were herded into concentration camps within and without Germany. Thousands of soldiers and members of the Gestapo and SS must have been instrumental in the processes of deportation, torture, and extermination. The mere task of disposal of mountainous piles of corpses (evidence of which we have seen) became a serious problem and the subject of disagreement between the various organizations involved. The thousands of Germans who took part in the atrocities must have returned from time to time to their homes in the Reich. The atrocities were of a magnitude unprecedented in the history of the world. Are we to believe that no whisper reached the ears of the public or of those officials who were most concerned? Did the defendants think that the nation-wide pogrom of November 1938 officially directed from Berlin and Hitler's announcement to the Reichstag threatening the obliteration of the Jewish race in Europe were unrelated? At least they cannot plead ignorance concerning the decrees which were published in their official organ, "The Reichsgesetzblatt". Therefore, they knew that Jews were to be punished by the police in Germany and in Bohemia and Moravia. They knew that the property of Jews was confiscated

* Trial of the Major War Criminals, op. cit., volume I, pp. 234, 235, and 237.

on death of the owner. They knew that the law against Poles and Jews had been extended to occupied territories, and they knew that the Chief of the Security Police was the official authorized to determine whether or not Jewish property was subject to confiscation. They could hardly be ignorant of the fact that the infamous law against Poles and Jews of 4 December 1941 directed the Reich Minister of Justice himself, together with the Minister of the Interior, to issue legal and administrative regulations for "implementation of the decree". They read *The Stuermer*. They listened to the radio. They received and sent directives. They heard and delivered lectures. This Tribunal is not so gullible as to believe these defendants so stupid that they did not know what was going on. One man can keep a secret, two men may, but thousands, never.

The evidence conclusively establishes the adoption and application of systematic government-organized and approved procedures amounting to atrocities and offenses of the kind made punishable by C. C. Law 10 and committed against "populations" and amounting to persecution on racial grounds. These procedures when carried out in occupied territory constituted war crimes and crimes against humanity. When enforced in the Alt Reich against German nationals they constituted crimes against humanity.

The pattern and plan of racial persecution has been made clear. General knowledge of the broad outlines thereof in all its immensity has been brought home to the defendants. The remaining question is whether or not the evidence proves beyond a reasonable doubt in the case of the individual defendants that they each consciously participated in the plan or took a consenting part therein.

THE DEFENDANT SCHLEGELBERGER

The defendant Franz Schlegelberger was born on 23 October 1875 in Koenigsberg. He received the degree of doctor of law at the University of Leipzig in 1899 and passed the higher state law examination in 1901. He is the author of several law books. His first employment was as an assistant judge at the local court in Koenigsberg. In 1904 he became judge at the district court at Lyck. In 1908 he was appointed judge of the local court in Berlin and in the fall of the same year was appointed as an assistant judge of the Berlin Court of Appeals. He was then appointed councillor of the Berlin Court of Appeals in 1914, where he worked until 1918. During the First World War, on 1 April 1918 he became an assistant to the Reich Board of Justice. On 1 October 1918 he was appointed Privy Government Councillor and department chief. In 1927 he was appointed ministerial director in the Reich

Ministry of Justice. On 10 October 1931 he was appointed Secretary of State in the Reich Ministry of Justice under Minister of Justice Guertner, which position he held until Guertner's death. Upon Guertner's death on 29 January 1941 Schlegelberger was put in charge of the Reich Ministry of Justice as administrative Secretary of State. When Thierack became the new Minister of Justice on 20 August 1942, Schlegelberger resigned from the Ministry.

In 1938 Hitler ordered Schlegelberger to join the NSDAP. Schlegelberger testified that he made no use of the Party, that he never attended a Party meeting, that none of his family belonged to the Party, and that Party attitudes often rendered his position difficult. However, upon his retirement as Acting Minister of Justice on 20 August 1942, Schlegelberger received a letter of appreciation from Hitler together with a gift of 100,000 RM.

Later in 1944 Hitler gave Schlegelberger the special privilege to use the 100,000 RM to purchase a farm, which under the rule then prevailing could have been purchased only by an expert agriculturist. Schlegelberger states that the 100,000 RM were on deposit in a Berlin German bank to his account when the collapse came. Thus, it is shown that Hitler and Schlegelberger were not too objectionable to each other. These transactions also show that Hitler was at least attempting to reward Schlegelberger for good and faithful service rendered in the performance of some of which Schlegelberger committed both war crimes and crimes against humanity as charged in the indictment.

We have already adverted to his speech at the University of Rostock on 10 March 1936, on the subject, "A Nation Beholds Its Rightful Law." In this speech Schlegelberger declared:

> "In the sphere of criminal law the road to a creation of justice in harmony with the moral concepts of the new Reich has been opened up by a new wording of section 2 of the criminal code, whereby a person is also (to) be punished even if his deed is not punishable according to the law, but if he deserves punishment in accordance with the basic concepts of criminal law and the sound instincts of the people. This new definition became necessary because of the rigidity of the norm in force hitherto."

As amended, section 2 remained in effect until repealed by Law No. 11 of the Allied Control Council. The term "the sound people's sentiment" as used in amended section 2 has been the subject of much discussion and difference of view as to both its proper translation and interpretation. We regard the statute as furnishing no objective standards "by which the people's sound sentiment may be measured". In application and in fact this expression became the "healthy instincts" of Hitler and his coconspirators.

What has been said with regard to the amendment to section 2 of the criminal code is equally true of the amendment of section 170a of the code by the decree of Hitler of 28 June 1935, which is also signed by Minister Guertner and which provides:

> "If an act deserves punishment according to the common sense of the people but is not declared punishable in the code, the prosecution must investigate whether the underlying principle of a penal law can be applied to the act and whether justice can be helped to triumph by the proper application of this penal law." *

This new conception of criminal law was a definite encroachment upon the rights of the individual citizen because it subjected him to the arbitrary opinion of the judge as to what constituted an offense. It destroyed the feeling of legal security and created an atmosphere of terrorism. This principle of treating crimes by analogy provided an expedient instrumentality for the enforcement of Nazi principles in the occupied countries. German criminal law was therefore introduced in the incorporated areas and also in the nonincorporated territories, and German criminal law was thereafter applied by German courts in the trial of inhabitants of occupied countries though the inhabitants of those countries could have no possible conception of the acts which would constitute criminal offenses.

In the earlier portions of this opinion we have repeatedly referred to the actions of the defendant Schlegelberger. Repetition would serve no good purpose. By way of summary we may say that Schlegelberger supported the pretension of Hitler in his assumption of power to deal with life and death in disregard of even the pretense of judicial process. By his exhortations and directives, Schlegelberger contributed to the destruction of judicial independence. It was his signature on the decree of 7 February 1942 which imposed upon the Ministry of Justice and the courts the burden of the prosecution, trial, and disposal of the victims of Hitler's Night and Fog. For this he must be charged with primary responsibility.

He was guilty of instituting and supporting procedures for the wholesale persecution of Jews and Poles. Concerning Jews, his ideas were less brutal than those of his associates, but they can scarcely be called humane. When the "final solution of the Jewish question" was under discussion, the question arose as to the disposition of half-Jews. The deportation of full Jews to the East was then in full swing throughout Germany. Schlegelberger was unwilling to extend the system to half-Jews. He therefore pro-

* 1935 RGBl. I, page 844.

posed to Reich Minister Lammers, by secret letter on 5 April 1942 (*4055–PS, Pros. Ex. 401*) :

"The measures for the final solution of the Jewish question should extend only to full Jews and descendants of mixed marriages of the first degree, but should not apply to descendants of mixed marriages of the second degree. [First degree presumably those with two non-Aryan grandparents, and second degree with only one.]

"With regard to the treatment of Jewish descendants of mixed marriages of the first degree, I agree with the conception of the Reich Minister of the Interior which he expressed in his letter of 16 February 1942, to the effect that the prevention of propagation of these descendants of mixed marriages is to be preferred to their being thrown in with the Jews and evacuated. It follows therefrom that the evacuation of those half-Jews who are no more capable of propagation is obviated from the beginning. There is no national interest in dissolving the marriages between such half-Jews and a full-blooded German.

"Those half-Jews who are capable of propagation should be given the choice to submit to sterilization or to be evacuated in the same manner as Jews."

Schlegelberger knew of the pending procedures for the evacuation of Jews and acquiesced in them. As to half-Jews his only suggestion was that they be given the free choice of either one of the impaling horns of a dilemma. On 17 April 1941 Schlegelberger wrote to Lammers as follows (*NG–144, Pros. Ex. 199*) :

"On being informed of the Fuehrer's intention to discriminate in the sphere of penal law between the Poles (and probably the Jews as well), and the Germans, I prepared, after preliminary discussions with the presidents of the courts of appeal and the attorneys general of the annexed eastern territories, the attached draft concerning the administration of the penal laws against Poles and Jews in the annexed eastern territories and in the territory of the former Free City of Danzig."

The draft of a proposed ordinance "concerning the administration of justice regarding Poles and Jews in the Incorporated Eastern Territories" was attached to his letter and is in evidence. A comparison of its phraseology with the phraseology contained in the notorious law against Poles and Jews of 4 December 1941 discloses beyond question that Schlegelberger's draft constituted the basis on which, with certain modifications and changes, the law against Poles and Jews was enacted. In this respect he was not only guilty of participation in the racial persecution of Poles

and Jews; he was also guilty of violation of the laws and customs of war by establishing that legislation in the occupied territories of the East. The extension of this type of law into occupied territories was in direct violation of the limitations imposed by the Hague Convention, which we have previously cited.

It is of interest to note that on 31 January 1942 Schlegelberger issued a decree providing that the provisions of the law against Poles and Jews "will be equally applicable with the consent of the public prosecutor to offenses committed before the decree came into force". We doubt if the defendant would contend that the extension of this discriminatory and retroactive law into occupied territory was based on military necessity.

Schlegelberger divorced his inclinations from his conduct. He disapproved "of the revision of sentences" by the police, yet he personally ordered the murder of the Jew Luftgas on the request of Hitler, and assured the Fuehrer that he would, himself, take action if the Fuehrer would inform him of other sentences which were disapproved.

Schlegelberger's attitude toward atrocities committed by the police must be inferred from his conduct. A milking-hand, Bloedling, was sentenced to death in October 1940, and during the trial he insisted his purported confession had been obtained as a result of beatings imposed upon him by the police officer Klinzmann. A courageous judge tried Klinzmann and convicted him of brutality and sentenced him to a few months imprisonment. Himmler protested against the sentence of Klinzmann and stated that he was going "to take the action of the Hauptwachtmeister of the police Klinzmann as an occasion to express gratitude for his farsighted conduct which was only beneficial to the community." He said further:

> "I must reward his action because otherwise the joy of serving in the police would be destroyed by such verdicts. But finally K. has to be rehabilitated in public because his being sentenced by a court is known in public."

On 10 December 1941 Schlegelberger wrote to the Chief of the Reich Chancellery stating that he was unable to understand the sentence passed against Klinzmann. We quote:

> "No sooner had the verdict passed on Klinzmann become known here, orders were for this reason given to the effect that the sentence in case of its validation should not be carried out for the time being. Instead, reports concerning the granting of a pardon should be made as soon as possible. In the meantime, however, the sentence passed on Klinzmann became valid, by decision of the Reich [Supreme] Court of 24 November 1941 which abandoned the procedure of revision as apparently un-

founded. Taking into regard also the opinion you expressed on the sentence, Sir, I now ordered the remission of the sentence and of the costs of proceedings by way of pardon as well as the striking out of the penalty note in the criminal records."

On 24 December 1941 Schlegelberger wrote to Lammers that he had quashed the proceedings. In February 1942 Himmler wrote expressing appreciation of the efforts in quashing the proceedings against Klinzmann and stated that he had since promoted him to Meister of the municipal police.

Schlegelberger presents an interesting defense, which is also claimed in some measure by most of the defendants. He asserts that the administration of justice was under persistent assault by Himmler and other advocates of the police state. This is true. He contends that if the functions of the administration of justice were usurped by the lawless forces under Hitler and Himmler, the last state of the nation would be worse than the first. He feared that if he were to resign, a worse man would take his place. As the event proved, there is much truth in this also. Under Thierack the police did usurp the functions of the administration of justice and murdered untold thousands of Jews and political prisoners. Upon analysis this plausible claim of the defense squares neither with the truth, logic, or the circumstances.

The evidence conclusively shows that in order to maintain the Ministry of Justice in the good graces of Hitler and to prevent its utter defeat by Himmler's police, Schlegelberger and the other defendants who joined in this claim of justification took over the dirty work which the leaders of the State demanded, and employed the Ministry of Justice as a means for exterminating the Jewish and Polish populations, terrorizing the inhabitants of occupied countries, and wiping out political opposition at home. That their program of racial extermination under the guise of law failed to attain the proportions which were reached by the pogroms, deportations, and mass murders by the police is cold comfort to the survivors of the "judicial" process and constitutes a poor excuse before this Tribunal. The prostitution of a judicial system for the accomplishment of criminal ends involves an element of evil to the State which is not found in frank atrocities which do not sully judicial robes.

Schlegelberger resigned. The cruelties of the system which he had helped to develop were too much for him, but he resigned too late. The damage was done. If the judiciary could slay their thousands, why couldn't the police slay their tens of thousands? The consequences which Schlegelberger feared were realized. The police, aided by Thierack, prevailed. Schlegelberger had failed. His hesitant injustices no longer satisfied the urgent demands of

the hour. He retired under fire. In spite of all that he had done he still bore an unmerited reputation as the last of the German jurists and so Hitler gave him his blessing and 100,000 RM as a parting gift. We are under no misapprehension. Schlegelberger is a tragic character. He loved the life of an intellect, the work of the scholar. We believe that he loathed the evil that he did, but he sold that intellect and that scholarship to Hitler for a mess of political pottage and for the vain hope of personal security. He is guilty under counts two and three of the indictment.

THE DEFENDANT KLEMM

Herbert Klemm, formerly State Secretary of the Reich Ministry of Justice, was born in Leipzig on 15 May 1903. After normal schooling, he passed his first legal state examination in 1925, his second legal state examination in 1929. From 1929 to 1933, he was court assessor of the prosecution authority of Dresden. From March 1933 to March 1935 he was the personal Referent and adjutant of Thierack, Minister of Justice, Saxony. In 1935, at the time of the centralization of the administration of justice, he was transferred to the Reich Ministry of Justice where he remained until he was mobilized for war service on 23 June 1940. On 20 April 1939 he was promoted to the office of Ministerialrat. In July of 1940 he was assigned to the Reich Commissioner for the Occupied Dutch Territories, upon the request of the Plenipotentiary for Occupied Dutch Territories. On 17 March 1941 he was transferred to the staff of the deputy of the Fuehrer, which later became the Party Chancellery, in Munich. He remained with the Party Chancellery until 4 January 1944, when he became state secretary of the Reich Ministry of Justice under Thierack. He remained in this capacity until the surrender.

Klemm's Party connections were as follows: he applied for membership in the NSDAP on 4 November 1930; his membership card, 405576, was received 1 January 1931. On 30 June 1933 he joined the SA; the highest rank which he received in the SA was that of Oberfuehrer. When in Saxony he was the legal advisor of the SA for Saxony and liaison officer between the SA for Saxony and the Minister of Justice for Saxony. When he was transferred to Berlin, he was the liaison officer between the Reich Ministry of Justice and the SA Chief of Staff for Germany and the legal advisor to the Chief of Staff of the SA for Germany.

He was a member of the National Socialist Jurists' League from 1933. In September of 1944 he was appointed deputy chief of the National Socialist Jurists' League by Thierack, who was at that time chief.

He received the Bronze Party Service decoration in 1941 and the Golden Party decoration, the latter being conferred by Bormann in 1943.

During the time in which the defendant was in Saxony, he was a member of the disciplinary court of the SA group which dealt with the purge of the SA in connection with the Roehm Putsch.

A brief outline of the official activities of the defendant Klemm is as follows: after transfer to Berlin in 1935, the defendant dealt with acts against the State and Party and, later, the malicious acts law. In this field prosecution could be ordered only by the Ministry of Justice with the permission of the office of the deputy of the Fuehrer, which later became the Party Chancellery.

It was during this period that the following circular, dated Berlin, 18 October 1937, and initialed by Klemm, was issued (*NG–310, Pros. Ex. 33*):

"1. Criminal procedures concerning more severe interrogations by the Stapo will be dealt with centrally by Chief Prosecutor Klemm. They are to be sent to the competent co-worker Prosecutor Winkler.

"2. As far as reports concerning executions when escaping from concentration camps, etc., suicides in K.Z. arrive, they shall continue to be dealt with by the specialist competent for the respective subject. The general consultant for political criminal matters, however, is to be informed of the reports. They are to be submitted to him once."

The practice of more severe interrogations, according to the testimony of Lautz, caused much worry to those concerned with the administration of justice. By the term "more severe interrogations" is meant "third degree" methods which Hitler authorized the police to use in cases considered important for the safety of the State.

From July 1940 to March 1941, while Klemm was in Holland, he had charge of both civil and penal law. The penal section in Holland was for German citizens not in the army and Dutch who infringed on German interests. He was also liaison officer between the commissioner general for the administration of justice and secretary of the Dutch Ministry of Justice at The Hague.

During this period there were published in the official gazette for the occupied Dutch territories, in the year 1944,* decrees of the Reich Commissioner of Occupied Dutch Territories, Seyss-Inquart, pertaining to the registry of Jewish property, the confiscation of same under certain circumstances, and for the transfer

* This date is evidently a recording error, in as much as the decrees mentioned were published in 1940 and 1941.

of Jewish property to an official in the nature of an administrator. During this time a letter was written by Tenkink, Secretary General of the Dutch Ministry of Justice, to the Reich Commissioner of Holland, which shows the defendant's signature, informing the commissioner of excesses committed against Jews in Holland.

During this period letters dated 24 and 30 September 1940, marked "Secret," and signed by the defendant, to the department for legislation, Lange Vijverberg, with opinions and recommendations as to the registration and confiscation of Jewish property in Holland, were transmitted.

A letter dated 24 September 1940 contains the following statement:

> "In my view it must be achieved with other means to eliminate Jewish influence from such corporations. In the Reich, too, it needed months of careful work to gradually extract Jewish capital without disturbing the economy or to eliminate Jewish influence altogether."

The defendant Klemm was in the office of the deputy of the Fuehrer and Party Chancellery from March 1941 to January 1944. The Party Chancellery had to approve the drafts of decrees in connection with national laws and ordinances and also was charged with the responsibility for the approval of high official appointments. The Party Chancellery was formed from what had originally been the office of the deputy of the Fuehrer under Hess. It was the instrument of the Party in matters of State and soon became virtually the instrument of Bormann.

In the Party Chancellery Klemm was Chief of Group III–C. This group had the following functions, as stated by the defendant:

> "First, it had to deal with laws and drafts and decrees of the Reich Ministry of Justice, unless for reasons of their subject they were dealt with by another group, because that group appeared to be competent. Secondly, penal matters based on the law against malicious acts, as far as on the basis of legal provisions the approval of the Chief of the Party Chancellery was required for the prosecution. Thirdly, complaints from Party offices or individuals against decision by the courts. Fourth, complaints from the administration of justice against interference by Party offices into pending trials. Fifth, to observe especially civil and penal cases which concerned the Party. Sixth, matters of legal reform, and seventh, expert opinions in the field of the Party law."

Among his activities, and in conference with officials from the

Ministry of Justice, he made suggestions for strengthening the powers of the police.

At another conference with officials from the Ministry of Justice concerning the political evaluations of persons in connection with legal procedure, he represented the standpoint of the Party that Party evaluations should be accepted by the courts.

During the time that Klemm was Chief of Group III-C, the act providing for the retroactive application of law concerning treason was enacted and applied to the annexed eastern territories. It was claimed by the defendant that this was based upon a decision of Bormann.

At this time legislation depriving the Jews of legal rights was also contemplated; drafts of the proposals made were dealt with, and the letter of 9 September 1942, prepared in Department III, was dispatched.

Also as part of the activities of Group III–C under Klemm, the proposal of the defendant Schlegelberger regarding confirmation of sentences of penal cases by the president of the district court of appeals was disposed of and the defendant claims he influenced Bormann to oppose this recommendation of the Ministry of Justice.

During this period a circular entitled, "The New Organization of Justice," signed by Bormann, and which the defendant Klemm claims was intended to free the Ministry of Justice from Party criticism, states as follows:

> "Hereby is further required that you report to me all complaints which you have to bring in matters of justice, so that I can clear up the situation immediately by confidential negotiations with the Reich Minister of Justice. Should it, after a discussion with the Reich Minister of Justice, seem absolutely necessary that a problem is brought to the Fuehrer, then this will be taken care of by Reich Minister Dr. Lammers and myself."

During this period Klemm wrote the Minister of Justice as follows:

> "Your letter of 5 August 1943 is agreed to. No objections are raised to applying the German Criminal Code for Juveniles to foreign juveniles, unless they are Jewish, Polish, or gypsies. Regarding juvenile gypsies and those of mixed gypsy descent, you are asked to see to it that, simultaneously with the coming into force of the new law concerning Reich juveniles, a special regulation will come into effect which will prevent the German Criminal Code for juveniles from applying to gypsies and those of gypsy descent merely because a definite regulation is lacking."

The defendant states that during this period Bormann called him on the telephone and inquired whether he knew Rothenberger and inquired about Rothenberger. Also he later submitted to the defendant Klemm an inquiry as to the background and qualifications of persons presumed to have been possible appointees as Reich Minister of Justice. These included Thierack, and Klemm states that his report to Bormann was favorable to Thierack. These inquiries were made of the defendant in spite of the fact that, according to his testimony, he had to deal only with matters pertaining to the administration of justice, and these were definitely personnel matters under another department of the Party Chancellery.

During this period he was the liaison officer between Thierack and the Party Chancellery. As to this relationship, Klemm states:

> "Thierack asked me in all matters concerning the justice group of the Party Chancellery to come to him, that is to him personally, immediately and not to discuss them with the various Referents at the Ministry * * * and as I had worked in both fields, the best thing for him to get acquainted with the matter would be if I reported to him in person."

With reference to Klemm's duties as Under Secretary of State, the following paragraph of a report of the conference of the department chiefs, held 6 January 1944, outlines in part his duties in the Ministry as follows (*NG–195, Pros. Ex. 45*):

> "The Minister announced that from now on the Departments III, IV, and V, too, would be placed under the control of the State Secretary and hereby recalled the contrary regulation in office routine, which was published on 27 August 1942, but added that all death sentences must continue to be submitted to him. He would request the State Secretary to be present when they were submitted. Furthermore, all political and legal matters of particular importance must be reported to him."

Klemm maintains that his supervision of Departments III, IV, and V was merely on paper. However, the testimony of Hecker does not bear this out as regards Department V, nor does the testimony of Eggensperger.

During this period the decree against Poles and Jews was still being enforced under the jurisdiction of the Ministry of Justice insofar as any was left, outside the sphere of the Gestapo and the concentration camps.

During this period the Ministry of Justice still dealt with Nacht und Nebel cases. The defendant Klemm denies, in general, knowledge of NN procedure. Fourteen exhibits have been introduced in this case showing transactions concerning NN matters, subse-

quent to the time Klemm took over the office of State Secretary. The defendant admits knowledge that Nacht und Nebel prisoners were transferred from Essen to Silesia. He admits refusal of spiritual care for NN prisoners by foreign clergymen. He admits knowledge of a draft of a letter from Thierack to Bormann to the effect that NN women who were not to be executed should be so advised. He admits denying clemency to eight NN prisoners when he was acting as deputy for Thierack. In the remaining 123 cases, clemency was denied by Thierack when Klemm was presumably sitting in conference with him.

Among the fourteen documents enumerated above is a report from the defendant von Ammon, initialed by Klemm, relative to a trip concerning NN matters. This report states (*NG–231, Pros. Ex. 332*):

> "The Military Commander in Chief, France, is grateful for the evidence which the military courts in occupied French territory receive as a result of the activity of the general legal authorities concerned with the prosecution and trial of NN cases in occupied French territory."

Klemm explains this document by stating that he merely approved the trip. With the above explanations, Klemm's counsel stated:

> "These are the only documents which the prosecution has submitted against you as far as NN cases are concerned."

In view of the fact that Klemm was State Secretary when these matters were disposed of and, nominally at least, charged with supervision of Department IV where they were handled, this conclusion is not one which this Tribunal accepts.

With regard to clemency during the time the defendant was State Secretary, Klemm is shown to have dealt with clemency matters as the advisor of Thierack when he was present and as his deputy in his absence. He states that personally he dealt only with clear cases and, further, that in clear cases clemency had been disapproved by seven agencies before it became a clear case. He states that clear cases were legally incontestable.

His testimony that in clear cases seven agencies disapproved clemency during the period when he was State Secretary, does not conform to the testimony of the defendant Lautz or with Exhibit 279 which Lautz cites. Lautz' testimony on this point is as follows:

> "The examination of these clemency pleas for their correctness was no longer possible for the prosecutions in the majority of cases. The prosecutors now had to restrict themselves to adding the pleas to their reports without changing them. The time limit laid down in the decree was, as a rule, not adhered to be-

cause the offices at the People's Court and the Reich prosecution were so overburdened that it was impossible for them to submit the files within the time limit set. Owing to that, occasionally there was sufficient time to make further investigations in the matter of the clemency plea. However, the opinion of the court, the prison, and all other agencies was no longer heard. They had been of importance before." *(Tr. p. 5947.)*

Moreover, what may constitute a legally incontestable case is subject to considerable speculation. Presumably a case based upon a confession would be legally incontestable. Certainly it can hardly be assumed that the defendant Klemm was unaware of the practice of the Gestapo with regard to obtaining confessions. He had dealt with this matter during his early period with the department of justice. It is hardly credible that he believed that the police methods which at an earlier time were subject to some scrutiny by the Ministry of Justice, had become less harsh because the Gestapo, in October of 1940, was placed beyond the jurisdiction of law. He must have been aware that a prolific source of clear cases based on confessions and, therefore, legally incontestable, came to him from the obscurity of the torture chamber.

During the time Klemm was State Secretary, the plan of the leaders of the Nazi state to inspire the lynching of Allied fliers by the people of Germany was inaugurated, and during this period the matter of execution of approximately 800 political prisoners, prior to evacuation of the penitentiary at Sonnenburg, took place. These matters will be dealt with more fully hereafter.

As heretofore pointed out in this opinion, the essential elements to prove a defendant guilty under the indictment in this case are that a defendant had knowledge of an offense charged in the indictment and established by the evidence, and that he was connected with the commission of that offense.

As to the matter of knowledge of the defendant Klemm, aside from the sources of knowledge heretofore pointed out in this opinion in regard to all of the defendants herein, certain other facts are significant. The defendant's sources of information were of a wide scope. He had been the liaison officer between the administration of justice and the SA in Saxony and the legal advisor of the chief of the SA for Saxony. On transfer to Berlin, he acted in the same capacity with the SA main office for the Third Reich and was the liaison officer between the Ministry of Justice and the SA Main office. In Holland he was head of the department of legal matters under Seyss-Inquart. He served with the Office of the Deputy of the Fuehrer and Party Chancellery from March 1941 to January 1944. There he was in charge of Group III–C. He was the friend of Klopfer in charge of Group III and, from the

evidence, a trusted lieutenant of Bormann. Finally, he was State Secretary under Thierack, whom he had known since he was his adjutant and personal Referent in Saxony. In Berlin he lived with Thierack for the period in which he was State Secretary.

Klemm's career under the Third Reich moved smoothly from comparative insignificance to the position of State Secretary in the Ministry of Justice. His ascent was marked by no serious differences as to Party policies. He was close to both Bormann and Thierack and ascended by their favor. Under the circumstances it is not credible that he was ignorant of the policies and methods of these ruthless figures.

The defendant lays great stress on an order of Hitler as to secrecy and states that in connection with this order he adhered strictly to it; that he did not attempt to hear anything outside of his official duties. Such orders as to secrecy were not confined to Germany during the war; they were standard procedure in other countries and by no means excluded knowledge of secret matters derived from normal human contacts, particularly friends and acquaintances in the higher levels of state affairs. Further, the confidential position held by the defendant gave him a wide scope as to secret matters within the sphere of his official duties. As State Secretary of the Ministry of Justice and deputy of the minister in his absence, the defendant's official duties required knowledge of the higher spheres of State policy.

More specifically, Klemm knew of abuses in concentration camps. He knew of the practice of severe interrogations. He knew of the persecution and oppression of the Jews and Poles and gypsies. He must be assumed to have known, from the evidence, the general basis of Nacht und Nebel procedure under the Department of Justice. Therefore, it becomes important to consider his connection with the carrying out of these crimes alleged in the indictment and established by the evidence in this case.

It is clear from the evidence, heretofore outlined in part, that when the defendant Klemm was in Holland he knew of the persecution of Jews and he was connected to some extent with that persecution.

While he was in the Party Chancellery he wrote the letter, heretofore pointed out, denying the application of the German juvenile law to Poles, Jews, and gypsies. This Tribunal does not construe that letter as a legal opinion but as an expression of Party policy, submitted through the Party Chancellery to the Ministry of Justice to the effect that minors of the prescribed races must be subject to the merciless provisions of the decree against Poles and Jews. The argument that they were necessarily excluded because they were foreigners, and that the German Juvenile Act

contemplated entrance into the Hitler Youth, and similar provisions applicable only to Germans has little significance when the letter itself expressly states that there were no objections to applying the German Criminal Code for juveniles to foreign juveniles, unless they were Poles, Jews, or gypsies. Further, it can hardly be construed as a legal opinion as to gypsies in view of the statement therein made that a special regulation will come into effect which will prevent the German Criminal Code for juveniles from applying to gypsies and those of gypsy descent merely because a definite regulation is lacking.

While in the Party Chancellery, Klemm took part in drafting the law to make treason retroactive and applying it to annexed territories, and this draft bears his signature.

As State Secretary he knew of the NN procedure and was connected therewith, particularly as to the approximately 123 NN prisoners sentenced to death who were denied clemency while he sat in conference with Thierack, and in the eight cases where he denied clemency as deputy for Thierack.

As State Secretary in the Ministry of Justice, he necessarily exercised supervision over the enforcement of the decree against Poles and Jews and dealt with clemency matters pertaining to cases tried under that decree.

In connection with the defendant Klemm, two other transactions constituting crimes charged in the indictment are of particular significance. The first of these is charged under the second count of the indictment as a war crime against all the defendants and, particularly under paragraph 18 of the indictment, charging the defendant Klemm with special responsibility and participation. This pertains to the inciting of the German population to murder Allied airmen forced down within the Reich.

Evidence of this plan of the leaders of the German State is found as follows: First in the correspondence relative to the treatment of so-called "enemy terrorist airmen". As part of this correspondence from the deputy chief of the operations staff of the armed forces, entitled "Secret matter", dated 6 June 1944, and signed by General Warlimont,* the following sentence is significant:

"Lynch justice should be considered as being the rule." Further, a draft of a letter, dated Salzburg, 20 June 1944, to the Chief of the High Command of the Armed Forces, apparently drawn by the Foreign Office, contains this paragraph:

"The above considerations warrant the general conclusion that the cases of lynching ought to be stressed in the course of

* General Warlimont was a defendant in the High Command Case (United States *vs.* Wilhelm von Leeb, et al., Case 12, vols. X–XI, this series).

this action. If the action is carried out to such an extent * * * the deterring of enemy airmen is actually achieved."

In furtherance of this plan, Goebbel's speech of 27 May 1944 is cited and the letter from the Chief of the Party Chancellery, Fuehrer Headquarters, 30 May 1944, marked "Secret—not for publication," and bearing the initials of Thierack, concerning "the people's judgment of Anglo-American murders," signed by Bormann, is significant, particularly the following paragraph:

"No police or criminal proceedings have been taken against the citizens who have taken part herein."

The distribution of this circular was as follows: "Reichsleiter, Gauleiter, Verbaendefuehrer, Kreisleiter,"* and contains the following note to all Gauleiter and Kreisleiter, initialed by Thierack and signed by Friedrichs:

"The Chief of the Party Chancellery requests that the Kreisleiter inform the Ortsgruppenleiter only verbally of the contents of this circular."

Exhibit 109 [635–PS, Pros. Ex. 109] is of even greater significance. This is a letter from the Reich Minister and chief of the Reich Chancellery, dated 4 June 1944, to the Reich Minister of Justice, Dr. Thierack, headed, "Regards people's justice against Anglo-American murders". This letter is quoted in its entirety:

"The Chief of the Party Chancellery informed me about the enclosed transcript of a secret circular letter and requested me likewise to inform you.

"I herewith comply with this and beg you to consider how far you want to instruct the courts and district attorneys with it.

"The Reich Leader and Chief of the German Police has, as I was further told by executive leader Bormann, so instructed his police leaders."

It contains a handwritten note, initialed by Thierack as a signature and also initialed by Klemm, which reads as follows:

"Return note with the addition that such cases are to be submitted to me for the purpose of their examination for quashing in case proceedings are pending."

In this adroit plan to encourage the murder of Allied airmen and escape the responsibility, therefore, under the recognized rules of warfare, the procedures adopted by the Ministry of Justice were unique and worthy of the legal minds of those who dealt with the matter. As shown in the affidavit of Pejlovec, a secret

* The reference is to the highest and higher leaders of the National Socialist German Workers' Party.

directive was sent out by the Ministry of Justice calling for reports in cases of the lynching of Allied airmen. This directive was interpreted by Pejlovek to the effect that no prosecutions were contemplated.

The witness Dr. Gustav Mitzschke, Referent in the legislative department, testified that he was instructed to call upon the State Secretary, which he did, and received the following instructions:

> "When you talk to General Public Prosecutor Helm at Munich, please tell him that in cases where Allied fliers have been killed or ill-treated, the police and any other agencies concerned are to pass on the files to the prosecution office, and that the prosecution as quickly as possible must make a report to the minister and also forward the files."

Helm issued a directive to the prosecutors under him. This directive called for reports and files in such cases and stated that they were necessary because sometimes other factors, such as robbery or the use of Allied uniforms to cover the murder of Germans, had to be considered.

Klemm stated that Mitzschke was directed to inform Helm that reports were to be given in all cases.

The witness Helm stated that the note in conformity with Mitzschke's instructions as to the reports to be made was written and sent out, he thinks, on the same day of Mitzschke's visit and, in his cross-examination he states that he is sure it was not later than the day after Mitzschke's visit.

The witness Hans Hagemann, general public prosecutor at Duesseldorf, testified that he was directed that in such cases a report had to be made to the Ministry of Justice. He also verified the secret decree sent out by the Minister of Justice.

The nature of the reports called for, in itself, is not considered by this Tribunal of particular importance. Thierack had directed Klemm, as shown above, to submit to him reports as to cases pending "for quashing." The procedure followed by the Ministry went beyond this in that it required reports and the transmittal of files of cases where no indictment had as yet been issued. The Ministry of Justice thus took over, in substance, the disposition of these cases and the prosecution throughout Germany was thereby restricted in its normal duty of filing indictments against those who had murdered Allied airmen and were criminals under German law. From the evidence in this case and from sources of judicial information, this Tribunal knows of many instances of the lynching of Allied airmen by the German population. No case has been brought to the attention of this Tribunal where an indictment was actually filed for such offenses. What reports and

files were submitted to the Ministry of Justice we do not know, but it is obvious that such reports as were made were allowed to die in the archives of the Ministry.

There is evidence as to one case pertaining to this matter. The defendant Klemm in his testimony refers to it. Around the turn of the year 1944–45 in Kranenburg, in the district of the court of appeals, Duesseldorf, an SA leader had shot two captured paratroopers in cold blood. Regarding this, Klemm stated:

> "We prosecuted that case and even though the police, as well as the Party offices, offered considerable resistance, these discussions were advanced energetically. I do not know of the final outcome."

The evidence in this case, as shown by the testimony of Hagemann, indicates that during September of 1944, at the time of the Allied parachute attack on Arnhem two captured Canadian paratroopers were shot by one Kluetgen while a Kreisleiter stood by and either permitted or encouraged the shooting.

The witness Hagemann undertook to investigate the matter but was unable to do so fully because a Kreisleiter could not be so examined if he refused to testify. It was necessary if the Kreisleiter was to be examined to have the approval of the Party Chancellery. An application was made for such consent but it was never given. Hagemann stated that he made a report over the telephone to the Ministry about the case. He believed he spoke with the defendant Mettgenberg. Afterwards he made a written report to the Ministry of Justice. He told the Ministry that he needed their support to obtain permission for the Kreisleiter to testify. He received written instructions to clear up the case completely, but since no approval was received to interrogate the Kreisleiter, he could not continue the proceedings. He stated, that again and again he requested the Ministry to obtain permission for him to examine the Kreisleiter. When asked whether he heard from the Ministry regarding this authority, he stated that he had not.

Permission to examine the Kreisleiter not having been obtained, he was never examined. Up to the time of the capitulation of Germany, no indictment had been filed against Kluetgen. This apparently was the prosecution and energetic action on the part of the Ministry of Justice to which Klemm referred in his testimony. In many cases discussed before this Tribunal, indictment, trial, and final execution were certainly more expeditiously handled.

In this plan to incite the population to murder Allied airmen, the part of the Ministry of Justice was, to some extent, a negative one. However, neither its action in calling for a report on pending

cases for quashing, nor its action in calling for reports and files pertaining to all such incidents, was negative. Certainly the net effect of the procedure followed by the Ministry of Justice resulted in the suppression of effective action in such cases, as was contemplated in the letter from the Reich Ministry and Chief of the Reich Chancellery to the Ministry of Justice.

The defendant Klemm was familiar with the entire correspondence on this matter. He specifically directed the witness Mitzschke to obtain reports. His own testimony shows that he knew of the failure to take effective action in the case cited, and it is the judgment of this Tribunal that he knowingly was connected with the part of the Ministry of Justice in the suppression of the punishment of those persons who participated in the murder of Allied airmen.

The second transaction of particular importance with regard to the defendant Klemm is connected with the penitentiary at Sonnenburg. The record in this case shows that in the latter part of January 1945 this great penal institution under the Ministry of Justice was evacuated and that prior thereto, between seven and eight hundred political prisoners therein were shot by the Gestapo.

Klemm denies knowledge of this matter and states:

> "From the documents in this case only, particularly from the affidavit of Leppin, I found out that over 800 persons were shot at Sonnenburg."

He testified further that about the middle of January, Thierack had told him that Himmler had subordinated the prisoners at Sonnenburg to his own command and that as Minister of Justice of the Reich he, Thierack, could no longer do anything in regard to this institution. He testified further:

> "It is not only my opinion but it was absolutely clear that at that time that penal institution was exclusively under the order of Himmler."

He stated that he spoke to Hansen about the subject of Sonnenburg after this conversation with Thierack as to the change in authority, and that Hansen knew about such change. He testified further "that the prisoners were turned over to the Gestapo, I only found out here in this courtroom."

As to what occurred in the Ministry of Justice with regard to the evacuation of Sonnenburg, the testimony of Robert Hecker is important. Hecker was the Referent in the department of justice in Department V of Berlin. Hecker testified in substance as follows: that in discussions with Hansen, the general public prosecutor for the Kammergericht in Berlin and the official under the Ministry of Justice responsible for certain matters in penal institu-

tions, Hansen told him it might be necessary to evacuate Sonnenburg and that preliminary discussions had been carried on; that he, Hansen, had discussed the matter with the State Secretary with regard to the measures to be taken, and he had misgivings and suggested to Hecker that Hecker discuss the matter with the State Secretary. Hecker further stated that when he was the official on duty one night for the Minister of Justice, he received a telephone call from the director at Sonnenburg to the effect that a Russian break-through had taken place and asking for instructions; that he thereupon called Thierack at his home and asked for instructions and Thierack stated that the institution would be defended, and that the authorities at the institution were so informed. As the break-through did not then threaten the penitentiary, this order was not carried out. Hecker testified that later the director of the prison asked what measures he should take if the occasion should arise and that thereupon he called the general public prosecutor at the Kammergericht as to what instructions had been issued. The general public prosecutor was away at that time but the Referent who was present informed him that according to the instructions issued, the police were supposed to be informed in the case of evacuations. He testified further that Eggensperger, a Referent in Department V of the Ministry of Justice, who was on duty the night of the evacuation of Sonnenburg, had informed him the next morning that the prison had been evacuated; that Eggensperger told him that Hansen had called the night before, stating that the action of turning the prisoners not to be evacuated over to the Gestapo was under way and, when questioned as to whether it had been authorized by the Ministry of Justice, Hansen had named Klemm as the person in the Ministry who knew of and approved the transaction. He stated further that Eggensperger had made a typewritten note reporting his telephone conversation with Hansen and that he had received a copy of the note.

On cross-examination the witness Hecker testified in substance that he was himself in charge of the problem of the evacuation of prisons. When asked if he had heard that Himmler, in the middle of January, had issued an order concerning Sonnenburg, he answered that he had not and repeatedly denied any knowledge to the effect that Himmler had taken charge at Sonnenburg, and stated that he had not heard any rumor in the Ministry of Justice to the effect that Thierack had given up authority to issue orders concerning Sonnenburg. He stated that the conversation with Thierack over the telephone was at night and that Thierack had merely answered briefly his inquiry, stating that the institution would be defended. He testified that during the course of that

night he repeatedly spoke to the authorities in Sonnenburg penitentiary and that he tried to contact the competent person in the Kammergericht, namely Hansen, in regard to the matter. Hecker stated that the director of the penitentiary knew that some kind of an agreement with the Gestapo existed and what he should do in the case of an evacuation, and that there were secret directives for evacuating penitentiaries and prisons. As to the note made by Eggensperger, he stated that it included a statement to the effect that the matter had been discussed between the General Public Prosecutor and the State Secretary Klemm. When asked about what happened to prisoners not evacuated, he replied that "as far as I was informed, the prisoners were shot by the Gestapo."

The testimony of Eggensperger in connection with the evacuation of Sonnenburg is also significant. Eggensperger testified that he was an official in the penal execution department of the Ministry of Justice; that he was the official on duty for the entire Ministry of Justice to whom telephone calls were channeled on the night that Hansen reported the evacuation of Sonnenburg. Hansen called him during the night and informed him that during that night the prisoners of Sonnenburg penitentiary would be handed over to the Gestapo; that a detachment of the Gestapo had already arrived at Sonnenburg; and that the action was under way. "Hansen told me that this evacuation, or rather this transfer of the prisoners being carried out, was because the enemy constituted an immediate danger to the prison." When asked whether this directive had been approved by anyone in the Ministry of Justice, Hansen answered, "Yes. This matter has been discussed with the State Secretary Klemm." He testified as to the note which he made reporting the transaction, and that Hecker received a copy of this note. He stated that he had been deeply impressed by the information which he had received and asked Hecker if it was true that the State Secretary knew anything about the matter and approved it, and when asked what Hecker said, he answered:

> "Hecker shrugged his shoulders. He looked at me and said, 'Well, Hansen has—' Well, I can only give you the sense of what he says, that Hansen has fooled this Under Secretary of State and he has got around him, or he impressed him. I think he said, 'Hansen has convinced the Under Secretary of State to approve it.' "

He further stated that when he asked Hansen whether the minister or the Ministry were familiar with the matter, he answered in the affirmative and told him that the State Secretary knew about it and that he had put this down in his file note.

On cross-examination when asked if, as a liaison officer in Berlin in Department V, he reported repeatedly to the defendant Klemm in his capacity as State Secretary, he answered, "Yes." When asked with what matters he was concerned, he answered, "Again and again there were current matters which had to be discussed with the State Secretary who wanted some information and some information I gave him myself. In some complicated cases I asked the officials in charge to come in." The witness also testified that because of Klemm's personality he, Eggensperger, was quite surprised at the action of Klemm and that was why he discussed the matter with Hecker in the morning. He testified further that it was his duty to make the file note as to the telephone conversation which he had received; that that file note was, he would say, about a half of a typewritten page. When asked if the file note included the name Klemm in connection with the fact that Hansen had referred to him, he answered, "Yes." When asked whether Hansen spoke about an agreement, whether he used the word "agreement," the witness answered that while he could not state the exact word used, that Hansen informed him that the matter had been discussed and approved, and stated that Hansen "reported to me the execution of a directive which had been issued." He further stated:

> "If you ask me concerning the execution, it was the report of a general public prosecutor concerning an important occurrence in a penitentiary. I would formulate it like that. It was his duty to report this matter."

When asked if the name Klemm was mentioned by Hansen because Hansen had noticed that the witness had some doubts, the witness answered:

> "I certainly didn't ask him whether the State Secretary had a report on that matter. I certainly asked him that the minister knew about it, and therefore, it was striking that he did not refer to the minister himself but rather to Klemm."

He further testified:

> "I was the only official, apart from Hecker, in Department V, who had remained in Berlin, and in that capacity I maintained contact between the Ministry—that is the RMJ—and the evacuated divisions. If Hansen was given any instructions, then it was I who passed them on to him. That brought about the fact that I had frequent contact with him, particularly over the telephone."

He stated further that he never heard of anybody being called to account for the action taken in connection with the massacre at Sonnenburg.

Pertaining to the question as to who had the authority to determine what prisoners were to be evacuated in case of evacuation and what prisoners were to be turned over to the Gestapo for liquidation, [NG–030, Pros.] Exhibit 290 is important.

This exhibit includes the directive from the Reich Ministry of Justice, dated 5 February 1945, which is designated "Secret," to the public prosecutor in Linz, re: preparation for an evacuation of the penal institution within the district of Oberlandsgericht Graz. This letter shows enclosures. It states as follows:

"In view of the proximity of the front line I have advised the public prosecutor in Graz to make the necessary preparations for possible evacuation of the penal institutions within his jurisdiction, and I have decided that your district shall be the reception center for these institutions. You are requested to take any steps which may be necessary for their reception, as it might [become urgent at any moment. You will also get in touch] with the public prosecution in Graz and exchange all necessary particulars with him for the settlement of questions concerning you both. For details I refer to the enclosed directives. You are requested to keep me informed of whatever steps you take."

It also includes a directive from the Reich Ministry of Justice with the file mark "IV a 56/45 g," dated Berlin, 12 February 1945, marked "Secret," and also contains the stamp of the Oberlandesgericht president at Linz, "Received 9 March 1945." It is designated, "Relieving of the Penitentiaries." It shows enclosures as follows: "Additional copies for the public prosecutor and all independent penal institutions." This directive states, among other things:

"Foreigners can only be set free in full agreement with the police authorities; otherwise they must be transferred to the police."

This directive is signed "Thierack."

The exhibit contains further a directive to the public prosecutors, Linz, and is in part as follows:

"To the: Public Prosecutors, Linz.
The authorities in charge of the independent administrative offices.
Judges in charge of the juvenile prisons in Ottenheim [and Mattighofen].

"For their knowledge and consideration. The circulars given in the Reich ordinance of the Reich Ministers of Justice, dated 12 February, have been communicated as follows: * * *."

This directive also contains a form to be used in connection with the discharge of prisoners, designated: "Supplement to: Reich Ordinance of Reich Ministers of Justice, dated 12 February 1945," with the file mark "IV a 56/45 g," and has the seal of Linz showing receipt.

The exhibit also includes a directive of "Evacuation of the Judicial Executive Institutions Within the General Plan for the Evacuation of Threatened Territories in the Reich." This is marked "Secret" and has no heading, no date, and no signature (*NG–030, Pros. Ex. 290*).

This states, in paragraph 1:

"The evacuation of penal institutions lying within territories threatened by enemy attack is a matter of concern for the public prosecutors of the territories to be evacuated as well as for those within the territories appointed for reception in transit. This does not apply if the evacuation can be confined to a change of locality within the Landesgericht itself. The carrying out without friction of all measures of evacuation therefore depends upon the close cooperation of the public prosecutors concerned who must get in touch with each other on all the particulars which are necessary for those measures. The individual measures for evacuation must be left as far as possible to the personal initiative of the public prosecutors concerned, as only they possess the necessary knowledge of local conditions and are able to bring about the required cooperation with local administrative and Party offices. These directives can only give an indication of what is to be done."

From the import, a fair inference is that it was an enclosure to the original letter of Thierack.

Further along, the document states:

"NN prisoners are not to be released under any circumstances. They are to be rapidly transferred to territories which are not in danger of enemy attack according to special orders.

"Foreigners are to be released only if they had their residence in the Reich for many years, if they are especially reliable and fulfill all the requirements under (*h*).

"Jews, Jewish persons of mixed race of the first degree, and gypsies are not to be released.

"For Polish subjects, who are protected personnel, a release may be considered only if the requirements made under (*h*) apply to them after the strictest investigation. The same applies to people living in the Protectorate of Bohemia and Moravia. Poles who have been sentenced to at least 1 year internment in a disciplinary camp, may also be turned over to the police, with

an interruption, if necessary, in the execution of their sentence. This can only be done if an agreement is reached with the commander of the Security Police and the SD."

Under the heading of "Carrying-out the evacuation" is stated (*NG–030, Pros. Ex. 290*):

"As soon as orders for evacuation are issued, the evacuation has to be carried out in full accordance with the plans agreed upon. In many cases, it is true, prevailing conditions will necessitate deviations and improvisations. Should it become impossible, for any reasons, to bring the prisoners back to the extent agreed upon, these prisoners who are not outspokenly asocial or hostile to the State, are to be released in good time so that they will not fall into the hands of the enemy. The elements mentioned before, however, must be turned over to the police for their removal, and if this is not possible they must be rendered harmless by shooting. All traces of the extermination are to be carefully removed."

Further documents in this exhibit, issued at Linz, show that by agreement and orders of the defense commissioner, orders were issued by the prosecutor at Linz which appear to implement the preceding document. On 14 April 1945 the chief public prosecutor at Linz made an official report to the Reich Ministry of Justice showing steps which he had taken.

The significant directives of the Minister of Justice above quoted were issued shortly after the incident at Sonnenburg and concerned the disposition of prisoners in the penitentiaries of the Reich in areas threatened by the Allied advance. It is also significant that the defendant Klemm who denies all connection with or authority over the penitentiary at Sonnenburg in late January 1945 subsequently on 11 February 1945 ordered the evacuation of the prison at Bautzen, including the discharge of certain prisoners and the transfer of those not so discharged to Waldheim; and that around Easter of 1945 he ordered the evacuation of the prison at Rothenfeld and instructed the matron as to the disposition of the prisoners.

It is the contention of the defendant that Hansen was an unreliable person who falsely used the name of the State Secretary. It is to be noted, however, that the testimony does not show that Hansen was undertaking to obtain from Eggensperger authority for some contemplated action under alleged authority from the State Secretary. Hansen called Eggensperger who was the official on duty at the Ministry of Justice to make an official report of an action which was already under way and when questioned as to his authority, he cited the approval of the State Secretary. His report was embodied in an official note as he could assume it would

be. This note stated that the action taken was based upon the approval of the State Secretary. Surely Hansen, an official under the Minister of Justice, whatever his character might have been, would never have dared to use falsely an alleged authority by the State Secretary to account for the liquidation of some 800 people and then make an official report that, according to all normal procedure, would come directly into the hands of the State Secretary.

This Tribunal is asked to believe that in the middle of January, Himmler took over the operations of the penitentiary at Sonnenburg and that the first time that the State Secretary, the defendant Klemm, heard of the liquidation of those who were not evacuated was in this trial. That Himmler controlled evacuations within the area of his command was shown by evidence in this case and can be assumed from the nature of the evacuation. An evacuation is a matter of military concern since it involves interference on the roads with military operations and transport. The operational control of a penal institution is an entirely different matter. In the middle of January, Himmler was in command of an army which was having considerable difficulty and he was scarcely in a position to assume the functions and responsibilities in the Ministry of Justice as regards the operations of a penal institution. Certainly if he did so it is strange that Eggensperger, a Referent in Department V dealing with penal institutions, or Hecker, also in Department V and in charge of evacuations of penal institutions, or the director of the institution at Sonnenburg, knew nothing about this transfer of authority some two weeks after it is alleged to have been made. It was also strange that Hansen, who is alleged to have known of this transfer of authority, would call the Ministry of Justice and make an official report as to the transaction on the night when it was under way and cite as his authority for his connection therewith the State Secretary. That the defendant Klemm knew nothing about the liquidation of some 800 people in this institution until he learned it in this trial, overtaxes the credulity of this Tribunal. Even in Nazi Germany the evacuation of a penal institution and the liquidation of 800 people could hardly have escaped the attention of the Minister of Justice himself or his State Secretary charged with supervision of Department V which was competent for penal institutions. Exhibit 290, herein extensively quoted, shows that the operations of penal institutions and the disposition of the inmates remained a function of the Ministry of Justice, and it is the opinion of this Tribunal that the Ministry of Justice was, at the time of the evacuation of Sonnenburg, responsible for the turning over of the

inmates to the Gestapo for liquidation, and that the defendant, Klemm, approved in substance, if not in detail, this transaction.

When Rothenberger was ousted as State Secretary because he was not brutal enough, it was Klemm who was chosen to carry on the Thierack program in closest cooperation with the heads of the Nazi conspiracy. Klemm was in the inner circle of the Nazi war criminals. He must share with his dead friend, Thierack, (with whom he had lived), and his missing friend, Bormann, the responsibility, at a high policy level, for the crimes committed in the name of justice which fill the pages of this record. We find no evidence warranting mitigation of his punishment.

Upon the evidence in this case it is the judgment of this Tribunal that the defendant, Klemm, is guilty under counts two and three of the indictment.

THE DEFENDANT ROTHENBERGER

From his own sworn statements we derive the following information concerning the defendant Rothenberger. He joined the NSDAP on 1 May 1933 "for reasons of full conviction." From 1937 until 1942 he held the position of Gau Rechtsamtleiter. He states: "As such I also belonged to the Leadership Corps." Parenthetically, it should be stated that the organization within the Leadership Corps to which he belonged has been declared criminal by the judgment of the first International Military Tribunal, and that membership therein with knowledge of its illegal activities is a punishable crime under C. C. Law 10. We consider the interesting fact of his membership in the Leadership Corps no further, solely because defendant Rothenberger was not charged in the indictment with membership in a criminal organization. He was a Dienstleiter in the NSDAP during 1942 and 1943. From 1934 to 1942 he was Gaufuehrer in the National Socialist Jurists' League. In 1931 he became Landgerichtsdirektor, and in 1933 Justiz-Senator in Hamburg. From 1935 to 1942 he was president of the district court of appeals in Hamburg. In 1942 he was appointed Under Secretary in the Ministry of Justice under Thierack. He remained in that office until he left the Ministry in December 1943, after which he served as a notary in Hamburg. Thus, it is established by his own evidence that while serving as president of the district court of appeals he was also actively engaged as a Party official. Other evidence discloses the wide extent to which the interests and demands of the Ministry of Justice, the Party, the Gau Leadership, the SS, the SD, and the Gestapo affected his conduct in matters pertaining to the administration of justice. Rothenberger took over the Gau Leadership of the National Socialist Lawyers' League at the request of Gauleiter Kauffmann,

who was the representative of German sovereignty in the Gau and who was, for all intents and purposes, a local dictator. As Gaufuehrer during the period following the seizure of power, Rothenberger had ample opportunity to learn of the corruption which permeated the administration of justice. He testified:

"It has been emphasized here time and again how during the first period, after the revolution of 1933, every Kreisleiter attempted to interfere in court proceedings; the Gestapo tried to revise sentences, and it is known how the NSRB, the National Socialist Jurists' League, tried to gain influence with the Gauleiter or the Reichsstatthalter in order to act against the administration of justice."

Concerning the dual capacity in which he served, he said:

"On account of the identity, of course, between president of the district court of appeals and Gaufuehrer, I was envied by all other district courts of appeal because they continually had to struggle against the Party while I was saved this struggle."

In August 1939, on the eve of war, Rothenberger was in conference with officials of the SS and expressed to them the wish to be able to fall back on the information apparatus of the SD, and offered to furnish to the SD copies of "such sentences as are significant on account of their importance for the carrying-out of the National Socialist ideas in the field of the administration of justice." Rothenberger testified that during the first few years after the seizure of power, there was the usual system of SD informers in Hamburg. The unsatisfactory personnel in the SD was removed by Reichstatthalter Kauffmann, and the defendant Rothenberger nominated in their place individuals who, he said, "were judges and who I knew would never submit reports which were against the administration of justice." He states also:

"In the meantime, the directive had been sent down from the Reich Ministry of Justice to the effect that the SD should be considered and used as a source of information of the State by agencies of the administration of justice."

While he was president of the district court of appeals at Hamburg, and during the war, this ardent advocate of judicial independence was not adverse to acting as the agent of Gauleiter Kauffmann. On 19 September 1939 Kauffmann, as Reichsstatthalter and defense commissioner, issued an order as follows:

"The president of the Hanseatic Court of Appeals, Senator Dr. Rothenberger, is acting on my order and is entitled to demand information in matters concerning the special courts and to inspect documents of every kind. All administrative

offices as well as the offices of the NSDAP are requested to assist him in his work."

On 26 September 1939 Rothenberger, as president of the Hanseatic Court of Appeals, notified the Prosecutor General of Kauffmann's order and requested that a copy of the indictment "in all politically important cases or cases which are of special interest to the public should be sent to him." In a report to Schlegelberger of 11 May 1942 he spoke of the "crushing effect" of the Fuehrer's speech of 26 April 1942 and of the feeling of consequent insecurity on the part of the judges, and said:

"I have therefore assumed responsibility for each verdict which the judges discuss with me before passing it."

In the same report he states that on 6 May 1942 he made arrangements with all senior police officers, senior SS, senior officers of the criminal police, of the Secret State Police, and of the SD "to the effect that every complaint about juridical measures taken by judges was to be referred to me before the police would take action (especially regarding execution of sentence)."

In June 1942 Rothenberger reported to the defendant Schlegelberger that he had made similar arrangements in Bremen with the Kreisleiter, president of the police, leader of the Secret State Police (Gestapo), and the leader of the SD. He reported to Schlegelberger:

"In view of the present situation, I am intensifying the internal direction and control of jurisdiction which I have considered to be my main task since 1933."

On 7 May 1942 Rothenberger issued an order in which he stated his intention to inform himself prior to the proceedings on cases which are of political significance "or which involve the possibility of a certain conflict between formal law and the instinctive reactions of the people or National Socialist ideology." He directed that reports be submitted to him which must be in sufficient detail in order, as he said, "to enable my deputy to judge the necessity of my intervention."

By reference to his own words we have already set forth Rothenberger's expressed convictions as to the duty of a judge as the "vassal" of the Fuehrer to decide cases as the Fuehrer would decide. The conclusion which we are compelled to draw from a great mass of evidence is not that Rothenberger objected to the exertion of influence upon the courts by Hitler, the Party leaders, or the Gestapo, but that he wished that influence to be channeled through him personally rather than directed in a more public way at each individual judge. On the one hand he estab-

lished liaison with the Party officials and the police, and on the other he organized the system of guidance of the judges who were his subordinates in the Hamburg area. He testifies that he considered the system of conferences between judges and prosecutors before trial, during trial and sometimes after trial, but before the consultation of the judges, to be wrong, and states that he considered it more correct, in view of the situation, that such a discussion should take place a long time before the trial and not between individual judges and the prosecutor, "but on a higher level, namely, between the chiefs of the offices, so that there would be no possibility to exert an influence on the individual judge in any way." Concerning his dictatorial attitude toward the other judges, Rothenberger testified: "Of course, guidance is guidance, and absolute and complete independence of the judge is possible only in normal conditions of peace, and we did not have these conditions after the Hitler speech."

The guidance system instituted by the defendant Rothenberger was not limited to conferences concerning pending cases of political importance before trial. We are convinced from the evidence that he used his influence with the subordinate judges in his district to protect Party members who had been charged or convicted of crime, that on occasions he severely criticized judges for decisions rendered against Party officials, and on at least one occasion was instrumental in having a judge removed from his position because he had insisted upon proceeding with a criminal case against a Party official.

As further illustration of the character of control which was exercised by Rothenberger over the other judges in his district, reference is made to his letter of 7 May 1942 addressed to the judges in Hamburg and Bremen in which he announced that a conference would be held for the discussion of cases fixed for the following week. We quote (*NG–389, Pros. Ex. 76*):

> "A few cues to matters which will come up will be given, file numbers quoted, and comments made in a few key words."

He especially required of the judges that they report to him concerning penal cases against Poles, Jews, and other foreigners, and "penal and civil cases in which persons are involved who are State or Party officials, or NSDAP functionaries, or who hold some other eminent position in public life."

One will seek in vain for any simple, frank, or direct statement by Rothenberger relative to any of the abuses of the Nazi system. His real attitude can only be extracted from the ambiguities of his evasive language. We quote from the record of the re-

port made by Rothenberger to the judges on 27 January 1942 (*NG–1106, Pros. Ex. 462*) :

> "With regard to the matter it had to be considered whether or not any material claims made by the Jews could still be answered in the affirmative. Concerning this question, it might, however, be practical to maintain a certain reserve."

In an early report to the Hamburg judges, Rothenberger discussed the opinion of the Ministry concerning the legal treatment of Jews. He stated that the fact that a debtor in a civil case is a Jew should as a rule be a reason for arresting him; that Jews may be heard as witnesses but extreme caution is to be exercised in weighing their testimony. He requested that no verdict should be passed in Hamburg when a condemnation was exclusively based on the testimony of a Jew, and that the judges be advised accordingly.

On 21 April 1943, as the result of a long period of interdepartmental discussions, a conference of the state secretaries was held. Rothenberger was at the time State Secretary in the Ministry of Justice and participated in the conference concerning the limitation of legal rights of Jews. Kaltenbrunner also participated. At this meeting consideration was given to drafts of a decree which had long been under discussion. Modifications were agreed upon and the result was the promulgation of the infamous 13th regulation under the Reich Citizenship Law which provided that criminal actions committed by Jews shall be punished by the police and that after the death of a Jew his property shall be confiscated.

We next consider Rothenberger's activity concerning the deprivation of the rights of Jews in civil litigation. In the report of 5 January 1942 the defendant wrote:

> "The lower courts do not grant to Jews the right to participate in court proceedings in *forma pauperis*. The district court suspended such a decision in one case. The refusal to grant this right of participation in court proceedings in *forma pauperis* is in accordance with today's legal thinking. But since a direct legal basis is missing, the refusal is unsuitable. We therefore think it urgently necessary that a legal regulation or order is given on the basis of which the rights of a pauper can be denied to a Jew." (*Pros. Ex. 373, NG–392, document book 5–D, p. 331.*)

Notwithstanding his statement of 5 January to the effect that it would be unsuitable to deprive Jews of this right without a legal regulation, we find that on 27 January 1942 the report of a conference shows the following (*NG–1106, Pros. Ex. 462*) :

"The senator reported that the question of the poor law concerning Jews has gained significance again. With the district court there were two cases pending. He requested that contacts with the district court and with the local court judges be made at once so that a uniform line is followed to the effect that the Jews be denied the benefits of the poor law. It would be entirely out of the question that Jews be granted the benefits of the poor law subsequent to the present development. This would apply especially to Jews who had been evacuated, but in his opinion also to those who had not been evacuated."

About this time a report concerning the claim of the Jewish plaintiff, Israel Prenzlau, came to the attention of the defendant Rothenberger. The Jew sought the right to proceed in *forma pauperis*. The report on the case contains the following statement by a Gau economic advisor, which is couched in the usual Nazi language of sinister ambiguity (*NG–589, Pros. Ex. 372*) :

"In reply to your inquiry I state my point of view in detail.

"In a lawsuit between a German national and a Jew, I consider the settling of a dispute by compromise settlement in court inadmissible for political reasons. The German national, as party in the lawsuit, pursuant to his clearly defined conceptions of justice derived from his political schooling since 1933, can expect that the court will decide the case by a verdict, i. e., take a conclusive attitude toward the dispute in hand. What is expected is a decision which was arrived at not from purely legal points of view, as result of a legal train of thought, but which is an expression to the way in which National Socialist demands concerning the Jewish question are realized by German administrators of justice. Evading this decision by a compromise might mean encroaching upon the rights of a fellow citizen in favor of a Jew. This kind of settlement would be in contradiction to the sound sentiments of the people. I therefore consider it inadmissible."

The report shows that upon receipt of the opinion of the Gau economic advisor, "the defendants thereupon refused settlement with the plaintiff and now deny that they owe him anything." The court which had jurisdiction of the Prenzlau case granted to the plaintiff the right to proceed in *forma pauperis*. On 13 February 1942 having before him the report of the Gau economic advisor, the defendant Rothenberger wrote to the president of the district court, Hamburg, as follows:

"I do not intend to approach the economic advisor of the Gau for the time being, seeing from the documents that the ultimate beneficiary of the claim, the son of the plaintiff, emigrated in

the year 1938 and his property, therefore, surely being confiscated. I fail to understand why the court granted *forma pauperis* rights to the assignee, a Jew, without first consulting the authority for sequestration of property."

A note dated 24 February shows that Rothenberger had issued a directive to two judges of his district to the effect that every case involving the claim of the right of Jews to proceed in *forma pauperis* must first be submitted to him. On 5 March 1942 a directive was issued from the Reich Ministry of Justice in substantial conformity with the recommendation of the defendant Rothenberger. It provided:

"In future the granting of rights of *forma pauperis* to Jews can only come into consideration if the carrying-out of the lawsuit is in the common interest, viz, in disputes concerning family rights (divorce in cases of mixed marriages, establishing the descent)."

After the enactment of the foregoing ordinance, and on 7 May 1942, a courageous president of the district court at Hamburg wrote to Rothenberger stating that in his opinion the right of Jews to proceed in *forma pauperis* would have to be granted. He added:

"I am convinced that it is in the common interest that an Aryan cannot evade without further ado a just claim against him merely for the reason that the court denies the *forma pauperis* right to Jews."

Notwithstanding this protest, and on 22 May 1942, the defendant Rothenberger, in reliance upon the ordinance which was based upon his recommendation, wrote to the president of the district court of Hamburg that he considered it "adequate that the *forma pauperis* right granted to the plaintiff Prenzlau be canceled. Please have this taken into consideration by the court in a form which you deem appropriate."

The foregoing narrative takes on additional significance when summarized. First, Rothenberger recommends to the Minister of Justice that it is desirable to deny to Jews the right to proceed in *forma pauperis*, but that such denial is inadmissible because there is no law to justify it. He recommends the passage of such a law. About 3 weeks later, no law having been passed, he recommends that the judges take a uniform line depriving the Jew of the right to proceed in *forma pauperis*. A specific case now arises in which the right was granted to a Jew, and the defendant Rothenberger receives veiled suggestions from the Gau economic advisor to the effect that defendants should not be allowed to compromise a case brought against them by a Jewish plaintiff because the court

should decide against the Jew in any event on political grounds. Concerning this suggestion Rothenberger ventures no comment. The defendant in the Prenzlau case takes his cue from the advice of the economic advisor and denies liability; the court grants to the Jew the right to proceed in *forma pauperis*. Rothenberger criticizes this action, although the lower court had acted in strict conformity with the law. In March the awaited law excluding the Jew from the benefit of the poor-law is passed. In May, Rothenberger overrules the protest of a judge and directs the canceling of the order which was made by the lower court. This dictation by the defendant Rothenberger to other courts and judges of his district was not done in the course of a legal appeal from the lower court to the court over which he presided. It was done after the manner of a dictator directing an administrative inferior how to proceed.

Rothenberger not only participated in securing the enactment of a discriminatory law against Jews; he enforced it when enacted and, in the meantime, before its enactment, upon his own initiative he acted without authority of any law in denying to Jewish paupers the aid of the courts.

It is true that the denial to Jews of the right to proceed in civil litigation without advancement of costs appears to be a small matter compared to the extermination of Jews by the millions under other procedures. It is nevertheless a part of the government-organized plan for the persecution of the Jews, not only by murder and imprisonment but by depriving them of the means of livelihood and of equal rights in the courts of law.

The defendant Rothenberger testified that various judges reported to him "that they had heard rumors to the effect that everything was not quite all right in the concentration camps" and that they wished to inspect one. Accordingly, Rothenberger and the other judges visited the concentration camp at Neuengamme. He testified that they inquired about food conditions, accommodations, and the methods of work, and spoke to some inmates, and he asserts that they did not discover any abuses. This was in 1941. Again in 1942, according to his own testimony, the defendant visited Mauthausen concentration camp in company with Kaltenbrunner, who was later in charge of all concentration camps in Germany and has since suffered death by hanging. At Mauthausen concentration camp the defendant Rothenberger again inspected installations, conferred with inmates, and inquired as to the cause of detention of the inmates with whom he had talked. He states that from his spot checks he "could not find out that there was any case of a sentence being 'corrected.' "

Upon inquiry as to what the defendant meant by the "correction of sentences," he answered:

"By correcting of a sentence we mean that when the court had pronounced a sentence, for example, had condemned somebody to be imprisoned for a term of 5 years—if the police now, after these 5 years had been served, if the police arrested this man and put him into a concentration camp—this is only an example of a correction. Or even if, and this is clearer, it happened that a person was acquitted by a court, and in spite of that the police put this man into a concentration camp. These are examples of correction of sentences."

The defendant stated that he did not observe and could not discover any abuse at Mauthausen. In this connection the testimony of defense witness Hartmann is of interest. Hartmann accompanied Dr. Rothenberger on his visit to Mauthausen concentration camp. He testified that rumors were current in Germany to the effect that conditions were not what they should be in the concentration camps. Hartmann testifies that they went about the camp freely and observed everything closely. On cross-examination by the Tribunal, Hartmann testified as follows:*

"Q. * * * When you visited Mauthausen concentration camp, you knew, did you not, that the courts in the Ministry of Justice never sentenced convicted criminals to a concentration camp? * * *

"A. Yes.

"Q. Did Dr. Rothenberger know it?

"A. Yes.

"Q. Then you knew that these ten people that he talked with, and the one or two that you talked with, were not there by reason of any action on the part of the Ministry of Justice or the court, but were there only by reason of action by the police or by the Party, did you not?

"A. Yes. That was preventive custody undertaken by the police."

The witness Hartmann testified further:

"Q. And they had already served their sentences as imposed by court before they were taken into this custody of the police, is that right?

"A. Yes. That is how I see it.

* Complete testimony of defense witness Hans Hartmann is recorded in the mimeographed transcript, 17 September 1947, pages 8999–9068.

"Q. And at that time, these twelve people who had served their sentences and had been taken over by the police—that met with the approval of the defendant Dr. Rothenberger, as I understand you?

"A. Well [we] did not approve the concentration camp as an institution altogether, but first of all we wanted to achieve this —that it would no longer happen that a defendant was acquitted and then after acquittal the Gestapo arrested (him) in front of the courtroom. * * * In those cases, too, he did not approve the fact that these people were in a concentration camp because we were of the opinion that only the administration of justice should decide these questions of criminal law and nobody else. But according to the power conditions within the State, as they happened to exist, our interest was first of all to remove the worst evils."

Upon redirect examination by counsel for the defendant Rothenberger, defense witness Hartmann testified as follows:

"Q. Therefore, sometimes was the situation for you and Dr. Rothenberger like this: that apparently you affirmed something with a smiling face, something which as a human being you had to disapprove of and reject?"

To this question the witness answered that Dr. Rothenberger "for reasons of power politics" had to accept the conditions though he did not approve them. After his inspection of Mauthausen concentration camp, Dr. Rothenberger took no action whatsoever with regard to the information which he had received.

It follows that the defendant Rothenberger, contrary to his sworn testimony, must have known that the inmates of the Mauthausen concentration camp were there by reason of the "correction of sentences" by the police, for the inmates were in the camp either without trial, or after acquittal, or after the expiration of their term of imprisonment.

It must be borne in mind that this inspection by the defendant Rothenberger was made at Mauthausen concentration camp, an institution which will go down in history as a human slaughter house and was made in company with the man who became the chief butcher.

We are compelled to conclude that Rothenberger was not candid in his testimony and that in denying knowledge of the institution of protective custody in its relationship with the concentration camps he classified himself as either a dupe or a knave. Nor can we believe that his trips to the camps were merely for pleasure or for general education. He also advised other judges to make like investigations. We concede that the concentration camps were

not under the direct jurisdiction of the Reich Minister of Justice, but are unable to believe that an Under Secretary in the Ministry, who makes an official tour of inspection, is so feeble a person that he could not even raise his voice against the evil of which he certainly knew.

If the defendant Rothenberger disapproved of protective custody and the consequent employment of concentration camps, it must be because of a change in heart concerning which we have had no evidence. On 13 June 1941 Rothenberger wrote Secretary Freisler suggesting that many small cases were being tried by the Special Court and that this was not compatible with the importance of the court. He referred to minor offenses which came under the public enemy decree, "in which, however, protective custody will be requested by virtue of the offender's past life and his character." Again, he speaks of cases in which motion is made for the offender to be taken into protective custody.

On 5 January 1942 the defendant Rothenberger addressed a report on the general situation in the Hamburg area to the Reich Minister of Justice. From this document his attitude concerning the institution of protective custody may be ascertained. Concerning the "transfer to the public prosecutors of the right to decide about the duration of protective custody," he said:

> "In a certain connection with this problem is the transfer to the public prosecutor's office of the right to decide about the duration of the protective custody. I regret that it is obvious that the courts are more cautious and reserved than they were previously in regard to the order of protective custody, because the duration of the protective custody is not any more within their control. This attitude of the courts cannot be approved, but it is psychologically understandable; I am afraid, that the reform effected the opposite of the intended more vigorous practice in regard to protective custody."

In February 1939 the defendant Rothenberger and the Chief Public Prosecutor reported to the Hamburg judges upon a conference which had been held in Berlin. The record of the joint report in which Rothenberger participated is as follows (*NG–629, Pros. Ex. 28*):

> "A report was then made on the discussions on protective custody. The ministry is of the opinion—also held here—that no objection can be raised to protective custody as long as it is purely protective, but that corrective measures, such as became known in certain cases, must not become a habit."

In conclusion, the evidence discloses a personality full of complexities, contradictions, and inner conflict. He was kind to many

half-Jews, and occasionally publicly aided them, yet he was instrumental in denying them the rights to which every litigant is entitled. He fulminated publicly against the "Schwarze Korps" for attacking the courts, yet he reproached judges for administering justice against Party officials and unquestionably used his influence toward achieving discriminatory action favorable to high Party officials and unfavorable to Poles and Jews. He wrote learnedly in favor of an independent judiciary, yet he ruled the judges of Hamburg with an iron hand. He protested vehemently against the practice of Party officials and Gestapo officers who interfered with the judges in pending cases, but he made arrangements with the Gestapo, the SS, and the SD whereby they were to come to him with their political affairs and then he instituted "preview and review" of sentences with the judges who were his inferiors. He thought concentration camps wrong but concluded that they were not objectionable if third degree methods did not become a habit.

Rothenberger was not happy with his work in Berlin. In his farewell speech on leaving Hamburg, he exuberantly exclaimed that he had been "an uncrowned king" in Hamburg, but he would have us believe that he received a crown of thorns in Berlin. Soon he learned of the utter brutality of the Nazi system and the cynical wickedness of Thierack and Himmler, whom he considered his personal enemies. He could not stomach what he saw, and they could not stomach him. The evidence satisfies us that Rothenberger was deceived and abused by his superiors; that evidence was "framed" against him; and that he was ultimately removed, in part at least, because he was not sufficiently brutal to satisfy the demands of the hour. He was retired to the apparently quiet life of a notary in Hamburg, but even then we find that he was receiving some pay as an Under Secretary and was assisting Gauleiter Kauffmann in political matters in that city.

The defendant Rothenberger is guilty of taking a minor but consenting part in the Night and Fog program. He aided and abetted in the program of racial persecution, and notwithstanding his many protestations to the contrary he materially contributed toward the prostitution of the Ministry of Justice and the courts and their subordination to the arbitrary will of Hitler, the Party minions, and the police. He participated in the corruption and perversion of the judicial system. The defendant Rothenberger is guilty under counts two and three of the indictment.

THE DEFENDANT LAUTZ

The defendant Lautz from 20 September 1939 until the end of the war served as Chief Public Prosecutor at the People's Court in

Berlin. He joined the NSDAP in May 1933. During the period of his service the "higher officials" under his supervision increased from 25 to about 70. The office originally consisted of four departments which were later increased to five to correspond with the number of senates of the People's Court. After the enlargement of the department there were five public prosecutors and one senior public prosecutor in each department. The defendants Barnickel and Rothaug were among the senior public prosecutors under the general supervision of the defendant Lautz. The crimes with which his office dealt were those over which the People's Court had jurisdiction. Of particular interest here were the prosecutions for undermining the German defensive strength, high treason and treason, cases of attempted escape from the Reich by Poles and other foreigners, and NN cases.

A great number of prosecutions were brought under the decree of 17 August 1938 which provides that "Whoever * * * openly seeks to paralyze or undermine the will of the German people or an allied nation to self-assertion by bearing arms" should be punished by death. This was the law which effectively destroyed the right of free speech in Germany. The prosecutor's office was required to handle approximately 1,500 cases a month involving charges of this type. Under supervision of the defendant Lautz all of these charges had to be examined and assigned for trial to the People's Court in serious cases, or to other courts. In the cases which were assigned to the People's Court for trial "there was always the possibility that the death sentence would be pronounced."

The defendant Lautz instructed his subordinates that only those cases were to be retained for trial before the People's Court in which it was "possible to assume full responsibility if the People's Court senate pronounces the death sentence."

Lautz did not shirk responsibility for the acts of his deputies. He testified that the signature of his deputy "meant, of course, that I assumed responsibility for that matter."

In connection with the work of his department it was the duty of the defendant Lautz to sign all indictments, all suspensions of proceedings, and all reports to his superior, the Minister of Justice. This work assumed such proportions that it became necessary to delegate parts thereof to his subordinates, but the defendant Lautz required that important matters be reported directly to him. In partial explanation of his activities and motives in connection with his enforcement of the law against undermining the military efficiency of the nation, Lautz stated:

"Just as I think it is a good thing that no one today can claim that this war was lost only through treason, I must also

say that I regret that because of this war and through these death sentences many people, who were otherwise all right, had to lose their lives."

As an illustration of the type of case which was prosecuted under this law, we cite the case of the defendant who said to a woman: "Don't you know that a woman who takes on work sends another German soldier to his death?" This offense was described by Lautz and Rothaug as a serious case of undermining the military efficiency of the nation. The office of the Chief Public Prosecutor of the People's Court was vested with a wide discretion in connection with the assignment of cases to the various courts for trial. It will be recalled that the malicious acts law of 20 December 1934 provided for punishment of persons who made false or treacherous statements "fit to injure the welfare or prestige of the government and of the Reich", etc. Under this law moderate punishments by imprisonment were authorized, whereas, under the law against undermining the defensive strength of the nation, the death penalty was mandatory. If the prosecutor sent the case for trial to the People's Court on the charge of undermining, instead of sending it to a lower court for trial under the malicious acts law, he determined for all practical purposes the character of the punishment to be inflicted, and yet the evidence satisfies us that there was no rule by which the cases were classified and that the fate of the victims depended merely on the opinion of the prosecutor as to the seriousness of the words spoken.

The connection of the defendant Lautz with the illegal Nacht und Nebel procedure is established beyond question. The People's Court acquired jurisdiction of NN cases under the decree of the Reich Minister of Justice of 14 October 1942. Lautz estimated that the total number of NN cases examined by his department was approximately one thousand, of which about two hundred were assigned to the People's Court for trial, but he added that each case could concern several defendants. No good purpose will be served by a second review of the testimony concerning the Nacht und Nebel decree. In harmony with the decision in the case of the United States [et al.] *vs.* Goering, et al., this Tribunal finds that the secret procedure which was instituted and enforced through the Ministry of Justice constituted a war crime and a crime against humanity. The Chief Public Prosecutor of the People's Court zealously enforced the provisions of this decree, and his conduct in so doing violated the laws and customs of war and the provisions of C. C. Law 10.

Treason Cases Involving Border Crossings by Poles

Lautz estimated that from 150 to 200 persons were prosecuted for leaving their places of work and attempting to escape from

Germany by crossing the border into Switzerland. These cases were prosecuted under the provisions of penal code concerning treason and high treason.

On 24 February 1942 an indictment against the Pole Ledwon was filed by Parrisius as deputy for the defendant Lautz. The indictment was marked "Secret Treason Case", and bore the stamp of the Chief Public Prosecutor at the People's Court. A letter signed by Lautz bearing the same date was addressed to the presidents of the Second Senate of the People's Court and advises them that he is sending to the court the indictment in the case Ledwon. The indictment alleges that on 28 July 1941 the accused left his place of work in Bavaria and attempted to escape by crossing the Reich border, and that he was stopped by a customs official whom he struck with his fist while evading the arrest. The indictment states that the reason given by the defendant Ledwon for his attempt to escape from Germany "does not deserve credence; it may rather be assumed that he intended to join the Polish Legion organized on the side of the hostile powers". The indictment states that the defendant knew that the aim of the Polish Legion was to restore a Polish state. On the basis of the foregoing specific allegations, the indictment charges that the defendant prepared within Germany "(1) the highly treasonable enterprise to separate from the Reich by force a territory belonging to the Reich; (2) to have aided and abetted the enemy inside Germany during a war against the Reich, and thus, as a Pole, not to have behaved according to the German laws and to the directives of the German authorities; and (3) to have committed a violent attempt on a German official. * * *." The indictment was brought under the provisions of sections 80, 83, and 91b of the penal code, and under the provisions of the law against Poles and Jews. Section 80 provides for the imposition of the death penalty upon anyone attempting by violence or threat of violence to detach from the Reich territory belonging to the Reich. Section 83 provides for the punishment of any person who solicits and incites an undertaking of high treason. Section 91b provides for imprisonment or death for any person who undertakes acts in favor of the enemy powers or causes a detriment against the armed forces of the Reich. On 10 August 1942 the case was tried. The court found the following facts: defendant was a Pole who lived in Poland on 1 September 1939. (See: Law against Poles and Jews.) After the Polish campaign the defendant reported "voluntarily" for work in Germany and then tried to leave the country. The court states further that "the prosecution charges the defendant with the intention of going to Switzerland in order to join the Polish Legion there." It adds that the Polish Legion

was interned in Switzerland and that many Poles had been caught at the frontier, some of whom could be convicted of planning to join the Polish Legion in Switzerland. The court, with unwanted candor, states that "the trial did not show any concrete evidence that the defendant * * * had any knowledge of a Polish Legion in Switzerland." It held that due to lack of evidence "the defendant could not be convicted of the crime of preparation for treason and of treasonably aiding the enemy." The opinion of the People's Court continues (*NG–355, Pros. Ex. 128*):

> "The defendant is, however, guilty according to the result of the trial, of an offense under the ordinance relating to the administration of penal law for Poles, of 4 December 1941. The general conditions of this ordinance are fulfilled, as the defendant is, by origin, education, and sentiment, a racial Pole and was on 1 September 1939 resident in the former Polish State. In leaving his place of work as an agricultural laborer, of his own accord, at the end of July, i. e., during the harvest, he disturbed the orderly procedure of the harvest work of his employer to the detriment of the harvest. His action moreover was detrimental to the whole of the German people, for in leaving his place of work in order to go abroad he deprived the German people forever of his labor. Germany, in order to cover her war needs and to ensure food supplies for the front as well as for home, however, needs all persons employed, including foreigners. Every worker who by escape abroad deprives the German war economy for good of his labor, reduces the number of badly needed manpower, and thus endangers the interest of the German people."

The court held that it was irrelevant whether the Pole knocked the customs official down, because in any event he used force sufficient to prevent his arrest at the time. It observed that under the law against Poles and Jews "the only possible penalty is the death sentence, unless a less serious case can be made out in the defendant's favor. The senate was not able to recognize such case."

The opinion concludes as follows:

> "But by using violence against the customs officer who was going to arrest him and thus resisting the legal German authority, he has proved himself such a fanatical and violent Pole that he has forfeited any right for leniency. In view of the heavy responsibility of the Polish nation for the bloodshed caused during the weeks of August and September 1939, it is the duty of every member of this nation to obey willingly the rules of the German authorities. A Pole who, on the contrary,

uses violence against a German official can only be punished sufficiently by the highest degree of punishment. Accordingly, this has been imposed on the defendant."

The Pole was sentenced to death.

We are not here to retry the case. We may, therefore, ignore the ridiculous charge that the defendant desired to join an interned legion and the allegation that he came to the Reich "voluntarily" after the invasion of Poland. We have already discussed the essential evil in the practice of prosecutors whereby they charged that Poles were guilty of high treason by attempting to separate from the Reich territory which had never been legally annexed to the Reich. In the Ledwon case the sinister subtlety of the Nazi procedure is laid bare. If the case had been brought only under the law against Poles and Jews, the People's Court would not have had jurisdiction, so the defendant was charged with high treason for attempting to separate from the Reich, territory which did not belong to it. The proof of high treason failed. There remained only the charge that in attempting to escape from Germany and from forced labor there, the defendant assaulted a customs officer with his fist and that what he did was done as a Pole in violation of the law against Poles and Jews. It was under that discriminatory law that Ledwon was sentenced to death and executed. The defendant Lautz is guilty of participating in the national program of racial extermination of Poles by means of the perversion of the law of high treason.

In a similar case, upon an indictment signed by Parrisius and filed by authority of the defendant Lautz, the People's Court sentenced three Poles to death upon a charge of preparation of high treason "because they, as Poles, harmed the welfare of the German people, and because in a treasonable way they helped the enemy and also prepared for high treason." The specific facts found by the court were that the defendant Mazur and others attempted to cross the border into Switzerland for the purpose of joining the Polish Legion. By such conduct and by depriving the German Reich of the benefit of their labor, it was held that the efforts of the defendants aimed "at forcibly detaching the eastern regions incorporated in the Reich * * * from the German Reich." The opinion contains an illuminating passage concerning treason committed by attempting to join an interned legion. We quote (*NG–352, Pros. Ex. 129*):

"After the defeat of France in the present war, as is known to the senate (court) from other proceedings, detachments of the Polish Legion crossed the border into Switzerland and were interned in camps. The legion continues under the command of

Polish officers and is kept in readiness for military action against the Reich on the side of the enemy in the event of German troops invading Switzerland."

The evidence of intent to join the interned legion is paltry, but as before we will not attempt to retry the case on the facts. The court held that according to the law against Poles, the death sentence must be imposed. We quote:

"They wanted to deprive the German nation forever of their labor. Thus, they have damaged the welfare of the German nation. This is an offense under the ordinance on the administration of penal law against Poles. * * *

"The precept of the Regulation of Penal law against Poles applies to the defendant's offense, although it was committed before the regulation came into force for, according to article I of the Supplementary Regulation of 31 January 1942, the Regulation of Penal Law against Poles can be applied to offenses committed before the regulation was in force with the approval of the prosecutor. This approval has been given by the Reich Chief Prosecutor."

In another, the Kalicki case, the record of which is marked "Secret," three Poles were sentenced to death for preparation of high treason upon the same grounds as in the previous case. The court held that "the sentence to be pronounced has to be based on the ordinance concerning the administration of penal law against Poles, since this ordinance provides the heaviest penalty of all laws applicable to the case." The evidence does not disclose that the defendant Lautz personally signed the indictment, but it was certainly filed under his authority. The question of clemency in the Kalicki case was presented to the defendant Rothenberger. On 28 July 1943 he wrote:

"* * * I have decided upon authorization by the Fuehrer not to exercise my right of pardon but to let justice take its course."

The defendant Lautz filed an indictment against the Pole, Bratek. The specific charge was leaving his work in Germany and attempting to cross the border into Switzerland to join the Polish Legion. The general charge was the treasonable attempt to separate from the Reich an area belonging to the Reich and the violation of the law against Poles and Jews. The court said (*NG–595, Pros. Ex. 136*):

"At the same time he has made himself guilty of a crime according to Article I, paragraph 3, last half sentence, of the Ordinance on the Administration of Penal Law Against Poles, issued 4 December 1941. Because, being a Pole, he has inten-

tionally inflicted damage to the interests of the German people by malevolently leaving his important agricultural job, above all during harvest time, in September 1942, and by planning to rob the German people forever of his own labor by escaping abroad. * * *

"According to article 73, Penal Code, the penalty must be based on the ordinance concerning the administration of penal law against Poles which *loc. cit.* demands exclusively the death penalty as a rule, this being the most severe penal law applicable here."

A secret communication by the defendant Lautz to the Reich Minister of Justice is of especial interest. The proposal under consideration as for the prosecution of certain Poles upon the charge of high treason on account of acts done in Poland before the war. In his discussion Lautz quotes from Himmler, the Foreign Office, and the president of the People's Court. The facts on the basis of which opinions were expressed may be illustrated thus: Within Poland and before the war, a Pole institutes proceedings against a Polish citizen of German blood, charging the racial German with fifth column activities directed against Poland. During the war the Pole who instituted the prosecution against the racial German is captured. The question was: Can the Pole be prosecuted in a German court on a charge of high treason against the Reich, basing the charge on the fact that he had prosecuted the racial German in Poland? The German penal statute involved was section 91, paragraph 2, which provides that "whoever with the intention of causing a serious detriment to a national of the Reich, enters into relations as described in paragraph I shall be punished," in especially serious cases by death. Himmler, as quoted by Lautz, discusses the basis for punishment by German courts of "an offender who has caused racial Germans to be punished or otherwise prosecuted by Polish authorities." Himmler asserts that foreign police used methods against racial Germans which were contrary to international law and "the laws of minorities" and that such offenders deserve heavy punishment, but he also states that as far as racial Germans are concerned, section 91, paragraph 2, of the German Penal Code "is not directly applicable, as racial Germans, according to formal national laws were not German, but Polish, citizens. I can only express my opinion in the form of a suggestion, that in case of the betrayal of a racial German by the foreign Poles * * * section 91, paragraph 2, of the German Penal Code is to be applied * * *." (Citing decisions of the People's Court.) Himmler directly states that the provisions of section 91, paragraph 2, are "nonapplicable". We emphasize the fact that the question under discussion related to the proposed prosecution of

a Pole for acts committed before the war while Poland was in the exercise of its sovereign powers throughout its territory. The question could not well have related to acts done after Poland had been overrun and part of it purportedly annexed, for, at that time Polish authorities would have been in no position to prosecute racial Germans. Furthermore, in discussing the problem, Lautz mentions a case against the Pole Golek which had recently come into his hands on preliminary proceedings. He states that Golek in the years 1938 and 1939 in Poland had turned over to the police authorities a racial German of Polish nationality and had accused him of high treason committed in favor of the Reich.

Himmler, as quoted by Lautz, expressed the view that considerations of foreign policy would be opposed to the enactment of any German statute under which a Pole could be prosecuted by German authorities on account of acts of the kind indicated, but he added:

> "I see here a task for the courts, an opportunity to fill a gap in the law, a gap caused by political reasons of state by creating a law in the appropriate cases."

Himmler quoted from an opinion by the People's Court in which it was said that the National Socialist State "feels it incumbent on itself, even in case of a conspiracy by a foreign government against one single Reich citizen, to give the threatened person its protection in accordance with penal law as far as this is possible from the home country." It will be observed that this quotation relates to the protection of Reich citizens, not Polish citizens, who are only racial Germans. Himmler continued, however:

> "The Reich made no secret of the fact that with regard to the protection of Germans, it does not only claim the right to protect Reich Germans but also racial Germans living on its borders."

The defendant Lautz frankly expressed the view that the German statute defining treason did not cover the case under discussion. In this he was clearly correct. The German statute on treason had been extended to provide that "whoever with the intention of causing * * * any other serious detriment to the Reich, establishes relations with a foreign government, shall be punished by death." This section was not applicable to the case under discussion because the charge to be preferred against the Pole was one of treason against an individual and not against the Reich. By the law of 24 April 1934 the concept of treason was also expanded to cover certain cases of causing serious detriment to a German national, but that law also was inapplicable to the case under discussion because the serious detriment had not been

caused to a German national but only to a racial German. Insofar as the German statutes required punishment of acts done with the intention of causing serious detriment to a national of the Reich, they extended the concept of treason in a manner unknown to the criminal law of any civilized state, and this law was made applicable in occupied and purportedly annexed territory. Notwithstanding the extremes to which the German laws of treason were extended, the defendant Lautz stated that he agreed with the Reich Leader SS and the president of the People's Court that a direct application of the German law of treason protects only German nationals and does not apply to racial Germans. He then stated:

> "Furthermore, I concur with the conception that the general political development which has meanwhile come about, particularly during the last years, which has enabled the Reich largely to protect its racial members of foreign nationality to a greater extent than it has been possible hitherto, must be borne in mind in this particular instance. Therefore, I find it necessary, on principle, to protect by means of the German penal code those racial Germans who have seriously suffered through action such as mentioned in paragraph 92, subparagraph 2, of the Penal Code, provided that action deserves punishment in accordance with sound German sentiment, but where such punishment, considering the elements of wrongdoing of that particular case, cannot be brought home on the strength of any other directly applicable penal regulation."

In conclusion the defendant Lautz stated that in the majority of cases which have been committed by foreign nationals abroad against racial Germans he would "have to report in each individual case."

Stated in plain language, Lautz proposed that the courts should try and convict Poles for acts which violated no statute of any kind, if they deserved punishment according to sound German sentiment. This proposal violates every concept of justice and fair play wherever enforced, but when applied against a Pole for an act done in his own country in time of peace, the proposition becomes a monument to Nazi arrogance and criminality. Such a Pole owed no duty of loyalty to any state except Poland and was subject to the criminal jurisdiction of no state but Poland. The prosecution of the Pole Golek would constitute a palpable violation of the laws of war (see: citations to the Hague Convention, *supra*), and any official participating in such a proceeding would be guilty of a war crime under C. C. Law 10. The document discloses that cases similar to that of Golek had been tried by the People's Court and that more prosecutions were expected in the future. As a

witness, the defendant Lautz testified that "in several individual cases a decision had to be obtained from the minister." We are justified in believing that Lautz' expectations were fulfilled and that he participated in the prosecution of Golek and in similar cases.

We have cited a few cases which are typical of the activities of the prosecution before the People's Court in innumerable cases. The captured documents which are in evidence establish that the defendant Lautz was criminally implicated in enforcing the law against Poles and Jews which we deem to be a part of the established governmental plan for the extermination of those races. He was an accessory to, and took a consenting part in, the crime of genocide.

He is likewise guilty of a violation of the laws and customs of war in connection with prosecutions under the Nacht und Nebel decree, and he participated in the perversion of the laws relating to treason and high treason under which Poles guilty of petty offenses were executed. The proof of his guilt is not, however, dependent solely on captured documents or the testimony of prosecution witnesses. He is convicted on the basis of his own sworn statements. Defendant is entitled to respect for his honesty, but we cannot disregard his incriminating admissions merely because we respect him for making them.

There is much to be said in mitigation of punishment. Lautz was not active in Party matters. He resisted all efforts of Party officials to influence his conduct but yielded to influence and guidance from Hitler through the Reich Ministry of Justice, believing that to be required under German law. He was a stern man and a relentless prosecutor, but it may be said in his favor that if German law were a defense, which it is not, many of his acts would be excusable.

We find the defendant Lautz guilty as charged upon counts two and three of the indictment.

THE DEFENDANT METTGENBERG

By his own sworn statement the defendant Wolfgang Mettgenberg frankly and fully admits his connection with the Hitler Night and Fog decree. His statements show that he exercised wide discretion and had extensive authority over the entire plan from the time the Night and Fog prisoner was arrested in occupied territory and continuously after his transfer to Germany, his trial, and execution or imprisonment.

We will not reiterate the statements made by him in his sworn statement and hereinabove quoted. Suffice it to say that Mettgenberg held the position of Ministerialdirigent in Departments III

and IV of the Reich Ministry of Justice. In Department III, for penal legislation, he dealt with international law, formulating secret, general, and circular directives. He was regarded as an eminent authority on international law. He handled Night and Fog cases and knew the purpose and procedure in such cases. He knew that the decree was based upon the Fuehrer's order of 7 December 1941 to the OKW. He knew that an agreement existed between the Gestapo, the Reich Ministry of Justice, the Party Chancellery, and the OKW with respect to the purposes of the Night and Fog decree and the manner in which such matters were to be handled.

The defendant von Ammon was Ministerial Councillor in Mettgenberg's subdivision and was in charge of the Night and Fog section as shown in this judgment. The two acted together on doubtful matters and referred difficult questions to competent officials in the Reich Ministry of Justice and the Party Chancellery, since both of these offices had to give their "agreement" in cases of malicious attacks upon the Reich or Nazi Party or in the Night and Fog cases. The NN cases came from the Wehrmacht but in some cases directly from the Gestapo. These cases were assigned to Special Courts at several places in Germany and to the People's Court at Berlin by defendant von Ammon. Mettgenberg and von Ammon were sent to the Netherlands occupied territory because some German courts set up there were receiving Night and Fog cases in violation of the decree that they should be transferred to Germany. They held a conference at The Hague with the highest military justice authority and the heads of the German courts in the Netherlands, which resulted in a reference of the matter to the OKW at Berlin which agreed with Mettgenberg and von Ammon that "the same procedure should be used in the Netherlands as in other occupied territories, that is, that all Night and Fog matters should be transferred to Germany."

In Department IV for penal administration, Mettgenberg's work consisted of inspecting execution equipment. He witnessed one execution in 1944. He was entrusted with speeding up clemency applications because prisoners were escaping during air raids. Reich Minister Thierack called the defendant, Rothenberger, Under State Secretary, by telephone at Berlin and instructed him to make decisions concerning the clemency in death sentence cases presented by defendant Mettgenberg who made "reports lasting hours," and then Rothenberger made the decisions.

The evidence does not positively show that clemency cases presented by Mettgenberg and passed upon by Rothenberger were NN cases. We think, however, that the only conclusion that can be reached from Mettgenberg's testimony during the trial is that Rothenberger passed upon all clemency matters presented to him

by Mettgenberg which included NN cases. Mettgenberg stated that he was appointed to speed up clemency matters due to air raids and that he took the matter up with the Reich Minister of Justice, Thierack, who at the time called Rothenberger on the telephone and told him to receive and pass upon the clemency matters submitted. Mettgenberg testified that he did present clemency matters to Rothenberger by telephone conversations which lasted for several hours and that Rothenberger then made the decisions.

The defendant Mettgenberg assumed the burden of defending the illegality of the Night and Fog proceedings under the Ministry of Justice not only for himself but for all defendants connected therewith. He prefaced this defense with the following statement:

> "Today I am still of the view which I expressed in my affidavit. My view is that it was regrettable because the courts, in these matters, could not completely do justice to their foremost task, the finding of the truth. Now that I believe I have heard everything and believe myself to be able to survey the whole matter, I have to say that as concerns the various evils between which one had to choose, a transfer of the NN cases to the administration of justice was, after all, the lesser evil, so that this emergency solution which was made was probably the only possible solution." (*Tr. pp. 6269–6270.*)

With respect to the legal foundation for the NN cases, three laws or decrees are presented as justifying the proceedings. The first is article 161 of the Military Penal Code which dates back to the 1870's and which, as amended, provides:

> "A foreigner or a German who, in a foreign territory occupied by German troops, acts against German troops or their members or against an authority established by order of the Fuehrer and thereby commits an act which is punishable according to the laws of the Reich, is to be punished, just as if that act would have been committed by him within the territory of the Reich."

Whether this law violates international law of war need not be determined here because the defendants did not act under it in the execution and enforcement of the Hitler Night and Fog decree. Nor does this law authorize the execution and enforcement of any such decree.

The second legal ground presented is article 3, section 2 of the Code of Penal Procedure of 17 August 1938 which provides for the punishment of criminal acts committed in the areas of military operations in occupied territory by foreigners or Germans and further provides that:

"If a requirement of warfare demands it, * * * they may turn over the prosecution to the ordinary courts in the rear army area."

There can be no criticism of this law. It was not applied in any respect in the Night and Fog cases; hence, it constitutes no defense for the manner in which the Night and Fog decree was carried out.

The third legal foundation for the proceeding is based upon the claim that the Hitler decree of 7 December 1941 was a legal regulation for the handling of offenses against the Reich or against the occupation forces of the German Army in occupied areas. With respect to this decree we are convinced that it has no legal basis either under the international law of warfare or under the international common law as recognized by all civilized nations as heretofore set out in this judgment.

The defendant Mettgenberg referred to and approved the testimony of the defendant Schlegelberger which states "that the NN prisoners were expected to be, and were, tried materially according to the same regulations which would have been applied to them by the courts martial in the occupied territories" and that, accordingly, "the rules of procedure had been curtailed to the utmost extent." This court martial procedure was shown to have been used in the prosecution of NN persons who had been charged with high treason or preparation of treason against the Reich.

Mettgenberg testified as to the troubles the department had with the Gestapo because the Gestapo insisted that they had already investigated the facts as to each NN prisoner and that these facts should be accepted without further trial. This practice was not acceptable to the Ministry of Justice. As to other difficulties in securing proper evidence, Mettgenberg testified:

"Even though investigations were first of all carried out in the occupied territories before the NN prisoners were transferred to Germany, yet it was a matter of course that that evidence was not always without gaps."

These "gaps" in the evidence were shown by [NG–261 and NG–264] Prosecution Exhibits 334 and 335 in which the public prosecutor at Katowice complained of the difficulty of securing sufficient proof due to the utter secrecy of the proceedings. The Gestapo alone presented the evidence by "rather dubious police transcripts" and "such police records occasionally had been obtained by inadmissible means." Mettgenberg testified that defendant von Ammon made an official trip to Upper Silesia to discuss these matters with the chief judge in Belgium and northern France "to remedy that state of affairs." This action did not take place

until 30 June 1944, which was only a few months before the Night and Fog matters were taken out of the hands of the Ministry of Justice, and all prisoners then held by the Ministry of Justice were transferred to the Gestapo to be placed in concentration camps.

Mettgenberg also testified to the difficulties experienced with the Gestapo arising out of the fact that the Gestapo transferred many of these prisoners directly to concentration camps and thereby retained control over them. Nothing was done about the fact that the police took the NN prisoners into police custody and retained them in police custody.

We find defendant Mettgenberg to be guilty under counts two and three of the indictment. The evidence shows beyond a reasonable doubt that he acted as a principal, aided, abetted, and was connected with the execution and carrying out of the Hitler Night and Fog decree in violation of numerous principles of international law, as has been heretofore pointed out in this judgment.

THE DEFENDANT VON AMMON

From his own sworn statements we gain the following information concerning the defendant von Ammon. He joined the SA in December 1933, in which organization he held the rank of Scharfuehrer. He joined the NSDAP in May 1937. He was called to the Reich Ministry of Justice as of 1 January 1935, became a Landgerichtsrat on 1 February 1935, and Landgerichtsdirektor on 1 July 1937. His main activity in the Ministry during that period concerned "questions of international legal usage in penal matters."

After the Austrian Anschluss he was employed as liaison officer of Department III (penal matters) in connection with Department VIII (Austria), in the Reich Ministry of Justice. He was consultant in the department for the administration of penal law under Ministerialdirektor Crohne. He was transferred to the Munich Court of Appeals as Oberlandesgerichtsrat where he served until June 1940, at which time he was recalled to the Reich Ministry of Justice. As of 1 March 1943 he was appointed Ministerial Counsellor in the Ministry of Justice. He states (*NG–852, Pros. Ex. 55*):

> "From 1942 onward I dealt mainly with Nacht und Nebel cases in the occupied territories. In my capacity as consultant for Nacht und Nebel cases I made several duty trips to the occupied territories and took part in discussions in Paris and Holland which dealt with questions of Nacht und Nebel proceedings."

The broad scope and the variety of the official activities of von Ammon may be illustrated by reference to reports which he made to officials of the Ministry of Justice during the year 1944. On 14 January 1944 he reported at the Ministry upon "jurisdiction of Denmark". On 10 February he reported to the minister on "Competence for Prosecution of NN Cases." On 31 May, under the heading "Submissions to the State Secretary" (Klemm), he reported on "Action Against Stateless Jews, Admission of Legal Procedure." Under the heading "Reports to the State Secretary" for 21 June 1944, he reported on "Pastoral Service for NN Prisoners", after which in handwriting appears the word "rejection". Under the heading "Submissions to the Minister" for 26 July, he reported on "Proceedings of State Police in Lower Styria." Under the heading "Reports to the Ministers" of 5 October, he reported on "Taking Over of Criminal Proceedings from the Eastern Districts." Under the heading "Formal Verbal Reports to the Minister" of 3 November 1944, he reported on "Liquidation of Offenses from the Eastern Territories." On 10 January 1945 it appears that he made a verbal report on the "Taking Over Administration of Penal Justice of the Minister for the East."

The prosecution introduced in evidence a captured document of 142 pages in length, containing lists of many hundreds of death sentences which were submitted to the Minister of Justice and at times to State Secretary Klemm for final disposition. The cases were classified as "clear" or as "doubtful." The former, "clear," outnumbered the latter. An examination of the document discloses that between 14 January 1944 and 16 November of the same year the defendant von Ammon made twenty-four reports on cases in which persons from the occupied territories had been sentenced to death under the Nacht und Nebel procedure. The death sentences averaged more than one for every 3 days of the entire period.

In a notice addressed to Under Secretary Rothenberger, and to Minister Thierack, von Ammon reported that on 1 September 1942, in Kiel, Essen, and Cologne cases were pending against 1,456 persons charged under the Night and Fog decree.

In view of the fact that von Ammon was in charge of Nacht und Nebel procedure from 1942 until the end of the war, it is clear that we have in evidence only incomplete records of the activities of this defendant in connection with the Night and Fog decree. The fragmentary character of the captured documents which have been submitted renders it impossible to give a complete picture of this criminal activity. The illustrations which we have given and which cover only a portion of the time involved will, however, serve as an indication of the scope of the activities which were

under the direction of the defendants Mettgenberg and von Ammon. Von Ammon also participated in a lengthy secret correspondence concerning the transfer of NN cases to the Special Court at Oppeln and the necessity of allocating additional judges and public prosecutors to that court in view of the resultant increase in the volume of work.

The defendant von Ammon held an executive position of responsibility involving the exercise of personal discretion. Within the ministry he was in charge of the section which handled Night and Fog cases. The defendant Mettgenberg stated that the Night and Fog section within his subdivision was headed by von Ammon and that whenever von Ammon had doubts concerning the handling of individual cases joint discussions were held. We quote:

"When he had no doubts he could decide on matters himself."

We have already set forth at length the statement of von Ammon concerning his knowledge and activities and his misgivings concerning the entire procedure. The defendants von Ammon and Mettgenberg were the representatives of the Reich Ministry of Justice at a conference at The Hague on 2 November 1943 concerning "New Regulations for Dealing with Night and Fog Cases from the Netherlands". Von Ammon states that assurance was given by Mettgenberg and himself that close connection would be maintained between the judicial authorities at Essen and the German authorities in the Netherlands in the handling of NN cases. We have already quoted a note signed by von Ammon wherein he remarked that it was "rather awkward" that the defendants should learn the details of their charges only during the trial and commented on the insufficiency of the translation facilities in the trial of French NN prisoners. Von Ammon is chargeable with actual knowledge concerning the systematic abuse of the judicial process in these cases.

In respect to his other activities we refer to our general discussion under the heading "Night and Fog." We find the defendant von Ammon guilty of war crimes and crimes against humanity under counts two and three of the indictment.

THE DEFENDANT JOEL

The professional career of the defendant Guenther Joel in the Third Reich proceeded at the same pace as his career as a Party man; in fact, even before the war years his professional career merged with his career in Nazi organizations, and to be more precise, in the SS and the SD—the organization which the IMT judgment has declared to be criminal.

He became a member of the NSDAP on 1 May 1933 and entered the Ministry of Justice as a junior public prosecutor (Gerichts-

assessor) on 7 August 1933. In quick succession he became assistant public prosecutor (1 September 1933), public prosecutor (1 January 1934), senior public prosecutor (1 February 1935), and chief public prosecutor (1 November 1936).

Between August 1933 and October 1937, Joel was the chief of a newly created subdepartment of the Reich Ministry of Justice, the Central Public Prosecution (Zentralstaatsanwaltschaft). In October 1937 this subdepartment was dissolved, but the Reich Minister of Justice, Guertner, reserved the right to assign Joel as "Referent" for special cases and subsequently made use of this right. After the dissolution of the Central Public Prosecution, Joel worked as "Referent" in the Ministry's Penal Department III (later renumbered IV).

By a formal letter of appointment, dated 19 December 1937 and signed by Minister Guertner, Joel was, in addition to his other duties, appointed liaison officer between the Reich Ministry of Justice and the SS, including the SD, as well as the Gestapo. A few months later, namely, in a letter of 2 May 1938, signed by Heydrich, Joel was, effective 30 January 1938, admitted to the SS and, effective the same day, promoted to the rank of SS Untersturmfuehrer and given the position of leader (Fuehrer) in the SD Main Office (Security Service Main Office).

His SS personnel record shows how quickly he climbed to high positions in the SS and the SD: on 11 September 1938 he became SS Obersturmfuehrer; on 30 January 1939, SS Hauptsturmfuehrer; on 26 September 1940, SS Sturmbannfuehrer—holding all these ranks as leader in the SD Main Office.

The record shows that in his capacity as SS officer Joel was, between 2 and 8 May 1939, sent on an official mission for the Security Office (SD). An official letter from the Reich Leader of SS, Chief of the Security Service Main Office, dated 28 April 1939, so notified the Reich Minister of Justice. Again, on 4 July 1940, the Chief of the Security Police and the Security Service informed the Reich Ministry of Justice that Joel had been "put on the list of indispensable persons on behalf of the Reich Leader SS and Chief of the German Police," thereby reserving to the Security Police and the Security Service the indispensable service of Joel and freeing him from military service.

But in his answer, dated 11 July 1940, to this request, Freisler, Under Secretary of the Ministry of Justice, asked:

> "To refrain from calling upon SS Captain Joel, senior public prosecutor, for taking over duties for the Reich Leader SS and Chief of the German Police. Dr. Joel, as you know, is entrusted with extremely important reports at my ministry."

The nature of these reports will be later discussed.

On 1 May 1941 Joel was promoted to ministerial counsellor. He remained with the Reich Ministry of Justice until 12 May 1943.

The reason for his leaving the Ministry was that on 7 May 1943 he was appointed attorney general to supreme provincial court of appeals in Hamm (Westphalia). By letter dated Fuehrer Headquarters, 12 May 1943, Bormann, Chief of the Party Chancellery (sentenced to death in absentia by the IMT) personally confirmed his appointment. It should be added that a few weeks earlier, by letter of 13 March 1943 to Reich Minister of Justice, Thierack, the Gauleiter of Westphalia, Alfred Meyer, also formally endorsed Joel's appointment for attorney general at Hamm, in his own name and in the name of deputy Gauleiter Hoffmann, in charge of the administration of the Gau Westphalia-South.

Shortly after this new appointment, namely, as of 9 November 1943, Joel was promoted to the high rank of SS Obersturmbannfuehrer, which appointment was approved by Himmler. His political and Party career went hand in hand with his professional career, and his promotions were made by or approved by such high ranking Nazi officials as Himmler, Bormann, Heydrich, Thierack, and Freisler—whose desperate and despicable characters are known to the world; the record in this case is replete with many atrocities and crimes committed by these leaders and members of organizations which have been declared criminal by the IMT. Thus, Joel continued to the end as the confidant and trusted protegé of these most outstanding and notorious criminals of all time.

It will be remembered that ever since December 1937, Joel in his several capacities at the Ministry of Justice had, in addition to his other duties, acted as liaison officer between the ministry and the SS, the SD, and the Gestapo. To this position a successor, Chief Public Prosecutor Franke, was appointed on 1 August 1943. Joel claims that in fact he had ceased to act as such liaison officer when Thierack assumed office as Reich Minister of Justice in August 1942. However, the record shows that even after that time Joel made numerous reports, some of which are mentioned below, relating to the execution of death penalties imposed under the law against Poles and Jews, and relating to the transfer of Poles who had received mild sentences, or had been acquitted, or had served their term, to the Gestapo. These were the very duties which he had to perform in the Reich Ministry as liaison officer. Even after Thierack's appointment as minister, Joel was connected with the interests of the Reich Security Office, and his work was productive and satisfactory in the carrying out of the plan or scheme of racial persecution and extermination of Poles

and Jews. On 17 August 1943, defendant Rothenberger inducted defendant Joel into his office as general public prosecutor at Hamm, praised him in the highest terms, and referred to him as an SS member and also to his rank of SS Obersturmbannfuehrer. As late as 1945, when the question of military service for Joel again arose, Gauleiter Hoffmann of South Westphalia intervened in a letter to the Reich Ministry of Justice, referring to the fact that Joel was known to be a member of the Waffen SS, and that if he were to go into military service he would undoubtedly be assigned to the SS activities.

Under our discussion of the Night and Fog decree, reference is made to several documents which show Joel as having aided, abetted, participated in, and having been connected with, the Night and Fog scheme or plan.

Rudolf Lehmann, lieutenant general of the legal department of the armed forces, stated under oath:

> "These cases were, as I seem to remember, handled by von Ammon, also of that same division of the Reich Ministry of Justice. General Public Prosecutor Joel, who was in the Ministry of Justice until sometime in 1943, would be able to supply further details on this 'Nacht und Nebel' matter. Joel was general public prosecutor in Hamm, and a court handling 'Nacht und Nebel' cases was located at Hamm. Other courts handling 'Nacht und Nebel' cases were located at Cologne, Breslau, and at one or two other places unknown to me but which can be named by Joel."

Joel became chief prosecutor of the court of appeals in Hamm, covering all of Westphalia and the district of Essen, on 17 August 1943, which office he continued to hold until the end of the war. In this position he was in charge of the Night and Fog program for the Special Courts in Hamm and Essen until 15 March 1944 when these courts were transferred farther east to Oppeln in the Katowice district. Reports of Joel show that he attended conferences both in Hamm and in Belgium on Night and Fog matters. The record also shows that the district of which he was the highest, and therefore the most responsible, prosecuting authority was, in area and population, one of the largest in Germany. He had under his supervision the senior public prosecutors and their staffs at the Special Courts at Hamm and in Essen. It was his task to supervise the work of all prosecutors assigned to his office. The Special Courts in Hamm and Essen tried more Night and Fog cases than the combined total of all other Special Courts and the People's Court. In law, Joel must be held to have had the responsibility of these cases. The record further shows that Joel assumed this responsibility.

A letter addressed to Joel, dated 20 January 1944, stated that in the future all Night and Fog persons who were upon trial acquitted or who had served their sentences, must be turned over for custody to the Gestapo.

A letter dated 26 January 1944 from Joel to the Reich Minister of Justice complained about the delay which the defendant Lautz, chief prosecutor at the People's Court, caused by his failure to return files in NN cases. Joel pointed out that 84 Night and Fog prisoners who had been held near Hamm since 1941 were still there.

In November 1943 defendants von Ammon and Mettgenberg came to Hamm enroute back to Berlin from the conferences they had attended in Holland. The purpose of their visit to Joel was to determine whether there was any available space in prison for the keeping of additional Night and Fog prisoners to be transported from the Netherlands. Joel assured them that more prisoners could be accommodated and even opposed the view of his Oberlandesgericht who stated they should not be sent to the Hamm area. They were sent to that area. In December 1943 Joel attended a conference in Brussels which he reported upon after his return to Hamm, pertaining to Night and Fog prisoners who were sent from Belgium.

The categorical denial of Joel of ever having transferred an NN prisoner or of ever having tried an NN prisoner or of ever having issued an order to transfer an NN prisoner who had been acquitted or who had served his sentence, to Gestapo custody is no defense of his activities in connection with the custody, trial, execution, or transfer of NN prisoners after they had served their sentences or had been acquitted to the Gestapo.

The high office which he held required him to supervise and properly handle Night and Fog cases filed in the courts where he was chief prosecutor. He had numerous assistants whom he necessarily had to entrust with the prosecution and carrying out of the Night and Fog program and cases arising thereunder. The fact that Joel did not actually try the Night and Fog cases himself has no significance. He did supervise the men who tried and had executed some of them and imprisoned others and transferred others who were not guilty of any crime or who had served their sentence, to the Gestapo and concentration camps.

The defendant Joel is chargeable with knowledge that the Night and Fog program from its inception to its final conclusion constituted a violation of the laws and customs of war.

We turn now to the other activities here under indictment of the defendant Joel.

We direct attention to a document from the Reich Ministry of Justice which contains the program for conferences among the officials of the Ministry. In each instance the name of the official who is to report is set opposite the subject for discussion. From this we gain some information as to the scope of the work assigned to Joel.

According to this program Joel was scheduled to report upon the following subjects. We quote:

"Nullification plea, Maslanka.

"Nullification plea, Beyer Bosich (Italian) article 4, VVO.

"Matter of clemency Pongratz (70 year old farmer, non-delivery).

"Handing-over of Poles to the State Police (cases Bartosinski and Marcziniak).

"Lenzinger Zoowoll AG (Lenzinger Artificial Wool, Ltd.).

"Treatment of Jews and Poles, as well as Russians. Internal order of the Reich Leader SS.

"Bartosinski, Pole, shall be transferred from criminal custody (3 years' penal camp on account of sexual intercourse) to State Police.

"Marasyak, Pole, wanted to marry German maid in France. Detention pending investigation. State Police demands him turned in.

"Should there be any reports during the war on the question of mercy for Poles who have been sentenced to death on account of the possession of weapons and other offenses and who have been pardoned to 5 years' penal servitude with the reserve of an investigation after 2 to 3 years?

"Extortion of food ration cards, Mrs. Ritter. Chorlow, Russian from the district of Kursk, article 2, VVO. State Police wants to punish with police measures.

"Jakubowski, Pole, has raped German woman. He has been executed by hanging. The criminal police asks for a burial certificate.

"Uschako, workman, from the East, from old Soviet Russian territory, has stolen a jacket. The Secret State Police sent him to a labor education camp and requests cancelation of the order to inflict 1-month imprisonment."

Another significant incident relates to the case of two "deserving National Socialists." Our source of knowledge is a brief document signed by the defendant Joel. The facts stated are that a policeman and a temporary mayor "shot two Polish priests for no reason other than hatred for the Catholic clergy." On 11 June 1940, the two murderers were sentenced to 15 years' penal servitude for manslaughter. Joel states that more than 2 years of the

sentence had been served and that the Reich Leader SS asked for pardon. The document concludes as follows:

"Penal servitude changed to 5 years' imprisonment each. Postponement of the serving of the sentence and of the defamatory consequences for the duration of stay in a Waffen SS probation unit. Further pardon in the case of the probation. (Signed) Dr. Joel"

As early as 1937 it is clear that Joel had knowledge of conditions in concentration camps. A document marked "For the time of circulation: Secret! to III–a: After circulation in sealed envelope to the Gestapo general files", contains the following:

"2. As far as reports concerning executions when escaping from concentration camps, etc., suicides in K.Z.'s (concentration camps) arrive, they shall continue to be dealt with by the specialist competent for the respective subject. The general consultant for political criminal matters, however, is to be informed of the reports. They are to be submitted to him [at] once."

This order was circulated to all specialists for political criminal matters. Joel was listed as a political specialist.

An official report on a meeting of the presidential board of 1 February 1939 shows that a report was given by the Chief Public Prosecutor on developments in connection with the events of 9 to 11 November 1938 (the Jewish pogrom). We quote:

"The Reich Minister of Justice and Senior Public Prosecutor Joel pointed out that it was impossible, of course, to handle this matter in the usual judicial manner; if the top men disregarded legal principles, it was impossible to prosecute people concerned with the execution. For instance, the viewpoint of violation of the public peace should be dropped. This is legally justified *inter alia* by the fact that the culprits were not conscious of any violation, since they were acting under orders. As far as the criminal offenses committed on that occasion are concerned, trifles should be dropped. Otherwise, however, proceedings can only be quashed by the Fuehrer, whereas serious criminal offenses such as rape and race defilement must be prosecuted. The order to prosecute is issued in any case by the minister after the culprits, if they are members of the Party or of any organization, have been excluded by a special department of the Supreme Party Tribunal in Berlin."

It is self-evident that if prosecution was to take place only after a Party tribunal had excluded them, they would live a long and happy life of freedom.

Defendant Joel became a Referent in the Reich Ministry of Justice with authority and duty to review penal cases from the

Incorporated Eastern Territories after the occupation of Poland. In this capacity he handled many of the cases tried pursuant to the decree against Poles and Jews. In defense of these acts, Joel testified that "he felt obligated by the existing laws and so complied with them." Joel did not have the same view as other officials that after the surrender of the Polish nation the nationals of the annexed part of Poland became German nationals. He testified that such a Polish citizen after 1 September 1939 remained a Polish national and that "a Polish national is never a German." Joel frankly admitted that he knew he was not dealing with Germans but with foreign nationals.

In his capacity as Referent for the Incorporated Eastern Territories Joel, as liaison officer between the Reich Ministry of Justice and the Gestapo, took part in conferences with others from Department IV concerning the disposition of such Jewish and Polish cases. In one instance he reported having discussed an order of Himmler's as to the treatment Poles and Jews should receive. In another instance he reported ordering the transfer of Poles who had been sentenced to a penal camp for 3 years to the Gestapo.

As a witness, Schlegelberger testified concerning transfers to the police, which he described as "a very sad chapter for anyone who has a sense of justice." Guertner protested against this procedure and made compilations of press reports concerning executions by the police.

> "Lammers actually submitted these compilations to Hitler but told Guertner later Hitler had said that he had not given a general directive to carry out these shootings, but in individual cases he could not do without these measures because the courts, that was military courts as well as civil courts, were not able to take care of the special conditions as created by the war. And, Lammers at the same time announced that Hitler in a further case had already ordered the execution by shooting."

Schlegelberger testified further that after an order had been made for the transfer of a prisoner to the police, there was a time limit of 24 hours, at the end of which the police were required to report that the order had been executed. Schlegelberger states that Guertner charged the defendant Joel with the mission of representing the Ministry of Justice with the police in connection with these transfers. It appears that the Ministry of Justice, through Joel, was able to intervene in some cases and to prevent the transfers. Schlegelberger testified:

> "* * * the attempts to intervene on the part of the Ministry of Justice were successful in some cases but, if all possibilities had been exhausted, and if in spite of that he had

not succeeded in having the order issued by the police withdrawn, nothing was left but to issue the instructions to the executing authority not to offer any resistance but to hand the man over to the police when they requested him."

Notwithstanding the reluctance with which the officials of the Ministry of Justice acted, it appears from the foregoing that they did cooperate in the transfer of prisoners to the police.

From 10 September 1942 to March 1943, Joel reviewed 105 death sentences passed by courts in the Incorporated Eastern Territories and in most cases gave final authorization for their execution.

In his capacity as such Referent, Joel reviewed and passed upon 16 death sentences of Poles who had committed alleged crimes against the Reich or the German occupation forces. One of these Poles was born in Cleveland, Ohio, in the United States, and his death sentence was commuted to life imprisonment because Joel was fearful his execution would involve the Reich in international complications. The remaining 15 Poles were executed.

As Referent, Joel was shown by captured official documents to have had knowledge that many Jewish and Polish political prisoners were being executed under the law against Jews and Poles. This matter was called to his attention because of a dispute as to who should handle the corpses of the executed prisoners. One main difficulty was that, under Himmler's orders, these corpses were to be turned over to the Secret Police for disposition. The mayor and police of Posen [Poznan] refused to handle the corpses of Poles and Jews who were not executed as political prisoners. Joel was thereupon instructed to handle the matter temporarily and to work out a permanent plan for such burials, which he later assisted in doing.

As Referent in the department of justice and as liaison officer between the department and the SS, Joel obtained extensive information and exercised far-reaching power in the execution of the law against Jews and Poles. He therefore took an active part in the execution of the plan or scheme for the persecution and extermination of Jews and Poles.

Concerning Joel's membership in the SS and SD, a consideration of all of the evidence convinces us beyond a reasonable doubt that he retained such membership with full knowledge of the criminal character of those organizations. No man who had his intimate contacts with the Reich Security Main Office, the SS, the SD, and the Gestapo could possibly have been in ignorance of the general character of those organizations.

We find defendant Joel guilty under counts two, three, and four.

THE DEFENDANT ROTHAUG

Oswald Rothaug was born 17 May 1897. His education was interrupted from 1916 to 1918 while he was in the army. He passed the final law examination in 1922 and the State examination for the higher administration of justice in 1925.

He joined the NSDAP in the spring of 1938 and the membership was made effective from May 1937.

Rothaug was a member of the National Socialist Jurists' League and the National Socialist Public Welfare Association. In his affidavit he denies belonging to the SD. However, the testimony of Elkar and his own admission on the witness stand establishes that he was an "honorary collaborator" for the SD on legal matters.

In December 1925 he began his career as a jurist, first as an assistant to an attorney in Ansbach and later as assistant judge at various courts. In 1927 he became public prosecutor in Hof in charge of criminal cases. From 1929 to 1933 he officiated as counsellor at the local court in Nuernberg. In June 1933 he became senior public prosecutor in the public prosecution in Nuernberg. Here he was the official in charge of general criminal cases, assistant of the Chief Public Prosecutor handling examination of suspensions of proceedings and of petitions for pardon. From November to April 1937 he officiated as counsellor of the district court in Schweinfurt. He was legal advisor in the civil and penal chamber and at the Court of Assizes, as well as chairman of the lay assessors' court. From April 1937 to May 1943 he was director of the district court in Nuernberg, except for a period in August and September of 1939 when he was in the Wehrmacht. During this time he was chairman of the Court of Assizes, of a penal chamber, and of the Special Court.

From May 1943 to April 1945 he was public prosecutor of the public prosecution at the People's Court in Berlin. Here, as head of Department I he handled for a time cases of high treason in the southern Reich territory, and from January 1944 cases concerning the undermining of public morale in the Reich territory.

Crimes charged in the indictment, as heretofore stated in this opinion, have been established by the evidence in this case. The questions, therefore, to be determined as to the defendant Rothaug are: first, whether he had knowledge of any crime so established; and second, whether he was a participant in or took a consenting part in its commission.

Rothaug's sources of knowledge have, with those of all the defendants, already been pointed out. But Rothaug's knowledge was not limited to those general sources. Rothaug was an official of considerable importance in Nuernberg. He had many political and official contacts; among these—he was the friend of Haberkern,

Gau inspector of the Gau Franconia; he was the friend and associate of Oeschey, Gau legal advisor for the Gau Franconia; and was himself Gauwalter of the Lawyers' League. He was the "honorary collaborator" for the SD. According to the witness Elkar, [he was] the agent of the SD for Nuernberg and vicinity, this position was more important than that of a confidential agent, and an honorary collaborator was active in SD affairs. He testifies that Rothaug took the SS oath of secrecy.

Whether Rothaug knew of all the aspects of the crimes alleged, we need not determine. He knew of crimes as established by the evidence, and it is the function of this Tribunal to determine his connection, if any, therewith.

The defendant is charged under counts two, three, and four of the indictment. Under count four he is charged with being a member of the Party Leadership Corps. He is not charged with membership in the SD. The proof as to count four establishes that he was Gauwalter of the Lawyers' League. The Lawyers' League was a formation of the Party and not a part of the Leadership Corps as determined by the International Military Tribunal in the case against Goering, et al.

As to counts two and four of the indictment, from the evidence submitted, the Tribunal finds the defendant not guilty. The question of the defendant's guilt as to count three of the indictment remains to be determined.

The evidence as to the character and activities of the defendant is voluminous. We shall confine ourselves to the question as to whether or not he took a consenting part in the plan for the persecution, oppression, and extermination of Poles and Jews.

His attitude of virulent hostility toward these races is proved from many sources and is in no wise shaken by the affidavits he has submitted on his own behalf.

The evidence in this regard comes from his own associates—the judges, prosecutors, defense counsel, medical experts, and others with whom he dealt. Among, but not limited to these, we cite the evidence of Doebig, Ferber, Bauer, Dorfmueller, Elkar, Engert, Groben, and Markl. In particular the testimony of Father Schosser is important. He testified as to many statements made by the defendant Rothaug during the trial of his own case, showing the defendant's hostility to Poles and his general attitude toward them. He stated that concerning the Poles in general, Rothaug expressed himself in the following manner:

> "If he (Rothaug) had his way, then no Pole would be buried in a German cemetery, and then he went on to make the remark which everybody heard in that courtroom—that he would get up from his coffin if there was a Pole being buried near to

him. Rothaug himself had to laugh because of this mean joke, and he went on to say, 'You have to be able to hate, because according to the Bible, God is a hating God.' "

The testimony of Elkar is even more significant. He testifies that Rothaug believed in severe measures against foreigners and particularly against Poles and Jews, whom he felt should be treated differently from German transgressors. Rothaug felt there was a gap in the law in this respect. He states that Rothaug asserted that in his own court he achieved this discrimination by interpretation of existing laws but that other courts failed to do so. Such a gap, according to Rothaug, should be closed by singling out Poles and Jews for special treatment. Elkar testifies that recommendations were made by the defendant Rothaug, through the witness, to higher levels and that the subsequent decree of 1941 against Poles and Jews conformed to Rothaug's ideas as expressed and forwarded by the witness Elkar through SD channels to the RSHA.

This animosity of the defendant to these races is further established by documents in this case which show that his discrimination against these races encompassed others who he felt lacked the necessary harshness to carry out the policy of the Nazi State and Party toward these people.

In this connection the communication of Oeschey to Deputy Gauleiter Holz, concerning Doebig, is worthy of note. In this communication many charges were made against Doebig for his failure to take action against officials under him who had failed to carry out the Nazi programs against Jews and Poles. Oeschey testified that these charges were copied from a letter submitted to him by the defendant Rothaug and that the defendant assumed responsibility for these charges. Rothaug denies that he assumed responsibility or had anything to do with the charges made, except in one immaterial instance. However, in the light of the circumstances themselves, the Tribunal accepts Oeschey's testimony in this regard, particularly in view of the unimpeached affidavit of Oeschey's secretary to the effect that these charges were copied directly by her from a letter of Rothaug's.

Documentary proof of Rothaug's attitude in this respect is further found in the records of cases tried by him which hereafter will be considered.

Proof as to his animus is not shaken by his own testimony. It is confirmed by his testimony. He states:

"In my view, by introduction of the question of the so-called incredibility of Poles, the whole problem is shifted onto another plane. It is a matter of course that a nation, which has been

subjected by another nation, and which is in a state of stress—that a citizen of such a country which had been subjected to another *vis-à-vis* the victorious nation, finds himself in quite a different moral-ethical relationship. It is useless to shut your eyes against reality. Of course, he finds himself in a different moral relationship from the relationship in which a German citizen would find himself. It is so natural there is no point in ignoring it. There is no need to lie."

His explanations as to his feeling toward Poles, given in connection with the Schosser arrest and trial are also most enlightening but too extensive to quote here.

Concerning his participation in the Nazi policy of persecution and extermination of persons of these races, we shall confine our discussions to three cases which were tried by Rothaug as presiding judge.

The first case to be considered is that of Durka and Struss. Our knowledge of this case is based primarily upon the evidence of Hans Kern, the defense counsel of one of these defendants; Hermann Markl, the prosecutor in the case; and the testimony of the defendant Rothaug.

The essential facts are in substance as follows: Two Polish girls—one, according to the testimony of Kern, 17 years of age, the other somewhat older—were accused of starting a fire in an armament plant in Bayreuth. This alleged fire did not do any material damage to the plant, but they were in the vicinity when it started and were arrested and interrogated by the Gestapo. Both gave alleged confessions to the Gestapo. Almost immediately following this occurrence, they were brought to Nuernberg by the Gestapo for trial before the Special Court.

Upon their arrival the prosecutor in the case, Markl, was directed to draw up an indictment based upon the Gestapo interrogation. This was at 11 o'clock of the day they were tried.

The witness Kern was summoned by the defendant Rothaug to act as defense counsel in the case approximately 2 hours before the case came to trial. He informed Rothaug that he would not have time to prepare a defense. According to Kern, Rothaug stated that if he did not take over the defense, the trial would have to be conducted without a defense counsel. According to Rothaug, he told Kern that he would get another defense counsel. In either event the trial was to go on at once.

The trial itself, according to Kern, lasted about half an hour; according to the defendant, approximately an hour; according to Markl, it was conducted with the speed of a court martial.

The evidence consisted of the alleged confessions which one of the defendants repudiated before the court. Rothaug states that

he thereupon called the Gestapo official who had obtained these alleged confessions and questioned him under oath. According to Rothaug the Gestapo official stated that the interrogations were perfectly regular. There was also a letter in evidence which it was said the defendants had tried to destroy before their capture. The witness Kern stated on cross-examination that this letter had little materiality.

The defendant attempts to justify the speed of this trial upon the legal requirements in existence at this time. He states, in contradiction to the other witnesses, that a clear case of sabotage was established. This Tribunal is not inclined to accept the defendant Rothaug's version of the facts which were established. Under the circumstances and in the brief period of the trial, the Tribunal does not believe the defendant could have established those facts from evidence.

According to the witness Kern, one of the defendants was 17 years of age. This assertion as to age was not disputed. A German 18 years of age or thereunder would have come under the German Juvenile Act and would not have been subject to trial before a Special Court or to capital punishment. Whatever the age of the defendants in this case, they were tried under the procedure described in the ordinance against Poles and Jews which was in effect at this time, by a judge who did not believe the statements of Polish defendants, according to the testimony in this case. These two young Polish women were sentenced to death and executed 4 days after trial. In the view of this Tribunal, based upon the evidence, these two young women did not have what amounted to a trial at all but were executed because they were Polish nationals in conformity with the Nazi plan of persecution and extermination.

The second case to be considered is the Lopata case. This was a case in which a young Polish farmhand, approximately 25 years of age, is alleged to have made indecent advances to his employer's wife.

He first was tried in the district court at Neumarkt. That court sentenced him to a term of 2 years in the penitentiary. A nullity plea was filed in this case before the Reich Supreme Court, and the Reich Supreme Court returned the case to the Special Court at Nuernberg for a new trial and sentence. The Reich Supreme Court stated that the judgment of the lower court was defective, since it did not discuss in detail whether the ordinance against public enemies was applicable and stated that if such ordinance were applicable—a thing which seemed probable, a much more severe sentence was deemed necessary.

The case was therefore again tried in violation of the funda-

mental principles of justice that no man should be tried twice for the same offense.

In the second trial of the case, the defendant Rothaug obligingly found that the ordinance against public enemies had been violated.

In its reasons, the court states the facts on which the verdict was based as follows:

> "The wife of farmer Schwenzl, together with the accused and a Polish girl, chopped straw in the barn. The accused was standing on the righthand side of the machine to carry out the work. Suddenly, in the middle of the work, the accused, without saying anything, touched with his hand the genitals of the wife of farmer Schwenzl, through her skirt. When she said, after this unexpected action of the defendant, 'You hog, do you think I am not disgusted about anything; you think you can do that because my husband is sick,' the accused laughed and in spite of this dissuasion touched again the genitals of the farmer's wife above her skirt. The wife of farmer Schwenzl slapped him after that. In spite of this, the accused continued with his impertinent behavior; for a third time he touched the genitals of the farmer's wife above the skirt.
>
> * * * * * * *
>
> "The accused did not make a complete confession. He states that he only once, for fun, touched the farmer's wife's genitals above the skirt.
>
> "The court is convinced, on account of the testimony given by the witness Therese Schwenzl, who makes a trustworthy impression, that the affair occurred exactly as described by the witness. Therefore, its findings were arrived at according to the testimony given by her."

The Polish woman who was present at the time of this alleged assault is not listed as a witness. Rothaug has stated in his testimony before this Court that he never had a Polish witness.

As for the reasons for bringing the defendant under the public enemy ordinance, the following facts are stated in the reasons for the verdict: Lopata having had some minor difficulties with the farmer Schwenzl refused to eat his noon meal and induced the Polish servant maid to do likewise. Thereupon, farmer Schwenzl, his employer, called him to account in the stable. The defendant put up resistance to the farmer's "admonitions" by arming himself with a dung fork. It is further stated that the Pole, at the threshold of the farm hallway, again turned against his employer and let him go only when attacked by the sheep dog which the farmer kept.

As to the actual reasons for the sentence of this Polish farmhand to death, the following paragraphs are more significant:

"Thus, the defendant gives the impression of a thoroughly degenerate personality, which is marked by excitability and a definite trend to mendacity, or to lying. The whole inferiority of the defendant, I would say, lies in the sphere of character and is obviously based on his being a part of Polish subhumanity, or in his belonging to Polish subhumanity.

"The drafting of men into the armed forces effected a heavy labor shortage in all spheres of life at home, last but not least in agriculture. To compensate this, Polish laborers, among others, had to be used to a large extent, mainly as farmhands.

"These men cannot be supervised by the authorities to such an extent as would be necessary due to their insubordinate and criminal disposition.

* * * * * * *

"The action of the defendant constitutes a considerable disturbance of the peace of the persons immediately concerned by his mean actions. The rural population has the right to expect that the strongest measures will be taken against such terrorization by foreign elements. But beyond disregarding the honor of the wife of farmer Schwenzl, the attack of the defendant is directed against the purity of the German blood. Looking at it from this point of view, the defendant showed such insubordination within the German living space that his action has to be considered as especially significant. * * *

"Accordingly, as outlined in article III, paragraph 2, second sentence of the ordinance against Poles and Jews, the crime of the defendant, which in connection with his other behavior shows a climax of unheard-of impudence, has to be considered as especially serious so that the death sentence had to be passed as the only just expiation, which is also necessary in the interest of the Reich security to deter Poles of similar mentality."

The defendant was sentenced under the ordinance against Poles and Jews in the Incorporated Eastern Territories. The verdict was signed by the defendant Rothaug, and an application for clemency was disapproved by him.

When on the witness stand, the defendant Rothaug was asked the following question by the court:

"* * * if Lopata had been a racial German, all other facts being the same as they were in the Lopata case, is it your judgment that the nullity plea would have been invoked and that the Supreme Court would have ordered the case sent back to you for another trial? I should like your opinion on that."

Rothaug replied as follows to this question:

"Mr. President, this question is very interesting, but I cannot even imagine that possibility even theoretically, because the very elements which are of the greatest importance could not be the same in the case of a German."

Lopata was sentenced to death and subsequently executed.

The third case to be considered is that of Leo Katzenberger. The record in this case shows that Lehmann Israel Katzenberger, commonly called Leo Katzenberger, was a merchant and head of the Jewish community in Nuernberg; that he was "sentenced to death for an offense under paragraph 2, legally identical with an offense under paragraph 4 of the decree against public enemies in connection with the offense of racial pollution." The trial was held in the public session on 13 March 1942. Katzenberger's age at that time was over 68 years.

The offense of racial pollution with which he was charged comes under article 2 of the Law for the Protection of German Blood and Honor. This section reads as follows:

"Sexual intercourse (except in marriage) between Jews and German nationals of German or German-related blood is forbidden."

The applicable sections of the Decree Against Public Enemies reads as follows:

"Section 2

"Crimes During Air Raids

"Whoever commits a crime or offense against the body, life, or property, taking advantage of air raid protection measures, is punishable by hard labor of up to 15 years, or for life, and in particularly severe cases, punishable by death.

* * * * * * *

"Section 4

"Exploitation of the State of War a Reason for More Severe Punishment

"Whoever commits a criminal act exploiting the extraordinary conditions caused by war is punishable beyond the regular punishment limits with hard labor of up to 15 years, or for life, or is punishable by death if the sound common sense of the people requires it on account of the crime being particularly despicable."

The evidence in this case, aside from the record, is based primarily upon the testimony of Hans Groben, the investigating

judge who first investigated the case; Hermann Markl, the official who prosecuted the case; Karl Ferber, who was one of the associate judges in the trial; Heinz Hoffmann, who was the other associate judge in the trial; Armin Baur, who was medical expert in the trial; Georg Engert, who dealt with clemency proceedings; and Otto Ankenbrand, another investigating judge.

The salient facts established in connection with this case are in substance as follows: Sometime in the first half of the year 1941 the witness Groben issued a warrant of arrest against Katzenberger, who was accused of having had intimate relations with the photographer Seiler. According to the results of the police inquiry, actual intercourse had not been proved, and Katzenberger denied the charge. Upon Groben's advice, Katzenberger agreed that he would not move against the warrant of arrest at that time but would await the results of further investigation. These further investigations were very lengthy, although Groben pressed the public prosecutor for speed. The police, in spite of their efforts, were unable to get further material evidence, and it became apparent that the way to clarify the situation was to take the sworn statement of Seiler, and this was done.

In her sworn statement she said that Katzenberger had known both her and her family for many years before she had come to Nuernberg and that his relationship to her was a friendly and fatherly one and denied the charge of sexual intercourse. The evidence also showed that Katzenberger had given Seiler financial assistance on various occasions and that he was administrator of the property where Seiler lived, which was owned by a firm of which he was a partner. Upon Seiler's statement, Groben informed Dr. Herz, counsel for Katzenberger, of the result and suggested that it was the right time to move against the warrant of arrest.

When this was done, Rothaug learned of it and ordered that the Katzenberger case be transferred from the criminal divisional court to the Special Court. The first indictment was withdrawn, and another indictment was prepared for the Special Court.

The witness Markl states that Rothaug dominated the prosecution, especially through his close friendship with the senior public prosecutor, Dr. Schroeder, who was the superior of Markl.

The indictment before the Special Court was prepared according to the orders of Rothaug, and Katzenberger was not charged only with race defilement in this new indictment, but there was also an additional charge under the decree against public enemies, which made the death sentence permissible. The new indictment also joined the Seiler woman on a charge of perjury. The effect of joining Seiler in the charge against Katzenberger was to preclude her from being a witness for the defendant, and such a

combination was contrary to established practice. Rothaug at this time told Markl that there was sufficient proof of sexual intercourse between Seiler and Katzenberger to convince him, and that he was prepared to condemn Katzenberger to death. Markl informed the Ministry of Justice of Rothaug's intended procedure against Katzenberger and was told that if Rothaug so desired it, the procedure would be approved.

Prior to the trial, the defendant Rothaug called on Dr. Armin Baur, medical counsellor for the Nuernberg Court, as the medical expert for the Katzenberger case. He stated to Baur that he wanted to pronounce a death sentence and that it was, therefore, necessary for the defendant to be examined. This examination, Rothaug stated, was a mere formality since Katzenberger "would be beheaded anyhow." To the doctor's reproach that Katzenberger was old, and it seemed questionable whether he could be charged with race defilement, Rothaug stated:

> "It is sufficient for me that the swine said that a German girl had sat upon his lap."

The trial itself, as testified to by many witnesses, was in the nature of a political demonstration. High Party officials attended, including Reich Inspector Oexle. Part of the group of Party officials appeared in uniform.

During the proceedings, Rothaug tried with all his power to encourage the witnesses to make incriminating statements against the defendants. Both defendants were hardly heard by the court. Their statements were passed over or disregarded. During the course of the trial, Rothaug took the opportunity to give the audience a National Socialist lecture on the subject of the Jewish question. The witnesses found great difficulty in giving testimony because of the way in which the trial was conducted, since Rothaug constantly anticipated the evaluation of the facts and gave expression to his own opinions.

Because of the way the trial was conducted, it was apparent that the sentence which would be imposed was the death sentence.

After the introduction of evidence was concluded, a recess was taken, during which time the prosecutor Markl appeared in the consultation room and Rothaug made it clear to him that he expected the prosecution to ask for a death sentence against Katzenberger and a term in the penitentiary for Seiler. Rothaug at this time also gave him suggestions as to what he should include in his arguments.

The reasons for the verdict were drawn up by Ferber. They were based upon the notes of Rothaug as to what should be included. Considerable space is given to Katzenberger's ancestry

and the fact that he was of the Mosaic faith, although that fact was admitted by Katzenberger. Such space is also given to the relationship between Katzenberger and Seiler. That there was no proof of actual sexual intercourse is clear from the opinion. The proof seems to have gone little farther than the fact that the defendant Seiler had at times sat upon Katzenberger's lap and that he had kissed her, which facts were also admitted. Many assumptions were made in the reasons stated which obviously are not borne out by the evidence. The court even goes back to the time prior to the passage of the law for the protection of German Blood and Honor, during which Katzenberger had known Seiler. It draws the conclusion apparently without evidence, that their relationship for a period of approximately 10 years, had always been of a sexual nature. The opinion undertakes to bring the case under the decision of the Reich Supreme Court that actual sexual intercourse need not be proved, provided the acts are sexual in nature.

Having wandered far afield from the proof to arrive at this conclusion as to the matter of racial pollution, the court then proceeds to go far afield in order to bring the case under the decree against public enemies. Here the essential facts proved were that the defendant Seiler's husband was at the front and that Katzenberger, on one or possibly two occasions, had visited her after dark. On both points the following paragraphs of the opinion are enlightening (*NG–154, Pros. Ex. 152*):

"Looked at from this point of view, Katzenberger's conduct is particularly contemptible. Together with his offense of racial pollution he is also guilty of an offense under paragraph 4 of the ordinance against people's parasites.* It should be noted here that the national community is in need of increased legal protection from all crimes attempting to destroy or undermine its inner cohesion.

"On several occasions since the outbreak of war the defendant Katzenberger crept into Seiler's flat after dark. In those cases the defendant exploited the measures taken for the protection in air raids. His chances were further improved by the absence of the bright street lighting which exists in the street along Spittlertorgraben in peacetime. He exploited this fact fully aware of its significance because thus he instinctively escaped during his excursions being observed by people in the street.

"The visits paid by Katzenberger to Seiler under the protection of the black-out served at least the purpose of keeping relations going. It does not matter whether during these visits

* Popular name for the decree against public enemies.

extra-marital sexual relations took place or whether they only conversed as when the husband was present, as Katzenberger claims. The request to interrogate the husband was therefore overruled. The court holds the view the defendant's actions, done with a purpose within a definite plan, amount to a crime against the body according to paragraph 2 of the ordinance against people's parasites. The law of 15 September 1935 has been passed to protect German blood and German honor. The Jew's racial pollution amounts to a grave attack on the purity of German blood, the object of the attack being the body of a German woman. The general need for protection therefore makes appear as unimportant the behavior of the other partner in racial pollution who anyway is not liable to prosecution. The fact that racial pollution occurred up to at least 1939–1940 becomes clear from statements made by the witness Zeuschel to whom the defendant repeatedly and consistently admitted that up to the end of 1939 and the beginning of 1940 she was used to sitting on the Jew's lap and exchanging caresses as described above.

"Thus, the defendant committed an offense also under paragraph 2 of the ordinance against people's parasites.

"The personal character of the male defendant also stamps him as a people's parasite. The racial pollution practiced by him through many years grew, by exploiting wartime conditions, into an attitude inimical to the nation, into an attack on the security of the national community, during an emergency.

"This was why the defendant Katzenberger had to be sentenced both on a charge of racial pollution and of an offense under paragraphs 2 and 4 of the ordinance against people's parasites, the two charges being taken in conjunction according to paragraph 73 of the criminal code.

* * * * * * *

"In passing sentence the court was guided by these considerations: The political life of the German people under national socialism is based on the community. One fundamental factor of the life of the national community is race. If a Jew commits racial pollution with a German woman, this amounts to polluting the German race and, by polluting a German woman, to a grave attack on the purity of German blood. The need for protection is particularly strong.

"Katzenberger has been practicing pollution for years. He was well acquainted with the point of view taken by patriotic German men and women as regards racial questions, and he knew that by this conduct he insulted the patriotic feelings of

the German people. Nor did he mend his ways after the National Socialist revolution of 1933, after the passing of the law for the protection of German blood, in 1935, after the action against Jews in 1938, or the outbreak of war in 1939.

"The court therefore regards it as indicated, as the only feasible answer to the frivolous conduct of the defendant, to pass death sentence, as the heaviest punishment provided by paragraph 4 of the decree against public enemies. His case takes on the complexion of a particularly grave crime as he was to be sentenced in connection with the offense of committing racial pollution, under paragraph 2 of the Decree Against Public Enemies, especially if one takes into consideration the defendant's character and the accumulative nature of commission. This is why the defendant is liable to the death penalty which the law provides for only such cases. Dr. Baur, the medical expert, describes the defendants fully responsible."

We have gone to some extent into the evidence of this case to show the nature of the proceedings and the animus of the defendant Rothaug. One undisputed fact, however, is sufficient to establish this case as being an act in furtherance of the Nazi program to persecute and exterminate Jews. That fact is that nobody but a Jew could have been tried for racial pollution. To this offense was added the charge that it was committed by Katzenberger through exploiting war conditions and the black-out. This brought the offense under the ordinance against public enemies and made the offense capital. Katzenberger was tried and executed only because he was a Jew. As stated by Elkar in his testimony, Rothaug achieved the final result by interpretations of existing laws as he boasted to Elkar he was able to do.

This Tribunal is not concerned with the legal incontestability under German law of these cases above discussed. The evidence establishes beyond a reasonable doubt that Katzenberger was condemned and executed because he was a Jew; and Durka, Struss, and Lopata met the same fate because they were Poles. Their execution was in conformity with the policy of the Nazi State of persecution, torture, and extermination of these races. The defendant Rothaug was the knowing and willing instrument in that program of persecution and extermination.

From the evidence it is clear that these trials lacked the essential elements of legality. In these cases the defendant's court, in spite of the legal sophistries which he employed, was merely an instrument in the program of the leaders of the Nazi State of persecution and extermination. That the number the defendant could wipe out within his competency was smaller than the number involved in the mass persecutions and exterminations by the

leaders whom he served, does not mitigate his contribution to the program of those leaders. His acts were more terrible in that those who might have hoped for a last refuge in the institutions of justice found these institutions turned against them and a part of the program of terror and oppression.

The individual cases in which Rothaug applied the cruel and discriminatory law against Poles and Jews cannot be considered in isolation. It is of the essence of the charges against him that he participated in the national program of racial persecution. It is of the essence of the proof that he identified himself with this national program and gave himself utterly to its accomplishment. He participated in the crime of genocide.

Again, in determining the degree of guilt the Tribunal has considered the entire record of his activities, not alone under the head of racial persecution but in other respects also. Despite protestations that his judgments were based solely upon evidence introduced in court, we are firmly convinced that in numberless cases Rothaug's opinions were formed and decisions made, and in many instances publicly or privately announced before the trial had even commenced and certainly before it was concluded. He was in constant contact with his confidential assistant Elkar, a member of the criminal SD, who sat with him in weekly conferences in the chambers of the court. He formed his opinions from dubious records submitted to him before trial. By his manner and methods he made his court an instrumentality of terror and won the fear and hatred of the population. From the evidence of his closest associates as well as his victims, we find that Oswald Rothaug represented in Germany the personification of the secret Nazi intrigue and cruelty. He was and is a sadistic and evil man. Under any civilized judicial system he could have been impeached and removed from office or convicted of malfeasance in office on account of the scheming malevolence with which he administered injustice.

Upon the evidence in this case it is the judgment of this Tribunal that the defendant Rothaug is guilty under count three of the indictment. In his case we find no mitigating circumstances; no extenuation.

THE DEFENDANT BARNICKEL

The evidence has not convinced the Tribunal beyond a reasonable doubt of the guilt of the defendant Barnickel. He is therefore acquitted on all counts.

THE DEFENDANT PETERSEN

Upon the evidence submitted, it is the judgment of this Tribunal

that the defendant Hans Petersen is not guilty under any of the counts charged against him in the indictment.

THE DEFENDANT NEBELUNG

Upon the evidence submitted, it is the judgment of this Tribunal that the defendant Nebelung is not guilty under any of the counts charged against him in the indictment.

THE DEFENDANT CUHORST

The defendant Cuhorst is charged under counts two, three, and four of the indictment.

There is no evidence in this case to substantiate the charge under count two of the indictment.

As to count four, the proof establishes that Cuhorst was a Gaustellenleiter and so a member of the Gau staff and a "sponsoring" member of the SS. His function as Gaustellenleiter was that of a public propaganda speaker.

In its judgment the International Military Tribunal, in defining the members of the Party Leadership Corps who came under its decision as being members of a criminal organization, states the following:

> "The decision of the Tribunal on these staff organizations includes only the Amtsleiter who were heads of offices on the staffs of the Reichsleitung, Gauleitung, and Kreisleitung. With respect to other staff officers and Party organizations attached to the Leadership Corps other than the Amtsleiter referred to above, the Tribunal will follow the suggestion of the prosecution in excluding them from the declaration."

There is no evidence in this case which shows that the office of Gaustellenleiter was the head of any office on the staff of the Gauleitung.

With regard to the SS the judgment of the International Military Tribunal is as follows:

> "The Tribunal declares to be criminal within the meaning of the Charter the group composed of those persons who had been officially accepted as members of the SS as enumerated in the preceding paragraph who became or remained members of the organization with knowledge that it was being used for the commission of acts declared criminal by Article 6 of the Charter * * *."*

Referring back to the membership enumerated, the judgment declares:

* Trial of the Major War Criminals, op. cit., volume I, page 273.

"In dealing with the SS, the Tribunal includes all persons who had been officially accepted as members of the SS, including the members of the Allgemeine SS, members of the Waffen SS, members of the SS Totenkopf-Verbaende, and the members of any of the different police forces who were members of the SS." *

It is not believed by this Tribunal that a sponsoring membership is included in this definition.

The Tribunal therefore finds the defendant Cuhorst not guilty under counts two and four of the indictment.

As to count three the problem is considerably more complicated. There are many affidavits and much testimony in the record as to the defendant's character as a fanatical Nazi and a ruthless judge. There is also much evidence as to the arbitrary, unfair, and unjudicial manner in which he conducted his trials. Some of the evidence against him was weakened on cross-examination, but the general picture given of him as such a judge is one which the Tribunal accepts.

The cases to be considered as connecting him with crimes established in this case under count three involve the question as to whether the evidence establishes his connection with the persecution of Poles. In this connection we have given particular consideration to the Skowron and Pietra cases.

Unfortunately the records of the Special Court at Stuttgart were destroyed at the time that the Palace of Justice in Stuttgart was burned. There are therefore no records available as to the cases tried by Cuhorst.

From the evidence available, this Tribunal does not consider that it can say beyond a reasonable doubt that the defendant was guilty of inflicting the punishments which he imposed on racial grounds or that it can say beyond a reasonable doubt that he used the discriminatory provisions of the decree against Poles and Jews to the prejudice of the Poles whom he tried.

While the defendant Cuhorst followed a misguided fanaticism, certain things can be said in his favor. He was severely criticized for his leniency by the defendant Klemm in a number of cases which he tried. He was tried by a Party court for statements considered to reflect upon the Party, which he made in a trial involving Party officials. Subsequently he was relieved as a judge in Stuttgart because he apparently did not conform to what the State and Party demanded of a judge.

This Tribunal does not consider itself commissioned to try the conscience of a man or to condemn a man merely for a course of conduct foreign to its own conception of the law, it is limited to

* Ibid.

the evidence before it as to the commission of certain alleged offenses. Upon the evidence before it, it is the judgment of this Tribunal that the defendant Cuhorst has not been proved guilty beyond a reasonable doubt of the crimes alleged and that he be, therefore, acquitted on the charges against him.

THE DEFENDANT OESCHEY

The defendant Oeschey joined the NSDAP on 1 December 1931. He was war representative for the Gau Main Office for legal aid and legal advice. After filling other offices he was appointed on 1 January 1939 to the office of senior judge of the district court at Nuernberg, which office he held until 1 April 1941. He was then appointed district court director at the same court. He was a presiding judge of the Special Court in Nuernberg.

By decree of 30 July 1940 of the Reich legal office of the NSDAP, he was provisionally commissioned with the direction of the legal office of the NSDAP in the Franconia Gau, and the leadership of the Franconia Gau in the NSRB, the National Socialist Lawyers' League. He carried out his duties in the Leadership Corps of the Party at the same time that he was serving as a judge of the Special Court. His personnel file in the Reich Ministry of Justice shows that he was highly recommended for his Party reliability by at least five different public officials.

He was drafted into the army in February 1945, and remained in the army until the end of the war; however, he was released for the period from 4 April until 14 April 1945, during which time he functioned as chairman of the civilian court martial at Nuernberg. The record discloses that he and the defendant Rothaug were the guiding, if not controlling, spirits of the Special Court at Neurnberg, which was known as the most brutal of the special courts in Germany.

Among many cases which gave evidence of his arbitrary character we will give detailed attention to two:

In March 1943, Sofie Kaminska, a widowed Polish farm laborer, and Wasyl Wdowen, a Ukrainian, were indicted before the Special Court at Nuernberg for alleged crimes as follows:

Kaminska for a violation of the law against Poles and Jews in connection with the crime of assault and battery and threat and resistance to an officer; Wdowen for the alleged crime of being accessory to a crime according to the law against Poles and Jews, and for attempting to free a prisoner. The case was tried before the Special Court, the defendant Oeschey presiding.

The facts on which the sentence was based may, with complete fairness to the defendant Oeschey, be very briefly summarized. Shortly after the invasion of Poland, Kaminska "came to Ger-

many, being committed to work there." Kaminska and Wdowen were lovers. They were both working for a farmer, Gundel. They demanded pay from Gundel, which was refused, and they became more insistent. "The defendant Wdowen actually gave the farmer a push." "In his distress Gundel called for help of the Pfc. Anton Wanner who was in uniform and happened to be spending his leave there." A quarrel followed. Kaminska slapped the soldier's face, and the soldier slapped her face. During the dispute the soldier's combat infantryman's badge fell to the ground. There were various demonstrations; the soldier drew his bayonet, and Kaminska ran out of the room and took a hoe, but did not get a chance to attack the soldier because he closed the door. Shortly thereafter, the soldier was riding on his bicycle and the Pole, Kaminska, threw a stone at him without, however, hitting him. The next day a police official came out to the farm and arrested Kaminska who followed him "unwillingly." Wdowen, contrary to the instructions of the police officer, followed them. The policeman slapped Wdowen's face twice to force him to turn back. Nevertheless, Wdowen followed to the door of the cell and attempted to assist the Polish woman, Kaminska, in resisting imprisonment. The very most that can possibly be said of the evidence, as stated by the defendant Oeschey himself, is that there was a good squabble with mutual recriminations and threats. It is to be understood that many of the statements heretofore made, as quoted from the opinion, were denied by the defendants in that case but, as before stated, we do not retry the case upon the facts. The court argues at great length concerning the claim of the prosecution that the stone weighed a half a pound and should be considered equal to a cutting or thrusting weapon. The court said:

> "The defendant had the insolence to attack a German soldier; she took up an offensive position which would have led to a great blood bath if the soldier had not evaded the stone which was hurled at him."

The court said of Kaminska (*NG–457, Pros. Ex. 201*): "She thereby characterizes herself as a Polish violent criminal," and then stated:

> "As the defendant on 1 September 1939 was a resident in the territory of the former Polish state, she had to be found guilty, in application of paragraphs II, III, and XIV of the Penal Law against Poles, of a crime of assault and battery in coincidence with a crime of threat, a crime under paragraph 1, section 1, of the law against violent criminals, and of a crime of offering resistance to the authority of a state."

The fact that the discriminatory law against Poles was invoked in this case is established. The opinion signed by Oeschey states:

"Under paragraph III, section 2, of the Penal Law against Poles, the death sentence must be passed if the law threatens with it."

Concerning Wdowen, who was a Ukrainian and therefore could not be sentenced under the law against Poles, the court commented on the fact that he knew that the Germany economy, on account of wartime conditions, was dependent on foreign labor, "in particular, labor from the eastern territories." The court drew the conclusion that Wdowen, who had used at most only a little force in attempting to protect Kaminska, was guilty of having taken advantage of extraordinary wartime conditions and of violating the law against violent criminals. Both defendants were sentenced to death by the defendant Oeschey. The associated judges in the Kaminska and Wdowen case were Doctors Gros and Pfaff. They are guilty of having signed the judgment. Both submitted affidavits and both were cross-examined before this Tribunal. Dr. Gros stated that Oeschey demanded the severest countermeasures in similar cases. "We associate judges were powerless toward such an attitude. It must be mentioned that none of the defendants had criminal records, and that they were eliminated in a most objectionable way by Oeschey for racial and political reasons."

The other associate judge, Dr. Theodor Pfaff, spoke of the Kaminska case as "the most terrible of my entire career. * * * The sentence of death and the consequent execution of these Poles offended my sense of ethics and has continually preyed upon my conscience. I would like to state here that Oeschey forced his will upon us."

The two associate judges are to be condemned for their spineless attitude in submitting to the domination of the defendant Oeschey, but we cannot fail to give weight to their statements, which in effect amount to confessions of their own wrongdoing.

In this case Oeschey, with evil intent, participated in the government-organized system for the racial persecution of Poles. This is also a case of such a perversion of the judicial process as to shock the conscience of mankind.

The progressive degeneration in the administration of justice came to a climax in 1944 and 1945. A decree by Thierack on 13 December 1944 abrogated the rules concerning the obligatory representation of accused persons by defense counsel. It was left for the judge to decide whether defense counsel was required. On 15 February 1945 as a final measure of desperation and in the face of imminent defeat, the law was passed for the establishment of civilian courts martial. The statute provided that sentence should be either death, acquittal, or commitment to the regular court. Pursuant to this law Gauleiter Holz set up a drumhead

court martial in Nuernberg. It consisted of the defendant Oeschey as presiding judge, with Gau Inspector Haberkern and a major in the Wehrmacht as associate judges. On 2 April 1945 Karl Schroeder was appointed prosecutor. The judges and prosecutor then went to the office of the Gauleiter, where he delivered a speech in which he stated:

> "That the main point was to stop the American advance; one could count upon introduction of new weapons, and that he expected that the court martial would give the necessary support to the army at the front by applying the severest measures."

The officials were sworn in on 3 April. The affidavit of Schroeder, who later appeared for cross-examination, discloses that Holz intended that the first case be tried on the third day of April. Schroeder stated this would be impossible because he would need time to examine the case. The first case to be tried was that of Count Montgelas. Schroeder states that the case was the most difficult in his practice, but that it had to be tried "because the Gauleitung pressed for a quick decision of this matter". The defendant Oeschey testified concerning the court martial procedure as follows:

> "Proceedings were to follow the provisions laid down in the Code of Criminal Procedure which had been very strongly simplified. Nevertheless, the court martial had observed in its proceedings the most important principles of protecting the interest of the defendant. The defendant's right to be heard, oral trial, admission of defense counsel, thorough presentation of evidence, a freedom of the judge to go into the evidence, a vote among the judges, and so forth."

The procedure followed by Oeschey as presiding judge in the case Montgelas did not conform to the foregoing statement. Count Montgelas had for some time been represented by defense counsel Eichinger, who had an office in the courthouse adjacent to that of the prosecutor, and who had had dealings with the prosecutor concerning the Montgelas case. The defendant Oeschey testified that he had directed that Eichinger be notified concerning the trial, but in any event Eichinger was not notified and Oeschey informed the prosecutor that he would conduct the trial without defense counsel because the "legal prerequisites for trial without defense counsel did exist." He apparently had reference to Thierack's decree of 13 December 1944, *supra.** Eichinger, as attorney for Count Montgelas, received his first information concerning the trial after Montgelas had been convicted and shot.

* 1944 RGBl. I, page 339.

The statute creating civilian courts martial specifically provided that they should consist of "a judge of a criminal court, as president * * *." At the time of his appointment, Oeschey was a soldier serving in the Wehrmacht and was not a judge of a criminal court. He testified that the statute meant only that it was necessary "that a man be appointed who has the qualifications to exercise the function of a judge."

The Nuernberg civilian court martial functioned for the first time on 5 April, held ten sessions, and disposed of twelve defendants, ten of whom were charged with political offenses. On 16 April the American Army was approaching Nuernberg, and on that date at noon the civilian court martial ceased to function.

An exhibit was offered in evidence containing the results of an official investigation of the defendant Oeschey and prosecutor Schroeder for perversion of justice, conducted in August 1946, before German judicial authorities. An objection to the receipt of the exhibit was first made by counsel for Oeschey but was later withdrawn. The exhibit was received and is before us for consideration. From this exhibit we learn that Dr. Wilhelm Eser was the investigating judge in the Montgelas case. He states that at the hearing of Montgelas a Gestapo official was present, and that if Montgelas had not been arrested the official would have taken him back to the Gestapo "as it was demanded in the record of the investigation * * *." Eichinger, who appeared as a witness before this Tribunal, had been employed in February by Countess Montgelas to defend her husband. He stated that he had conferred with Prosecutor Dr. Mueller and had been informed that the prosecutor recognized—

> "* * * the competence of the People's Court and therefore he had submitted the record of the case to the chief public prosecutor at the People's Court for a decision. I asked him to inform me immediately after the record was returned, respectively, after receiving the decision of the chief public prosecutor. He promised me this, and I was completely reassured."

At this time Montgelas was in the sick ward of the prison for solitary confinement. On 10 April Eichinger went to the prison office to examine the files in the Montgelas case, whereupon the director of Nuernberg prison informed me confidentially that Count Montgelas had been summoned before the court martial on 5 April at 2 p.m., sentenced to death, and shot the next day. The crime for which Count Montgelas had been shot consisted of remarks made by him in a private room in the Grand Hotel to a lady, Mrs. Pfleger, of Bamberg. The Count had made insulting remarks concerning Hitler, among others to the effect that his

true name was Schickelgruber. He also expressed approval of the attempt upon Hitler's life of 20 July 1944. We are convinced from the testimony of Eichinger before this Tribunal that if any serious effort had been made he could have been notified prior to the trial of his client. Eichinger expressed the opinion with which this Tribunal concurs, that a summons issued at 1400 hours to appear at 1500 hours before a court martial is an offense against justice. The only witness who appeared against Count Montgelas was an SS Fuehrer, who had been shadowing him for many days in an attempt to secure evidence against him. By concealing himself in an adjoining room and by the use of a mechanical device, he was able to overhear the conversation between Montgelas and the lady and to testify concerning it. Eichinger states that the statements of the SS Fuehrer who was the eavesdropper at the hotel were "in important points contradictory" to the statements Montgelas had made to his attorney and that the latter had already proposed to summon the lady with whom Montgelas had conversed as a rebuttal witness in behalf of the Count.

The wife of the martyr Montgelas stated in the official investigation that Chief Prosecutor Schroeder told her that "there had not been time to comply with my husband's urgent request to get a defense counsel." Schroeder also told the Countess that she was not to be given any information on the disposal of the body of her husband because he had died a dishonorable death. Thus, on the last days of the war, when the American Army was almost at the gates of Nuernberg, and within a month of the total collapse of German opposition, a sick man, after solitary confinement, is indicted on 3 April, tried on 5 April, and shot on 6 April without the knowledge of his counsel in secret proceedings, and without the benefit of witnesses who would have testified for him. Such a mock trial is not a judicial proceeding but a murder.

It is provided in C. C. Law 10 that persecutions on political as well as racial grounds are recognized as crimes. While the mere fact alone that Montgelas was prosecuted for remarks hostile to the Nazi regime may not constitute a violation of C. C. Law 10, the circumstances under which the defendant was brought to trial and the manner in which he was tried convince us that Montgelas was not convicted for undermining the already collapsed defensive strength of the defeated nation, but on the contrary, that the law was deliberately invoked by Gauleiter Holz and enforced by Oeschey as a last vengeful act of political persecution. If the provisions of C. C. Law 10 do not cover this case, we do not know what kind of political persecution it would cover.

We have already indicated that we will not convict any defendant merely because of the fact, without more, that he participated in the passing or enforcement of laws for the punishment of habitual criminals, looters, hoarders, or those guilty of undermining the defensive strength of the nation, but we also stated that these laws were in many instances applied in an arbitrary and brutal manner shocking to the conscience of mankind and punishable here. This was the situation in a number of cases tried by Rothaug and Oeschey, but concerning which we have no transcript of testimony and we must therefore of necessity rely upon statements of associates and close observers. In this connection we shall have reference to affidavits and to testimony of associates of the defendant Oeschey. We shall refer to statements of affiants only in those cases in which the affiant was also brought to court and verbally cross-examined concerning his statements.

Dr. Hermann Mueller was a prosecutor at the Special Court in Nuernberg. He said:

> "He (Oeschey) frequently insulted the defendants and presented the crimes to them as if these crimes were already a proven fact. His behavior was often so extreme that one might well believe he was a psychopathic case. The abusive insults that he inflicted upon the defendants were, to the highest degree, unworthy of a court trial. He wielded such influence over the form of the administration of justice through his close Party affiliations that the other officials of equal rank at the Nuernberg administration of criminal justice were almost always forced to yield."

Mueller mentions several cases in which Oeschey announced before trial that the defendant would be executed. In a case against Schnaus he states that Oeschey—

> "* * * told me that, as a result of a discussion with government officials, he was certain to obtain the death sentence. At that time I was still unaware of the changed situation at the Special Court occasioned by the war, and turned to my immediate superior for information. He then informed me of the very close relations existing between judges and the prosecutors."

Concerning the case Montgelas, Mueller stated:

> "Concerning the case of Montgelas it must be pointed out that this was a case of political extermination, which was handled in a most hideous fashion."

Again, he said:

> "Oeschey was the most brutal judge that I have ever known in my life and a most willing instrument of the Nazi terroristic justice."

Dr. Armin Baur was the medical officer at the Special Court. He said:

> "One always had the impression that the verdict was already previously decided upon and that Oeschey and Rothaug were just playing cat and mouse with the defendants for hours. No occasion was missed to insult the defendants in the filthiest way."

This medical expert dealt with cases which were tried both by Rothaug and by Oeschey. In the Katzenberger case the defendant Rothaug told the doctor that he wanted the defendant examined but that the examination was a matter of pure formality because the Jew "would be beheaded anyhow," and he added, "It is sufficient for me that the swine said that a German girl sat on his lap." Dr. Baur states that "foreigners were generally dealt with by Rothaug and Oeschey as inferior beings whose task it was only to serve the German master race."

Hans Kern, defense counsel, stated "that foreigners were told at the beginning and throughout the trial that they were to be annihilated." Again he said:

> "Rothaug and Oeschey declined, as a matter of principle, to believe Polish citizens who were under accusation. They were branded as liars. It was assumed that their innate tendency made liars of them."

He described Oeschey as a "notorious Pole baiter."

Dr. Gustav Kunz, leading court doctor at Nuernberg, was an excellent and reliable witness. He stated:

> "Insult, humiliation, and mental torture of the defendants were routine and the two judges, especially Oeschey, did not even renounce them in cases in which—according to the legal situation—the verdict had to be and actually was acquittal or an insignificant sentence."

Kurt Hoffmann, prosecutor at Nuernberg, states that Oeschey was severe as to the German defendants and was—

> "* * * even more severe with regard to sentences against foreigners and much more furious in his conduct of their trials, especially in the case of Poles."

Adolf Paulus, former public prosecutor, speaks of the "brutality of which only Oeschey was capable."

Friedrich Doebig, who was president of the district court of appeals at Nuernberg, later senate president of the Reich Supreme Court, stated that "Oeschey like Rothaug was a fanatical Nazi,

who consistently interpreted and enforced the law in accord with Nazi ideologies."

Dr. Herbert Lipps served with defendant Oeschey on the Special Court, Nuernberg. He states that Oeschey was autocratic and would not tolerate contradiction.

"Defendants were insulted by Oeschey in the most abusive manner and death candidates were told by Oeschey right at the beginning of the session that they had forfeited their lives.

"Toward foreigners, particularly Poles, Oeschey was especially rigorous and here upheld the National Socialist theory of liquidating where nationals of the occupied territories were concerned. I remember a case in which a Polish farmhand was ill-treated by his employer and defended himself. Oeschey told the defendant that a Pole was not allowed to oppose a German."

Dr. Franz Gros was an associate judge at Nuernberg. He states that Oeschey followed the harsh procedural methods of Rothaug and was a "fanatic National Socialist who pursued his dishonorable motives with conviction and who willingly lent his hand to blood-thirsty National Socialist jurisdiction."

Dr. Pfaff was an associate judge at Nuernberg and corroborates the statements of Dr. Gros.

Dr. Joseph Mayer was a Referent in the prosecutor's office at Nuernberg. Concerning Oeschey, he said:

"Oeschey * * * was obviously of Rothaug's school. Outwardly he gave the impression of being morose and unrelenting. I cannot remember ever having had a personal conversation with him. As a rule he began the proceedings with a preconceived opinion to which he adhered. Anyone who tried to oppose this opinion was overridden by him in the most brutal way. He insulted the defendants all the time in a most offensive manner, informing them repeatedly all the way through, what he intended to do with them. He had an extensive vocabulary of invectives for that purpose, the use of which he developed to a fine art. * * * It was literally tormenting if one had to listen to this tirade often for hours at a time. When his face became distorted into a repulsive mask by his continual scolding and abusive language, Faust's words to Mephistopheles would often quite involuntarily come to my mind: 'Thou freak of filth and fire.'"

Joseph Eichinger, defense attorney at Nuernberg, stated:

"His prejudice was so strong that he did not consider, seriously, the statements of the defense and dismissed them rudely or ironically. Even during the trial he repeatedly addressed the

defendant thus: 'People such as you deserve to be exterminated,' 'You will be convicted;' or he called the defendant insulting and humiliating names such as 'criminal,' or 'scoundrel,' 'enemy of the people.' "

Again, he said:

"As leader of the Gau legal office (Gaurechtsamt) and, after the latter's disbanding, as member in the Gau staff (Gaustab), he enjoyed a special position of power which enabled him to hold the defense strongly in check; it was well known that a sign from the Gau authorities, instigated by Oeschey, was sufficient to have a lawyer turned over to the Gestapo.

"I had the impression that he supported, knowingly and willingly, the policy of Hitler to 'decimate' (Dezimierung) aliens, especially Poles, by increasing the number of death sentences against them * * *."

On cross-examination Eichinger admitted that he did not know of any lawyer who had been turned over to the Gestapo by Oeschey. It is clear that in his statements Eichinger was relying only upon general information as the basis of his opinion. We think, however, that his opinion merits consideration.

Dr. Karl Mayer, defense counsel, said that Rothaug was judge of the worst Special Court in Germany and used to tell defendants even during the trial that they would be exterminated. He adds that after Rothaug was transferred to Berlin, Oeschey even surpassed him in the spitefulness of his manner. Space does not permit the discussion of the other cases which illustrate Oeschey's ruthless exercise of arbitrary power. Mention should, however, be made of the trial of a group of foreign boys who had some fights with boys in the Nuernberg Hitler Youth Home. Dr. Mueller characterizes the action of the boys as harmless pranks. At worst they were indulging in street fights with the Hitler Youth. Oeschey held that they constituted a resistance movement and several of the boys were sentenced to death.

The defendant Oeschey is charged under count four of the indictment with being a member of the Party Leadership Corps at Gau level within the definition of the membership declared criminal according to the judgment of the first International Military Tribunal in the case against Goering, et al.

We have previously quoted the findings of the first International Military Tribunal which define the organizations and groups within the Leadership Corps which are declared to be criminal. Oeschey was provisionally commissioned with the direction of the legal office of the NSDAP in the Franconia Gau and served in that official capacity for a long time. In his testimony he states that

from 1940 to 1942 he was solely in charge of the Gau legal office as section chief. The evidence clearly establishes the defendant's voluntary membership as the chief of a Gau staff office subsequent to 1 September 1939. The judgment of the first International Military Tribunal lists among the criminal activities of the Party Leadership Corps the following:

"The Leadership Corps played its part in the persecution of the Jews. It was involved in the economic and political discrimination against the Jews which was put into effect shortly after the Nazis came into power. The Gestapo and SD were instructed to coordinate with the Gauleiter and Kreisleiter the measures taken in the pogroms of 9 and 10 November 1938. The Leadership Corps was also used to prevent German public opinion from reacting against the measures taken against the Jews in the East. On 9 October 1942, a confidential information bulletin was sent to all Gauleiter and Kreisleiter entitled 'Preparatory measures for the final solution of the Jewish question in Europe —rumors concerning the conditions of the Jews in the East.' This bulletin stated that rumors were being started by returning soldiers concerning the conditions of Jews in the East which some Germans might not understand, and outlined in detail the official explanation to be given. This bulletin contained no explicit statement that the Jews were being exterminated, but it did indicate they were going to labor camps, and spoke of their complete segregation and elimination and the necessity of ruthless severity. * * *

"The Leadership Corps played an important part in the administration of the slave labor program. A Sauckel decree dated 6 April 1942 appointed the Gauleiter as plenipotentiary for labor mobilization for their Gaue with authority to coordinate all agencies dealing with labor questions in their Gaue, with specific authority over the employment of foreign workers, including their conditions of work, feeding, and housing. Under this authority the Gauleiter assumed control over the allocation of labor in their Gaue, including the forced laborers from foreign countries. In carrying out this task the Gauleiter used many Party offices within their Gaue, including subordinate political leaders. For example, Sauckel's decree of 8 September 1942, relating to the allocation for household labor of 400,000 women laborers brought in from the East, established a procedure under which applications filed for such workers should be passed on by the Kreisleiter, whose judgment was final.

"Under Sauckel's directive the Leadership Corps was directly concerned with the treatment given foreign workers, and the Gauleiter were specifically instructed to prevent 'politically

inept factory heads' from giving 'too much consideration to the care of eastern workers'. * * *

"The Leadership Corps was directly concerned with the treatment of prisoners of war. On 5 November 1941 Bormann transmitted a directive down to the level of Kreisleiter instructing them to insure compliance by the army with the recent directives of the department of the interior ordering that dead Russian prisoners of war should be buried wrapped in tar paper in a remote place without any ceremony or any decorations of their graves. On 25 November 1943 Bormann sent a circular instructing the Gauleiter to report any lenient treatment of prisoners of war. On 13 September 1944 Bormann sent a directive down to the level of Kreisleiter ordering that liaison be established between the Kreisleiter and the guards of the prisoners of war in order 'better to assimilate the commitment of the prisoners of war to the political and economic demands'. * * *

"The machinery of the Leadership Corps was also utilized in attempts made to deprive Allied airmen of the protection to which they were entitled under the Geneva Convention. On 13 March 1940 a directive of Hess, transmitted instructions through the Leadership Corps down to the Blockleiter for the guidance of the civilian population in case of the landing of enemy planes or parachutists, which stated that enemy parachutists were to be immediately arrested or 'made harmless.'" *

As to his knowledge, the defendant Oeschey joined the NSDAP on 1 December 1931. He was head of the Lawyers' League for the Gau Franconia and a judicial officer of considerable importance within the Gau. These offices would provide additional sources of information as to the crimes outlined. Furthermore, these crimes were of such wide scope and so intimately connected with the activities of the Gauleitung that it would be impossible for a man of the defendant's intelligence not to have known of the commission of these crimes, at least in part if not entirely.

We find the defendant Oeschey guilty under counts three and four of the indictment. In view of the sadistic attitude and conduct of the defendant, we know of no just reason for any mitigation of punishment.

THE DEFENDANT ALTSTOETTER

Joseph Altstoetter was born 4 January 1892. He was educated for the bar and passed the State examination in jurisprudence in Munich. He subsequently served in the Bavarian and in the Reich Ministries of Justice.

* Trials of the Major War Criminals, op. cit., volume I, pages 259–261.

In 1932 he was promoted and sent to the Reich Supreme Court in Leipzig. In 1933 he was a member of the appeals criminal senate. In 1936 he was a member of the Reich Labor Court. From 1939 to 1943 he served with the Wehrmacht. In 1943 he was assigned to the Reich Ministry of Justice where he was made chief of the civil law and procedure division in the Ministry of Justice with the title of Ministerialdirektor and served in that capacity until the surrender. He had been a member of the Stahlhelm prior to the Nazi rise to power. When the Stahlhelm was absorbed into the Nazi organization, he automatically became a member of the SA. Prior to May 1937 he resigned from the SA to become a member of the general SS. His membership in the SS, from his personnel files, dates from 15 May 1937. He applied for membership in the NSDAP in 1938 and his membership was dated back to 1 May 1937. He was awarded the Golden Party Badge for service to the Party.

Upon the evidence in this case it is the judgment of this Tribunal that the defendant Altstoetter is not guilty under counts two and three of the indictment.

The question which remains to be determined as to the defendant Altstoetter is whether, knowing of its criminal activities as defined by the London Charter, he joined or retained membership in the SS, an organization defined as criminal by the International Military Tribunal in the case of Goering, et al.

The evidence in this case as to his connection with the SS is found primarily in his personnel record which covers a great many pages, in his correspondence with SS leaders, and his own testimony. From this evidence it appears that the defendant, upon the request of Himmler, joined the SS in May 1937. He stated that Himmler told him he would receive a rank commensurate with his civil status. The record does not indicate what rank in the SS was commensurate with his civil status as a member of the Reich Supreme Court, but on 20 April 1938 he was promoted to Untersturmfuehrer, which corresponds to a second lieutenant in the army. He was subsequently promoted on 20 April 1939 to Obersturmfuehrer; on 20 April 1940 to Hauptsturmfuehrer. On 12 March 1943, according to a letter to the SS Main Personnel Office, signed by Himmler, he was promoted to Sturmbannfuehrer, effective 25 January 1943 and, by the same letter, to Obersturmbannfuehrer as of 20 April 1943, and it was directed that he be issued a skull and crossbones ring. In June 1943 he wrote to the Chief of the SS Main Office, SS Gruppenfuehrer Berger, thanking him for this ring bestowed by the Reich Leader SS. In this letter he wrote:

"Both this promotion and the honoring of this decoration with the skull and crossbone ring I will take not only as a token of the Reich Leader's most distinct proof of trust in me, but also as an incentive for further active proof of my loyalty and for strictest adherence to my duties in my career as an SS man."

On 11 February 1944 he wrote SS Gruppenfuehrer and Lieutenant General of the Waffen SS, Professor Dr. Karl Gebhardt, a letter containing the following paragraph:

"One more personal remark—You kindly promoted me SS Oberfuehrer. It is not that far yet. At least, I did not get to know it until now. I merely tell you this because I do not want to claim anything for me which does not correspond to facts."

By letter dated 16 June 1944 he was notified that the Reich Leader SS had promoted him to the rank of Oberfuehrer, effective 21 June 1944.

The defendant stated that he was assigned to the legal staff of the 48th Standarte and later to the legal staff of the SS Main Office. He stated that he had no actual duties. However, part of his service credentials, dated 14 March 1939, under the heading of qualifications, signed by Dalski, SS Obersturmbannfuehrer, the following is stated:

"SS Untersturmfuehrer Altstoetter is frank, honest, and helpful. His ideology is firmly established on a National Socialist basis. A. was a leader of the staff of the 48th Standarte and there at all times performed his duties in a satisfactory manner."

In a report from Leipzig, dated 10 June 1939, it is stated that he was awarded the "badge of honor for legal service, in silver", effective 19 April 1938, signed Sachse, SS Untersturmfuehrer and Adjutant.

The defendant was evidently highly regarded by Himmler who, on 18 September 1942, at a meeting with Thierack and Rothenberger, referred to him as a reliable SS Obersturmfuehrer.

It also appears that his appointment to the Ministry of Justice was at the suggestion of Himmler and that the defendant's relationship with Himmler was one which Thierack fostered for purposes of his own.

At the instance of Thierack, he visited Himmler at his headquarters and was present at a speech given by Himmler at Kochem, where he attended a dinner for twelve people, including SS Standartenfuehrer Rudolf Brandt and SS Obergruppenfuehrer Pohl.

He visited Berger, a high SS official, at Berger's request. He carried on considerable correspondence with high officials in the

SS, including Himmler, SS Gruppenfuehrer Professor Dr. Gebhardt, SS Gruppenfuehrer Berger, and Kaltenbrunner, Chief of the Security Police and SD.

On 25 May 1940 Altstoetter wrote to the Reich Leader SS as follows:

> "If I can contribute my small part towards helping our Fuehrer to accomplish his great task for the benefit of our nation, this causes me particular joy and satisfaction, especially in my capacity as SS officer."

According to a letter to Gebhardt, Himmler had instructed the SS leaders to request Altstoetter's advice in certain matters.

On 6 June 1944 he wrote Gebhardt, congratulating him upon a recent award. In this letter he states:

> "I am especially glad about your distinction, especially because I do not see only in it a recognition of your great war service as a physician and surgeon but also as a research scientist and organizer and which is attributed to our old and trusty friend."

The evidence in this case clearly establishes that the defendant joined and retained his membership in the SS on a voluntary basis. In fact it appears that he took considerable interest in his SS rank and honors. The remaining fact to be determined is whether he had knowledge of the criminal activities of the SS as defined in the London Charter. In this connection we quote certain extracts from the judgment of the International Military Tribunal in the case of Goering, et al., as to the SS—

> "Criminal activities: SS units were active participants in the steps leading up to aggressive war. The Verfuegungstruppe was used in the occupation of the Sudetenland, of Bohemia and Moravia, and in Memel. The Henlein Free Corps was under the jurisdiction of the Reich Leader SS for operations in the Sudetenland in 1938, and the Volksdeutsche Mittelstelle financed fifth column activities there.
>
> "The SS was even a more general participant in the commission of war crimes and crimes against humanity. Through its control over the organization of the police, particularly the Security Police and SD, the SS was involved in all the crimes which have been outlined in the section of this judgment dealing with the Gestapo and SD. * * * The Race and Settlement Office of the SS, together with the Volksdeutsche Mittelstelle were active in carrying out schemes for Germanization of occupied territories according to the racial principles of the Nazi Party and were involved in the deportation of Jews and other foreign nationals. Units of the Waffen SS and Einsatzgruppen

operating directly under the SS Main Office were used to carry out these plans. These units were also involved in the widespread murder and ill-treatment of the civilian population of occupied territories. * * *

"From 1934 onward the SS was responsible for the guarding and administration of concentration camps. The evidence leaves no doubt that the consistently brutal treatment of the inmates of concentration camps was carried out as a result of the general policy of the SS, which was that the inmates were racial inferiors to be treated only with contempt. There is evidence that where manpower considerations permitted, Himmler wanted to rotate guard battalions so that all members of the SS would be instructed as to the proper attitude to take to inferior races. After 1942 when the concentration camps were placed under the control of the WVHA they were used as a source of slave labor. An agreement made with the Ministry of Justice on 18 September 1942 provided that antisocial elements who had finished prison sentences were to be delivered to the SS to be worked to death. * * *

"The SS played a particularly significant role in the persecution of the Jews. The SS was directly involved in the demonstrations of 10 November 1938. The evacuation of the Jews from occupied territories was carried out under the directions of the SS with the assistance of SS police units. The extermination of the Jews was carried out under the direction of the SS central organizations. It was actually put into effect by SS formations. * * *

"It is impossible to single out any one portion of the SS which was not involved in these criminal activities. The Allgemeine SS was an active participant in the persecution of the Jews and was used as a source of concentration camp guards. * * *

"The Tribunal finds that knowledge of these criminal activities was sufficiently general to justify declaring that the SS was a criminal organization to the extent hereinafter described. It does appear that an attempt was made to keep secret some phases of its activities, but its criminal programs were so widespread, and involved slaughter on such a gigantic scale, that its criminal activities must have been widely known. It must be recognized, moreover, that the criminal activities of the SS followed quite logically from the principles on which it was organized. Every effort had been made to make the SS a highly disciplined organization composed of the elite of national socialism. Himmler had stated that there were people in Germany 'who become sick when they see these black coats', and that he did not expect that 'they should be loved by too many'. * * *

Himmler in a series of speeches made in 1943, indicated his pride in the ability of the SS to carry out these criminal acts. He encouraged his men to be 'tough and ruthless'; he spoke of shooting 'thousands of leading Poles', and thanked them for their cooperation and lack of squeamishness at the sight of hundreds and thousands of corpses of their victims. He extolled ruthlessness in exterminating the Jewish race and later described this process as 'delousing'. These speeches show that the general attitude prevailing in the SS was consistent with these criminal acts. * * *

"In dealing with the SS the Tribunal includes all persons who had been officially accepted as members of the SS, including the members of the Allgemeine SS, members of the Waffen SS, members of the SS Totenkopf Verbaende, and the members of any of the different police forces who were members of the SS. * * *

"The Tribunal declares to be criminal within the meaning of the Charter the group composed of those persons who had been officially accepted as members of the SS as enumerated in the preceding paragraph who became or remained members of the organization with knowledge that it was being used for the commission of acts declared criminal by article 6 of the Charter * * *."*

In this regard the Tribunal is of the opinion that the activities of the SS and the crimes which it committed as pointed out by the judgment of the International Military Tribunal above quoted are of so wide a scope that no person of the defendant's intelligence, and one who had achieved the rank of Oberfuehrer in the SS, could have been unaware of its illegal activities, particularly a member of the organization from 1937 until the surrender. According to his own statement, he joined the SS with misgivings, not only on religious grounds but also because of practices of the police as to protective custody in concentration camps.

Altstoetter not only had contacts with the high ranking officials of the SS, as above stated, but was himself a high official in the Ministry of Justice stationed in Berlin from June 1943 until the surrender. He attended conferences of the department chiefs in the Ministry of Justice and was necessarily associated with the officials of the Ministry, including those in charge of penal matters.

The record in this case shows as part of the defense of many of those on trial here that they claim to have constantly resisted the encroachment of the police under Himmler and the illegal acts of the police.

* Ibid., pp. 270–273.

Documentary evidence shows that the defendant knew of the evacuation of Jews in Austria and had correspondence with the Chief of the Security Police and Security Service regarding witnesses for the hereditary biological courts. This correspondence states:

> "If the Residents' Registration Office or another police office gives the information that a Jew has been deported, all other inquiries as to his place of abode as well as applications for his admission of hearing or examination are superfluous. On the contrary, it has to be assumed that the Jew is not attainable for the taking of evidence."

It also quotes this significant paragraph:

> "If in an individual case it is to the interest of the public to make an exception and to render possible the taking of evidence by special provision of persons to accompany and means of transportation for the Jew, a report has to be submitted to me in which the importance of the case is explained. In all cases offices must refrain from direct application to the offices of the police, especially also to the Central Office for the Regulation of the Jewish Problem in Bohemia and Moravia at Prague, for information on the place of abode of deported Jews and their admission, hearing, or examination."

He was a member of the SS at the time of the pogroms in November 1938, "Crystal Week," in which the IMT found the SS to have had an important part. Surely whether or not he took a part in such activities or approved of them, he must have known of that part which was played by an organization of which he was an officer. As a lawyer he knew that in October of 1940 the SS was placed beyond reach of the law. As a lawyer he certainly knew that by the thirteenth amendment to the citizenship law the Jews were turned over to the police and so finally deprived of the scanty legal protection they had theretofore had. He also knew, for it was part of the same law, of the sinister provisions for the confiscation of property upon death of the Jewish owners, by the police.

Notwithstanding these facts, he maintained his friendly relations with the leaders of the SS, including Himmler, Kaltenbrunner, Gebhardt, and Berger. He refers to Himmler, one of the most sinister figures in the Third Reich, as his "old and trusty friend." He accepted and retained his membership in the SS, perhaps the major instrument of Himmler's power. Conceding that the defendant did not know of the ultimate mass murders in the concentration camps and by the Einsatzgruppen, he knew the policies of the SS and, in part, its crimes. Nevertheless he accepted

its insignia, its rank, its honors, and its contacts with the high figures of the Nazi regime. These were of no small significance in Nazi Germany. For that price he gave his name as a soldier and a jurist of note and so helped to cloak the shameful deeds of that organization from the eyes of the German people.

Upon the evidence in this case it is the judgment of this Tribunal that the defendant Altstoetter is guilty under count four of the indictment.

This Tribunal has held that it has no jurisdiction to try any defendant for the crime of conspiracy as a separate substantive offense, but we recognize that there are allegations in count one of the indictment which constitute charges of direct commission of war crimes and crimes against humanity. However, after eliminating the conspiracy charge from count one, we find that all other alleged criminal acts therein set forth and committed after 1 September 1939 are also charged as crimes in the subsequent counts of the indictment. We therefore find it unnecessary to pass formally upon the remaining charges in count one. Our pronouncements of guilt or innocence under counts two, three, and four dispose of all issues which have been submitted to us.

Concerning those defendants who have been found guilty, our conclusions are not based solely upon the facts which we have set forth in the separate discussions of the individual defendants. In the course of 9 months devoted to the trial and consideration of this case, we have reached conclusions based upon evidence and observation of the defendants which cannot fully be documented within the limitations of time and space allotted to us. As we have said, the defendants are not charged with specific overt acts against named victims. They are charged with criminal participation in government-organized atrocities and persecutions unmatched in the annals of history. Our judgments are based upon a consideration of all of the evidence which tends to throw light upon the part which these defendants played in the entire tragic drama. We shall, in pronouncing sentence, give due consideration to circumstances of mitigation and to the proven character and motives of the respective defendants.

[Signed] JAMES T. BRAND
Presiding Judge

MALLORY B. BLAIR
Judge

JUSTIN W. HARDING
Judge

VIII. SEPARATE OPINION BY JUDGE BLAIR

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The judgment recites at another point—

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

At still another place the judgment recites—

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

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

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

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

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

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

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

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

The judgment makes the further and additional declaration that—

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

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

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

Charter and Jurisdiction of this Tribunal

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*Ibid., p. 218.

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

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

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

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

* Ibid., pp. 216–218.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conspiracy

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

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

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

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

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

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

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

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

* * * * * * *

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

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

"2. Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this article, if he was (*a*) a principal or (*b*) was an accessory to the commission of any such crime or ordered or abetted the same or (*c*) took a consenting part therein or (*d*) was connected with plans or enterprises involving its commission or (*e*) was a member of any organization or group connected with the commission of any such crime or (*f*) with

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SENTENCES[2]

THE MARSHAL: The Tribunal is again in session.

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

Is our understanding correct, Dr. Kubuschok?

DR. KUBUSCHOK: Yes, Your Honor.

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

PRESIDING JUDGE BRAND: The Tribunal will now impose sentence upon those defendants who have been adjudged guilty in these proceedings.

This Tribunal has adjudged the defendant FRANZ SCHLEGELBERGER guilty on counts two and three of the indictment filed in this case. For the crimes of which he has been convicted, this Tribunal sentences him to imprisonment for life.

The Marshal will produce before the Tribunal the defendant Klemm.

HERBERT KLEMM, on the counts of the indictment on which you have been convicted, this Tribunal sentences you to imprisonment for life.

The Marshal will produce before the Tribunal the defendant Rothenberger.

CURT ROTHENBERGER, on the counts of the indictment on which you have been convicted, this Tribunal sentences you to seven years' imprisonment. You will receive credit upon your sentence for the time already spent in confinement awaiting and pending trial.

The Marshal will bring before the Tribunal the defendant Ernst Lautz.

ERNST LAUTZ, on the counts of the indictment on which you have been convicted, this Tribunal sentences you to ten years' imprisonment. You will receive credit upon your sentence for the time already spent in confinement awaiting and pending trial.

The Marshal will produce the defendant Wolfgang Mettgenberg.

WOLFGANG METTGENBERG, on the counts of the indictment on which you have been convicted, this Tribunal sentences you to ten years' imprisonment. You will receive credit upon your sentence for the time already spent in confinement awaiting and pending trial.

The Marshal will remove this defendant from the court and produce the defendant Wilhelm von Ammon.

Defendant WILHELM VON AMMON, on the counts of the indictment on which you have been convicted, this Tribunal sentences you to ten years' imprisonment. You will receive credit upon your sentence for the time already spent in confinement awaiting and pending trial.

The Marshal will remove this defendant from the court and will produce the defendant Guenther Joel.

GUENTHER JOEL, on the counts of the indictment on which you have been convicted, this Tribunal sentences you to ten years'

imprisonment. You will receive credit upon your sentence for the time already spent in confinement awaiting and pending trial.

The Marshal will remove this defendant from the court and will produce the defendant Oswald Rothaug.

Defendant OSWALD ROTHAUG, on the count of the indictment on which you have been convicted, this Tribunal sentences you to imprisonment for life.

The Marshal will remove this defendant from the court and will produce the defendant Rudolf Oeschey.

RUDOLF OESCHEY, on the counts of the indictment on which you have been convicted, this Tribunal sentences you to imprisonment for life.

The Marshal will remove this defendant from the court and will produce the defendant Josef Altstoetter.

JOSEF ALTSTOETTER, on the count of the indictment on which you have been convicted, this Tribunal sentences you to five years' imprisonment. You will receive credit upon your sentence for the time already spent in confinement awaiting and pending trial.

The Marshal will remove the defendant from the courtroom.

The Tribunal now stands adjourned without day.

THE MARSHAL: This Tribunal now adjourns without day.

(At 1745 hours, 4 December 1947, the Tribunal was adjourned.)