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CASE NO. 35

THE JUSTICE TRIAL

TRIAL OF JOSEF ALTSTÖTTER AND OTHERS

UNITED STATES MILITARY TRIBUNAL, NUREMBERG, 17TH FEBRUARY–4TH DECEMBER, 1947

Liability for War Crimes, Crimes against Humanity and Membership of Criminal Organisations of German Judges, Prosecutors and Officials of the Reich Ministry of Justice.

Altstötter and the other accused in this trial were former German Judges, Prosecutors or officials in the Reich Ministry of Justice. All were charged with committing war crimes and crimes against humanity between September, 1939, and April, 1945 and with conspiring between January, 1933 and April, 1945 to commit such offences. Several were also charged with membership of criminal organisations as defined in the judgment of the Nuremberg International Military Tribunal.

The Count alleging conspiracy was attacked by Defence Counsel and the Tribunal ruled that it had no jurisdiction to try a defendant upon a charge of conspiracy considered as a separate offence.

One accused died before the opening of the trial and the Tribunal declared a mis-trial as regards a second. Four accused were found not guilty and the remaining ten were held guilty of war crimes, crimes against humanity, membership of criminal organisations, or of two or all three of the foregoing. Sentences imposed ranged from imprisonment for life to imprisonment for five years.

In its judgment the Tribunal dealt, *inter alia*, with the legal basis of the Tribunal and of the Law which it applied, the scope of the concept of crimes against humanity, the legal position of countries occupied by Germany during the war, the illegality of condemning to death nationals of such territories for high treason against Germany, the illegality of proceedings taken under the Nacht und Nebel plan, and in general the legal aspects of the part taken in furthering the persecution of Jews and Poles and other aspects of Nazi policy by various of the accused acting in their official or judicial capacities.

A. OUTLINE OF THE PROCEEDINGS

1. THE COURT

The Court before which this trial was held was a United States Military Tribunal set up under the authority of Law No. 10 of the Allied Control Council for Germany and Ordinance No. 7 of the Military Government of the United States Zone of Germany.(1)

2. THE CHARGES

The accused whose names appeared in the Indictment were the following: Josef Altstötter, Wilhelm von Ammon, Paul Barnickel, Hermann Cuhorst, Karl Engert, Guenther Joel, Herbert Klemm, Ernst Lautz, Wolfgang Mettgenberg, Guenther Nebelung, Rudolf Oeschey, Hans Petersen, Oswald Rothaug, Curt Rothenberger, Franz Schlegelberger and Carl Westphal.

Detailed allegations were made against them in the Indictment and were arranged under four Counts, headed: *The Common Design and Conspiracy*, *War Crimes*, *Crimes against Humanity*, and *Membership in Criminal Organisations*. The first three counts related to all accused, but the fourth to some only.

The essence of Count One (*Common Design and Conspiracy*) is contained in the first three paragraphs appearing under this heading, which run as follows:

> " 1. Between January, 1933 and April, 1945, all of the defendants herein, acting pursuant to a common design, unlawfully, wilfully, and knowingly did conspire and agree together and with each other and with divers other persons, to commit War Crimes and Crimes against Humanity, as defined in Control Council Law No. 10, Article II.
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> " 2. Throughout the period covered by this Indictment all of the defendants herein, acting in concert with each other and with others, unlawfully, wilfully, and knowingly 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.
>
> " 3. All of the defendants herein, acting in concert with each other and with others, unlawfully, wilfully, and knowingly participated as leaders, organisers, instigators, and accomplices in the formulation and execution of the said common design, conspiracy, plans, and enterprises to commit, and which involved the commission of, War Crimes and Crimes against Humanity, and accordingly are individually responsible for their own acts and for all acts performed by any person or persons in execution of the said common design, conspiracy, plans, and enterprises."

The crimes involved were said to embrace " atrocities and offences against persons and property, including plunder of private property, murder,

(1) For a general account of the United States law and practice regarding war crime trials held before Military Commissions and Tribunals and Military Government Courts, see Volume III of this series, pp. 103-120. The present is the first report in this series of volumes to deal with a case tried before such a Military Tribunal. Reports on others of the twelve trials held before the United States Military Tribunals in Nuremberg will appear in subsequent volumes.

extermination, enslavement, deportation, unlawful imprisonment, torture, persecutions on political, racial and religious grounds, and ill-treatment of, and other inhumane acts against thousands of persons, including German civilians, nationals of other countries, and prisoners of war ". The methods allegedly used were described in these terms: " It was a part of the said common design, conspiracy, plans, and enterprises to enact, issue, enforce, and give effect to certain purported statutes, decrees, and orders, which were criminal both in inception and execution, and to work with the Gestapo, SS, SD, SIPO and RSHA for criminal purposes, in the course of which the defendants, by distortion and denial of judicial and penal process, committed the murders, brutalities, cruelties, tortures, atrocities, and other inhumane acts, more fully described in Counts Two and Three of this Indictment ". The Indictment subsequently went on to claim that: " The said common design, conspiracy, plans, and enterprises embraced the use of the judicial process as a powerful weapon for the persecution and extermination of all opponents of the Nazi régime regardless of nationality and for the persecution and extermination of ' races '."

Paragraph 8 of the Indictment set out the substance of Count Two (*War Crimes*):

> " Between September, 1939 and April, 1945, all of the defendants herein unlawfully, wilfully, and knowingly committed War Crimes, as defined by Control Council Law No. 10, 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 offences against persons and property, including, but not limited to, plunder of private property, murder, torture, and illegal imprisonment of, and brutalities, atrocities, and other inhumane acts against thousands of persons. These crimes included, but were not limited to, the facts set out in Paragraphs 9 to 18, inclusive, of this Indictment, and were committed against civilians of occupied territories and members of the Armed Forces of nations then at war with the German Reich and who were in the custody of the German Reich in the exercise of belligerent control."

In paragraph 9 it was alleged that all defendants used " extraordinary irregular courts, superimposed upon the regular court system . . . to suppress political opposition to the Nazi régime ".

Paragraphs 10 to 18 alleged against various named accused in particular, *inter alia*, the trial by Special Courts, involving the " denial of all semblance of judicial process ", of Jews of all nationalities, Poles, Ukrainians, Russians, and other nationals of the occupied Eastern territories, indiscriminately classed as " Gipsies "; the extension of discriminatory German laws to non-German territories for the purpose of exterminating Jews and other nationals of occupied countries; the denial of access to impartial justice to these nationals; participation on the part of the Ministry of Justice with the OKW[1] and the Gestapo, in the execution of Hitler's decree of " Night and Fog " (Nacht und Nebel) whereby civilians of occupied territories who had been accused of crimes of resistance against occupying forces were

[1] I.e. Oberkommando Wehrmacht (Army High Command).

spirited away for secret trial by certain Special Courts of the Justice Ministry within the Reich, in the course of which the victims' whereabouts, trial, and subsequent disposition were kept completely secret, thus serving the dual purpose of terrorising the victims' relatives and associates and barring recourse to any evidence, witnesses, or counsel for defence ; and taking part in " Hitler's programme of inciting the German civilian population to murder Allied airmen forced down within the Reich ". These war crimes were said to constitute " violations of international conventions, particularly of Articles 4, 5, 6, 7, 23, 43, 45, 46 and 50 of the Hague Regulations, 1907, and of Articles 2, 3 and 4 of the Prisoner of War Convention (Geneva, 1929), the laws and customs of war, the general principles of criminal law as derived from the criminal laws of all civilised nations, the internal penal laws of the countries in which such crimes were committed, and of Article II of Control Council Law No. 10."

The kernel of the charges made under Count Three (*Crimes against Humanity*) is contained in paragraph 20 of the Indictment, which claims that :

> " Between September, 1939 and April, 1945, all of the defendants herein unlawfully, wilfully, and knowingly committed Crimes against Humanity as defined by Control Council Law No. 10, 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 offences, including but not limited to murder, extermination, enslavement, deportation, illegal imprisonment, torture, persecution on political, racial and religious grounds, and ill-treatment of, and other inhumane acts against German civilians and nationals of occupied countries ".

The detailed allegations which also appear under this Count related to offences which were said to be " further particularised " in the paragraphs appearing under Count Two (War Crimes), which were " incorporated herein by reference ". It was charged that " the said Crimes against Humanity constitute violations of international conventions, including Article 46 of the Hague Regulations, 1907, the laws and customs of war, the general principles of criminal law as derived from the criminal laws of all civilised nations, the internal penal laws of the countries in which such crimes were committed, and of Article II of Control Council Law No. 10."

Finally, under Count Four (*Membership in Criminal Organisations*) it was charged that the defendants Altstötter, Cuhorst, Engert, and Joel were guilty of " membership in an organisation declared to be criminal by the International Military Tribunal in Case No. 1,[1] in that each of the said defendants was a member of Die Schutzstaffeln der National Sozialistischen Deutschen Arbeiterpartei (commonly known as the " SS ") after 1st September, 1939." Similarly, Cuhorst, Oeschey, Nebelung, and Rothaug were said to be guilty of membership of the Leadership Corps of the Nazi Party at Gau level after 1st September, 1939, and Joel of membership of the

[1] That is to say by the Nuremberg International Military Tribunal in its Judgment, delivered 30th September and 1st October, 1946, on the trial of Göring and others. See pp. 65-72.

Sicherheitsdienst des Reichsführer SS (commonly known as the " SD ") after 1st September, 1939. Such membership was said to be in violation of Paragraph I (d) Article II of Control Council Law No. 10.

The defendants, having each been served with a copy of the Indictment in German at least thirty days before the commencement of the trial, were arraigned on 17th February, 1947. Each pleaded not guilty to all charges made against him. German Counsel selected by the accused were approved by the Tribunal and represented the defendants throughout the trial.

The defendant Carl Westphal died before the commencement of the trial and on 22nd August, 1947, the Tribunal entered an order declaring a mistrial as to the defendant Karl Engert, who had been able to attend court for only two days after 5th March, 1947.

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

3. A CHALLENGE TO THE SUFFICIENCY OF COUNT ONE OF THE INDICTMENT

The sufficiency of Count 1 of the indictment was challenged by the defendants upon jurisdictional grounds, and on 11th July, 1947, the Tribunal made the following order :[1]

> " Count 1 of the indictment in this case charges that the defendants, acting pursuant to a common design, unlawfully, wilfully and knowingly did conspire and agree together to commit war crimes and crimes against humanity as defined in Control Council Law No. 10, Article 2. 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 offence.
>
> " Count 1 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 1 from the indictment, but, in so far as Count 1 charges the commission of the alleged crime of conspiracy as a separate substantive offence, 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 2, paragraph 2, of Control Council Law No. 10, or as denying to either prosecution or defence the right to offer in evidence any facts or circumstances occurring either before or after September, 1939, if

[1] See pp. 104-110.

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."

It may be added here that the final Judgment of the Tribunal included the following words :

" This Tribunal has held that it has no jurisdiction to try any defendant for the crime of conspiracy as a separate substantive offence, but we recognise 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 1st 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."

4. THE EVIDENCE BEFORE THE TRIBUNAL

The presentation of evidence was begun on 6th March and ended on 13th October, 1947. The Tribunal heard the oral testimony of 138 witnesses and received some 2,100 documentary exhibits, the majority being put in by the Defence.

The facts contained in the evidence put before the Tribunal may be summarised under the following headings :

(i) *The Progressive Degradation of the German Judicial System under Hitler*

The Tribunal admitted evidence relating to the degeneration of the German judicial system from 1933 onwards ; their reason for doing so is set out elsewhere.(1)

It was shown for instance that, beginning in 1933, there developed side by side two processes by which, in the words of the Judgment of the Tribunal, " the Ministry of Justice and the courts were equipped for the terroristic functions in support of the Nazi régime." 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 inclusive 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. The texts of many statutes were put as evidence of the increased severity of the criminal law and the development of a less strict definition of the legal nature of punishable acts. The latter was especially evident in the statutes concerning the " sound sentiment of the people " and crime by analogy, and those regarding " undermining the defensive strength of the nation ".

(1) See p. 73.

Thus, Article 2 of the " Law to Change the Penal Code ", which was promulgated on 28th June, 1935, by Adolph Hitler as Führer and Reich Chancellor, and by Dr. Guertner as Reich Minister of Justice, ran 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 ".(1)

On 17th August, 1938, a decree was promulgated against " undermining German defensive strength ". It provided in part :

> " Section 5. (1) the following shall be guilty of undermining German defensive strength, and shall be punished by death :
>
> > " 1. Whoever openly solicits or incites others to evade the fulfilment of compulsory military service in the German or an allied armed force, or otherwise openly seeks to paralyse or undermine the will of the German people or an allied nation to self-assertion by bearing arms."

Furthermore, on 20th August, 1942, Hitler issued a decree which ran as follows :

> " A strong administration of justice is necessary for the fulfilment 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."

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(1) The Tribunal in its Judgment commented as follows :

" 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 co-conspirators.

" 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 28th 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 offence. 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 non-incorporated 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 offences."

These laws were, upon their face, of general applicability. Discriminations on political, racial, and religious grounds were to be found not in the text, but in the application of the text.

Coincidentally with the development of these laws and decrees there arose, however, 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. A decree of 4th December, 1941, " Concerning the Organisation and Criminal Jurisdiction against Poles and Jews in the Incorporated Eastern Territories", is an outstanding example of this body of law and also illustrates the extension of German laws to purportedly annexed territory, and to territory of the so-called protectorates.[1]

It was also deemed necessary to use the Ministry of Justice and the entire system of courts for the enforcement of the penal laws in accordance with National Socialist ideology. Thus, by a decree of 21st March, 1933, Special Courts were established within the district of every court of appeal ; these Courts and the " People's Court " were given wide discretionary powers and jurisdiction, and during the war their sphere of operation was extended to the occupied territories.

The evidence relating to the actual operation of the law in Nazi Germany showed that two basic principles were held to govern the conduct of the Ministry of Justice. The first was the absolute power of Hitler in person or by delegated authority to enact, enforce, and adjudicate law. The second was the incontestability of such law. In German legal theory, Hitler was not only the Supreme Legislator ; he was also the Supreme Judge. The evidence also demonstrated that Hitler and his highest associates were not content with the issuance of general directives for the guidance of the judicial process, but also insisted upon the right to interfere with individual criminal sentences. Furthermore, by issuing " Judges' Letters" and " Lawyers' Letters ", Thierack, Minister of Justice, sought to ensure that the Bench and Bar should both act according to Nazi principles.

To the domination by Hitler and the political " guidance " of the Ministry of Justice was added the direct pressure of Party functionaries and police officials.

(ii) *The Nacht und Nebel (Night and Fog) Plan*

A decree of Hitler's signed by Keitel on 7th December, 1941, provided, *inter alia*, in substance as follows :

(*a*) that 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 ;

(*b*) that such criminal acts would be tried in occupied territories only when it appeared probable that the death sentence would be

[1] See pp. 11-13, 62, and 92-4.

passed and carried out without delay. Otherwise the offenders would be taken to Germany ;

(*c*) that offenders taken to Germany were subject to court martial procedures there only when a particular military concern should require it ;

(*d*) that the Commanders-in-Chief in occupied territories and certain subordinates within their command would be held personally responsible for the execution of this decree ;

(*e*) that the Chief of the OKW would decide in which of the occupied territories this decree would be applied.

The Hitler decree was sent to the Reich Minister of Justice on 12th December, 1941, endorsed for the attention of defendant Schlegelberger. The latter signed a decree of 7th February, 1942, whereby the Ministry of Justice took over the conduct of Nacht und Nebel operations.

The defendant von Ammon commented in evidence :

" 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 Night and Fog decree was from time to time implemented by several plans, which were enforced by various of the defendants. One such scheme was for 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 for the transfer of the inhabitants of occupied territories to concentration camps in Germany as a substitute for a court trial.

The evidence established that in the execution of the Hitler Nacht und Nebel Decree the Ministry of Justice, special courts, and public prosecutors acted together with the OKW and Gestapo in causing to be arrested, transported to Germany, tried, sentenced to death and executed, or imprisoned under inhumane conditions in prisons and concentration camps, thousands of the civilian population of the countries overrun and occupied by the German military forces.

Many accused Nacht und Nebel persons were arrested and secretly transported to Germany and other countries for trial. Often they were denied the right to introduce evidence, to be confronted by witnesses against them, or to present witnesses on their own behalf. They were denied the right of counsel of their own choice, and were sometimes denied the aid of any counsel. No indictment was served in many instances and in such cases 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 were secret.

In autumn, 1944, Hitler ordered the discontinuance of the Nacht und Nebel proceedings by the civil and the OKW courts and transferred the entire operation to the Gestapo.

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 " offences " against the German Reich. Often the " offences " in no way concerned the security of the armed forces in the occupied territories. Many of them occurred after military operations had ceased or in areas where there were no military operations.

(iii) *The Plan for Racial Extermination*

The evidence also revealed the existence under Hitler's rule of a plan for the persecution and extermination of Jews and Poles, either by means of killing or by confinement in concentration camps, which often involved the death of the victims. Lesser forms of racial persecution were also practised by governmental authority and was shown to have constituted an integral part of the general policy of the Reich.

The Reich Ministry of Justice was in many ways involved in the execution of this plan, as will appear from the following paragraphs which set out a summary of the most important evidence brought specifically against each accused.

(iv) *The Evidence Concerning Individual Accused*: (1) *Schlegelberger*

This accused was appointed, on 10th October, 1931, Secretary of State in the Reich Ministry of Justice under Minister of Justice Guertner, which position he held until Guertner's death on 29th January, 1941, when he was put in charge of the Reich Ministry of Justice as Administrative Secretary of State. When Thierack became the new Minister of Justice on 20th August, 1942, Schlegelberger resigned from the Ministry.

The evidence against this defendant concerned first his connection with the general debasement of the German legal system. A decree signed by Adolph Hitler and by Schlegelberger on 4th September, 1941, amended the Criminal Code 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 also contained provisions for the establishment of martial law in the incorporated Eastern territories. Pursuant to a decree of the Führer of 16th March, 1939, Schlegelberger, together with Keitel and the Minister of the Interior, issued a decree which, *inter alia*, released the Reich Court from the necessity to follow precedents set up under the pre-Nazi régime in Germany ; the Court must " 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." There were also in evidence several examples of the assistance and encouragement given by the accused to Hitler in his personal interferences in the operation of the law. For instance, it was shown that a Jew who had been sentenced to two and one-half years imprisonment for hoarding eggs was handed over by Schlegelberger to the Gestapo for execution, because Hitler had desired the victim's death. In 1941 Schlegelberger removed from their offices three justices of the Lüneberg Court, who had passed a sentence on.

(1) In the interests of space, no summary will appear of the evidence relating to Westphal or Engert (see p. 5) or of Barnickel, Petersen, Nebelung and Cuhorst, who were found not guilty. The Tribunal expanded upon its finding of not guilty regarding Cuhorst, and its words are set out on p. 69.

a Polish farmhand which Hitler regarded as too light. In December, 1941, the accused, at the wish of Himmler, quashed a sentence passed on a German police officer who had obtained by beating a confession from a milking-hand named Bloeding.

It was Schlegelberger's signature on a decree of 7th February, 1942, which imposed upon the Ministry of Justice and the German courts the tasks involved in the prosecution, trial, and disposal of the victims of Hitler's Night and Fog plan. In an affidavit, the accused von Ammon stated, *inter alia :* " The decree of 7th 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."

Schlegelberger prepared a draft of a proposed ordinance " concerning the administration of justice regarding Poles and Jews in the incorporated Eastern territories ". A comparison of its phraseology with the phraseology contained in the law against Poles and Jews of 4th December, 1941, disclosed that Schlegelberger's draft constituted the basis on which, with certain modifications and changes, the law against Poles and Jews was enacted. This law provided :

" 1. *Criminal Law*

" I. (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 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 :

" 1. If he commits any act of violence against a member of the German Armed Forces or associated services, of the German Police Force or its auxiliaries, of the Reich Labour service, of any German authority or office or of a section of the N.S.D.A.P. ;

" 2. If he purposely damages installations of the German authorities or offices, objects used by them in performance of their duties or objects of public utility ;

" 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 sub-sections (2), (3) and (4), paragraphs 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.

" 5. If he is in unlawful possession of firearms, hand-grenades or any weapon for stabbing or hitting, of explosives, ammunition or other implements of war, or if he has credible information that a Pole or a Jew is in unlawful possession of such objects, and fails to notify the authorities forthwith.

" 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 offence points to particularly objectionable motives or is particularly grave for other reasons ; the death sentence may also be passed upon juvenile offenders.

" 2. *Criminal Procedure*

" 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.

" (2) The State Prosecutor may institute proceedings before a Special Court in all cases. Proceedings may be instituted by him before a District Judge if the punishment to be imposed is not likely to be heavier than five years in a penal camp, or three years in a more rigorous penal camp.

" (3) The jurisdiction of the People's Court remains unaffected.

"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 two 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. (1) Arrest and temporary detention are allowed whenever there are good grounds to suspect that an offence has been committed.

" (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 depositions on oath 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, dispense with the provisions of the German Law on the Organisation of Courts and on Criminal Procedure, whenever this may appear to them advisable for the rapid and more efficient conduct of proceedings.

" 3. *Martial Law*

" XIII. (1) Subject to the consent of the Reich Minister of the Interior and the Reich Minister of Justice, the Reich Governor (*Oberpräsident*) 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 offences 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.

" (3) Subject to the consent of the Reich Minister of the Interior, the constitution and procedure of the Courts established under Martial Law shall be regulated by the Reich Governor (*Oberpräsident*).

" 4. *Extent of Application of this Decree*

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

" (2) The case may also be tried by the Court within whose jurisdiction the former domicile or residence of the offender is situated. Sections V–VIII apply accordingly.

" (3) Paragraphs 1 and 2 do not apply to offences tried by the Courts in the Government General.

" 5. *Supplementary Provisions*

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

Section XIV of the law was repeatedly employed by the courts in the prosecution of Poles, and on 21st January, 1942, Schlegelberger issued a

decree providing that the law against Poles and Jews " will be equally applicable with the consent of the Public Prosecutor to offences committed before the decree came into force."

Schlegelberger was unwilling to extend the system of deportation to the east to half-Jews. His solution, however, was that proposed by him to Reich Minister Lammers, in a secret letter on 5th April, 1942 :

> " Those half-Jews who are capable of propagation should be given the choice to submit to sterilisation or to be evacuated in the same manner as Jews."

(v) *Klemm*

From July, 1940 to March, 1941, Klemm was in Holland as head of the department dealing with legal matters in the occupation government of Seyss-Inquart and had charge of both civil and penal law. The penal section in Holland had jurisdiction over German citizens not in the army and Dutch nationals whose acts were said to infringe on German interests. He was also liaison officer between the Commissioner General for the Administration of Justice and the Secretary of the Dutch Ministry of Justice at The Hague. From March, 1941 to January, 1944, Klemm was in the office of the Deputy of the Führer and Party Chancellery in Berlin as Chief of Group III–C. During this period he was the liaison officer between Minister of Justice Thierack and the Party Chancellery. He later became State Secretary in the Ministry of Justice.

During his period of service in Holland, the accused wrote letters dated 24th and 30th September, 1940, marked " Secret ", to the Department for Legislation Lange Vijverberg, with opinions and recommendations as to the registration and confiscation of Jewish property in Holland. He knew of the persecution of the Jews in Holland. As State Secretary in the Ministry of Justice, he exercised supervision over the enforcement of the Law of 4th December, 1946, against Poles and Jews and dealt with clemency matters pertaining to cases tried under that decree. Further, during his term of office in the Party Chancellery, he wrote to the Minister of Justice, stating that while the German Criminal Code for juveniles could be made applicable to other foreign juveniles, it should not be applied to Jewish, Polish and gipsy juveniles. The letter also stated that " a special regulation will come into effect which will prevent the German Criminal Code for juveniles from applying to gipsies and those of gipsy descent."(1)

While in the Party Chancellery, Klemm took part in drafting the act to make the law relating to treason retroactive and applying it to the " annexed " Eastern territories, and this draft bears his signature.

(1) As to this act the Judgment states: " 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 proscribed 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 gipsies. Further, it can hardly be construed as a legal opinion as to gipsies 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 gipsies and those of gipsy descent merely because a definite regulation is lacking."

There was also some evidence implicating Klemm in the operation of the Nacht und Nebel Decree. When the defendant von Ammon attended conferences with public prosecutors in Breslau and Kattowice on 18th and 19th February, 1944, concerning the housing of Nacht und Nebel prisoners and possibility of transferring Nacht und Nebel cases from the Netherlands, Belgium and Northern France to special courts in Poland for trial, he reported to Klemm among others. As Under-Secretary, Klemm was required to pass judgment upon clemency matters either while acting with or in the absence of the Minister of Justice. He admitted deciding on eight clemency pleas in Nacht und Nebel cases where death sentences had been passed and refusing all of them. He knew of the transfer of Nacht und Nebel cases from Essen to Silesia and knew of the " routine " Nacht und Nebel matters which passed through his department.(1)

During the time when Klemm was State Secretary, the plan of the leaders of the Nazi State to inspire the lynching of forced-down Allied flyers by the people of Germany was inaugurated. The Ministry of Justice took over in substance the disposition of cases where Germans were alleged to have killed such captives and by its action the prosecution throughout Germany was restricted in its normal duty of filing indictments against those who had murdered Allied airmen and were criminals under German law. The evidence showed many instances of the lynching of Allied airmen by the German population, yet no case was brought to the attention of the Tribunal where an indictment was actually filed for such offences. There was evidence that Klemm knew of this policy.(2)

The evidence before the Tribunal showed that in the latter part of January, 1945, the penitentiary at Sonnenburg under the Ministry of Justice was evacuated and that prior thereto, between seven and eight hundred political prisoners therein were shot by the Gestapo. The accused denied knowledge of this matter.(3)

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(1) In its Judgment the Tribunal summed up Klemm's responsibility in this sphere as follows : " 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."

(2) The Tribunal gave voice to the following conclusion : " 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. . . . The defendant Klemm was familiar with the entire correspondence on this matter . . . 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."

(3) Regarding the accused's connection with these shootings, however, the Tribunal said : " That the defendant Klemm knew nothing about the liquidation of some 800 people in this institution until he learned it in this trial, over-taxes 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."

Exhibit 290 contained directives of the Ministry of Justice which 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.

(vi) *Rothenberger*

This accused was, from 1935 to 1942, 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. He was a Dienstleiter in the Nazi Party during 1942 and 1943, and from 1934 to 1942 he was Gauführer in the National Socialist Jurists' League.(1)

Rothenberger took an active part in making the German legal system subservient to the ends of Nazism. He expressed his conviction that the duty of a judge as the " vassal " of the Führer was to decide cases as the Führer would decide them. The evidence indicated 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 channelled through him personally.

On the one hand he established liaison with the Party officials and the police, and on the other he organised a system of political guidance for the judges who were his subordinates in the Hamburg area. This system of guidance was illustrated by the holding of conferences before trial concerning pending cases of political importance. The evidence showed also 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 criticised 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.

He protested against the practice of Party officials and Gestapo officers of interfering with the judges in trying 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 he then instituted a system of reviewing from a political point of view sentences passed by the judges who were his inferiors.

In a report addressed 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 was a Jew should as a rule be a reason for arresting him ; that Jews might be heard as witnesses but that extreme caution was 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 the judges be advised accordingly.

On 21st April, 1943, Rothenberger took part in a conference of State Secretaries concerning the limitation of legal rights of Jews, in which 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 13th Regulation under the Reich Citizenship Law which provided that criminal actions

(1) Concerning the dual capacity in which he served, the accused said : " On account of the identity, of course, between President of the District Court of Appeals and Gauführer, 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."

committed by Jews were to be punished by the police and that after the death of a Jew his property was to be confiscated.

Rothenberger also participated in the deprivation of the rights of Jews in civil litigation. In the report referred to above 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 be given on the basis of which the rights of a pauper can be denied to a Jew."

Notwithstanding this statement that it would be unsuitable to deprive Jews of this right without a legal regulation there was evidence that, in practice, he did help to secure the denial to Jews of the benefits of the German poor law.

The accused was also shown to have played a minor part in the carrying out of the Nacht und Nebel plan, and in 1941 and 1942 he visited Mauthausen concentration camp, but there was no evidence that after his inspection of Mauthausen he took any action with regard to the knowledge which he had gathered there.(1)

(vii) *Lautz*

The defendant Lautz served from 20th September, 1939, until the end of the war as Chief Public Prosecutor at the People's Court in Berlin. The defendant Rothaug was among the senior public prosecutors under the general supervision of Lautz and the crimes with which his office dealt were those over which the People's Court had jurisdiction. The matters which came before him included prosecutions for " undermining the German defensive strength ", " high treason " and " treason ", cases of attempted escape from the Reich by Poles and other non-Germans, and Nacht und Nebel cases.

A great number of prosecutions were brought under the decree of 17th August, 1938, which provided that " Whoever openly seeks to paralyse or undermine the will of the German people or an allied nation to self-assertion by bearing arms " should be punished by death.(2) The prosecutor's office was required to deal at one time with approximately 1,500 cases a month involving charges of this type. Under the 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

(1) The Tribunal found the evidence on this point sufficiently incriminating to enable it to say 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. . . . 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."

(2) The Tribunal commented that: " This was the law which effectively destroyed the right of free speech in Germany."

which were assigned to the People's Court for trial " there was always the possibility that the death sentence would be pronounced ".

Lautz 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. As an illustration of the type of case which was prosecuted under the law against " undermining the defensive strength of the nation " was that 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 offence was described by Lautz and Rothaug as a serious case of undermining the defensive strength of the nation.

The office of the Chief Public Prosecutor of the People's Court was vested with a wide discretion in the assignment of cases to the various courts for trial. 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," as Lautz often did, instead of sending it to a lower court for trial under the Malicious Acts Law of 1934, under which imprisonment could be awarded, he determined for all practical purposes the character of the punishment to be inflicted, and yet the evidence showed 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.

Lautz also took part in the enforcement of the Nacht und Nebel Decree until late 1944, when he was ordered to suspend People's Court proceedings against Nacht und Nebel prisoners and transfer them to the Gestapo. The People's Court acquired jurisdiction of Nacht und Nebel cases under the decree of the Reich Minister of Justice of 14th October, 1942. Lautz estimated that the total number of Nacht und Nebel 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.

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 the penal code concerning treason and high treason and the persons charged included many Poles. For instance, upon an indictment 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 defendants attempted to cross the border into Switzerland for the purpose of joining a Polish Legion which was supposed to exist there. By such conduct and by depriving the German Reich of the benefit of their labour, it was held that the efforts of the defendants aimed "at forcibly detaching the Eastern regions incorporated in the Reich from the German Reich."

In a secret communication by the defendant Lautz to the Reich Minister of Justice the former proposed that the German courts should try and convict Poles, including one Golek, upon the charge of high treason on account of acts done in Poland before the war, namely instituting proceedings against Polish citizens of German blood, charging these racial Germans with Fifth Column activities directed against Poland.

(viii) *Mettgenberg*

Mettgenberg held the position of Ministerialdirigent in Divisions III and IV of the Reich Ministry of Justice. In Division III, for penal legislation, he dealt with questions of international law, formulating secret, general and circular directives.

His statements showed that he exercised wide discretion and had extensive authority over the entire Night and Fog plan from the time the Night and Fog prisoners were arrested in occupied territory onwards to their transfer to Germany, trial and execution or imprisonment. 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 treated. There was evidence, for instance, that the accused had dealt with questions of procedure and of clemency in Nacht und Nebel cases and questions relating to the place of trial of such cases. Mettgenberg and von Ammon were sent to the Netherlands because certain German courts set up there were receiving Night and Fog cases in violation of the order 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 the sending of a report of the matter to the OKW at Berlin, which set out the opinion of 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."

Mettgenberg referred to and approved the testimony of the defendant Schlegelberger, which stated " that the Night and Fog prisoners were expected, and were to be tried materially according to the same regulations which would have 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 Night and Fog prisoners who had been charged with high treason or preparation of treason against the Reich.

In an affidavit Mettgenberg stated: " The ' Night and Fog ' Section within my sub-division was headed by Ministerial Counsellor von Ammon. This matter was added to my sub-division because of its international character. I know, of course, that a Führer 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 . . . . Whenever 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."

In response to several inquiries from prosecutors at Special Courts in Hamm, Kiel, and Cologne, citing pending Night and Fog cases, the defendants Mettgenberg and von Ammon replied that in view of the regulations for the keeping of Night and Fog trials absolutely secret defence counsel chosen by Night and Fog defendants would not be permitted to act for them.

A letter dated 3rd June, 1943, from the Reich Ministry of Justice to the People's Court Justices and the Chief Public Prosecutors, initialed by Mettgenberg, dealt with the subject of trials under the Night and Fog Decree of foreigners who were nationals of other countries than those occupied by the Nazi forces.(1) The question arose whether the usual secrecy measures should apply. The reply was 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 Nacht und Nebel procedure ; otherwise foreign nationals would obtain knowledge of the course of the trial against their accomplices.

(ix) *Von Ammon*

Von Ammon, having joined the Reich Ministry of Justice in 1935, was employed, after the Austrian Anschluss, as liaison officer of Department III (penal matters) and Department VIII (Austria), in the Reich Ministry of Justice. He was consultant in the department for the administration of penal law. 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. On 1st March, 1943, he became Ministerial Counsellor in the Ministry of Justice. He stated in evidence that :

> " From 1942 onwards 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."

Von Ammon's position involved the exercise of personal discretion. Within the Ministry he was Ministerial Counsellor in Mettgenberg's subdivision and was in charge of the Night and Fog matters ; the distribution of the Night and Fog cases to the several competent special courts and the People's Court was decided upon by him. The defendant Mettgenberg stated that whenever von Ammon had doubts concerning the handling of individual cases joint discussions between the two were held. He added : " When he had no doubts he could decide on matters himself."

Von Ammon and Mettgenberg acted together on doubtful matters and referred difficult questions to competent officials in the Reich Ministry of Justice and the Party Chancellery.

Von Ammon and Mettgenberg were the representatives of the Reich Ministry of Justice at a conference at The Hague on 2nd November, 1943, concerning " New Regulations for Dealing with Night and Fog Cases from

(1) In referring to this evidence, the Tribunal pointed out that : " The difficulty obviously involved a violation of international law as to such nationals of other countries."

the Netherlands." The broad scope and the variety of the official activities of von Ammon were also illustrated by reference to reports which he made to officials of the Ministry of Justice during the year 1944 on questions relating to Nacht und Nebel procedure. A declaration signed by von Ammon, dated 2nd October, 1947, stated that Nacht und Nebel prisoners were often ignorant of charges against them until a few moments before the trial.

A directive by the Reich Minister of Justice with respect to the treatment of Nacht und Nebel prisoners, dated Berlin, 21st January, 1944, initialed by defendant von Ammon, to the President of the People's Court, to the Reichsführer SS, Reich Prosecutor of the People's Court (defendant Lautz), to the Chief Public Prosecutor at Hamm (defendant Joel), and others, stated that :

> " 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."

In conferences attended by von Ammon, the Ministry of Justice agreed to the transfer of Nacht und Nebel proceedings which had been ordered by Hitler[1] and moved the victims from the Ministry's prisons to the Gestapo's custody.[2]

(x) *Joel*

Having entered the Ministry of Justice in May, 1933, as a junior public prosecutor, Joel had, by May, 1941, risen to the rank of Ministerial Counsellor. He remained with the Reich Ministry of Justice until 12th May, 1943, when he was appointed Attorney-General to Supreme Provincial Court of Appeals in Hamm (Westphalia). Joel became Chief Prosecutor of the Court of Appeals in Hamm, covering all of Westphalia and the district of Essen, on 17th August, 1943, which office he continued to hold until the end of the war. At the same time he rose in the ranks of the SS, reaching, on 9th November, 1943, the rank of SS Obersturmbannführer, his appointment being approved by Himmler. After December, 1937, Joel in his several capacities at the Ministry of Justice, 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 was appointed on 1st August, 1943.

In his position as Chief Prosecutor of the Court of Appeals in Hamm he was in charge of the Night and Fog prosecutions for the Special Courts in Essen until 15th March, 1944, when these courts were transferred farther east to Oppeln in the Kattowice district. It was his task to supervise the work of all prosecutors assigned to his office.

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(1) See p. 9.
(2) Regarding von Ammon see also pp. 15 and 19.

Joel was also a Referent in the Reich Ministry of Justice with the authority and duty to review penal cases from the incorporated Eastern territories after the occupation of Poland. In this capacity he dealt with many of the cases tried pursuant to the decree against Poles and Jews. In defence 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 occupation of Poland the nationals of the annexed part of Poland became German nationals. He testified that such a Polish citizen after 1st September, 1939, remained a Polish national and that " a Polish national is never a German ". Joel admitted that he knew he was not dealing with Germans but with foreign nationals.

In his capacity as Referent for the incorporated Eastern territories and liaison officer between the Reich Ministry of Justice and the Gestapo, Joel took part in conferences 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 three years to the Gestapo. Schlegelberger testified that Minister of Justice Guertner charged Joel with the mission of representing the Ministry of Justice with the police in connection with such transfers.

In his capacity as Referent, Joel reviewed 16 death sentences passed on 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.

(xi) *Rothaug*

This accused was, from April, 1937 to May, 1943, Director of the District Court in Nuremberg, 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 dealt for a time with cases of high treason in the Southern Reich territory, and, from January, 1944, with cases concerning the undermining of public morale in the Reich territory.

His attitude of hostility towards the Polish and Jewish races was proved from many sources and was not shaken by the affidavits which he submitted on his own behalf. One witness testified that recommendations regarding the treatment of Poles and Jews 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. In a communication to Deputy Gauleiter Holz the accused Oeschey made many charges against one Doebig for his failure to take action against officials under him who had failed to carry out the Nazi programme against the 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.

Evidence of Rothaug's participation in the Nazi policy of persecution and extermination of persons of these races included accounts of three cases which were tried by Rothaug as Presiding Judge.

In the first trial, two Polish girls of under 18 years of age were accused of starting a fire in an armament plant in Bayreuth. A person named Kern was summoned by the defendant Rothaug to act as defence counsel in the case approximately two hours before the case came to trial. He informed Rothaug that he would not have time to prepare a defence. According to Kern's evidence to the United States Military Tribunal, Rothaug stated that if he did not take over the defence, the trial would have to be conducted without a defence counsel. Rothaug on the other hand claimed to have told Kern that he would secure another defence 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 ; in the view of Markl, the prosecutor in the case, it was conducted with the speed of a court martial.

The evidence consisted of alleged confessions which one of the defendants repudiated before the Court. The two young Polish women were sentenced to death and executed four days after trial.(1)

In the second trial a Polish farmhand, approximately 25 years of age, was alleged to have made indecent advances to his employer's wife. The defendant was sentenced to death under the Law 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. The victim was subsequently executed. The judgment of Rothaug's court included the following words : " 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 sub-humanity, or in his belonging to Polish sub-humanity. . . . Beyond disregarding the feminine honour 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 a great deal of disobedience in the German living-space that his action has to be considered as especially significant."

In the third trial, a merchant who was head of the Jewish community in Nuremberg and 68 years of age was sentenced to death for an " offence " said to amount to race pollution, against Article 2 of the Law for the Protection of German Blood and Honour and Sections 2 and 4 of the Decree Against Public Enemies. These read respectively as follows :

" *Article* 2.

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

" *Section* 2.

" Crimes During Air Raids.

" Whoever commits a crime or offence against the body, life, or property, taking advantage of air raid protection measures, is punishable

(1) Rothaug stated in contradiction to the other witnesses, that a clear case of sabotage had been established, but the United States Tribunal ruled : " 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."

by hard labour of up to fifteen (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 labour of up to fifteen (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 indictment before the Special Court which tried the victim was prepared according to the orders of Rothaug. Before the trial, Rothaug told Prosecutor Markl that there was sufficient proof of sexual intercourse to convince him, and that he was prepared to condemn the Jew to death. Also before the trial, Rothaug called on Dr. Armin Bauer, medical counsellor for the Nuremberg Court, as the medical expert for the case. He stated to Bauer that he wanted to pronounce a death sentence and that it was therefore necessary for the defendant to be examined. This examination, Rothaug said, was a mere formality since the male accused " would be beheaded anyhow ". To the doctor's reply that the latter was old and that 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."

During the proceedings, Rothaug made repeated attempts to encourage the witnesses to make incriminating statements against the defendant. Scant attention was paid by the Court to the defendant's evidence. 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.

The proof before the Special Court seemed to have proved little more than the fact that the female defendant had at times sat upon the male accused's lap and that he had kissed her, which facts were admitted.

After the introduction of evidence was concluded, a recess was taken, during which time Rothaug made it clear to Prosecutor Markl that he expected the prosecution to ask for a death sentence against the male defendant and a term in the penitentiary for the German girl. Rothaug at this time also gave him suggestions as to what he should include in his arguments. As previously stated the male victim was sentenced to death.[1]

(xii) *Oeschey*

The defendant Oeschey joined the Nazi Party on 1st December, 1931 By a decision of 30th July, 1940, of the Reich Legal Office of the Nazi Party he was provisionally commissioned with the direction of the legal office of the Party in the Franconia Gau, and the Leadership of the Franconia Gau in the NSRB, the National Socialist Lawyers' League. In his testimony he stated that from 1940 to 1942 he was solely in charge of the Gau legal office as section chief. The evidence clearly established the defendant's

[1] Regarding Rothaug, see also pp. 18 and 26.

voluntary membership as the chief of a Gau staff office subsequent to 1st September, 1939. Oeschey was appointed on 1st January, 1939, to the office of Senior Judge of the District Court at Nuremberg, which office he held until 1st April, 1941. He was then appointed District Court Director at the same court. He was a presiding judge of the Special Court in Nuremberg. He carried out his Party duties at the same time as he served as a judge of the Special Court.

He was drafted into the army in February, 1945, and remained in the army until the end of the war ; but he was released for the period from 4th April until 14th April, 1945, during which time he functioned as chairman of the civilian court martial at Nuremberg.

Among the evidence of the arbitrary character of the defendant's behaviour while acting in a judicial capacity appeared accounts of the following incidents.

A female Pole and a male Ukrainian were indicted before the Special Court at Nuremberg for these alleged crimes : she for a violation of the law against Poles and Jews in connection with the crime of assault and battery and threat and resistance to a German officer ; he for the alleged offence 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 Pole was found guilty under the Penal Law against Poles, and the Ukrainian, who had used at most only a little force in attempting to protect her, was found guilty of having taken advantage of extraordinary war-time conditions and of violating the law against violent criminals. Both defendants were sentenced to death by the defendant Oeschey, who imposed his will upon his two fellow judges and induced them to concur.

A decree by Minister of Justice Thierack on 13th December, 1944, abrogated the rules concerning the obligatory representation of accused persons by defence counsel. It was left for the judge to decide whether defence counsel was required. On 15th February, 1945, a 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 the law Gauleiter Holz set up a court martial in Nuremberg, of which the defendant Oeschey was presiding judge. The first case to be tried was that of a German Count who was tried, convicted and shot for having allegedly made insulting remarks concerning Hitler to a lady in a private room in the Grand Hotel and expressed approval of the attempt upon Hitler's life of 20th July, 1944. The victim was indicted on 3rd April, tried on 5th April, and shot on 6th April, without the knowledge of his counsel, after secret proceedings during which he was without the benefit as a witness of the lady mentioned above, who would have testified for him. Oeschey had informed the prosecutor that he would conduct the trial without defence counsel because the " legal prerequisites for trial without defence counsel did exist ".

There was also evidence of a trial of a group of foreign boys who had fights with boys in the Nuremberg Hitler Youth Home. A witness characterised the actions of the boys as harmless pranks. Oeschey held that they constituted a resistance movement and sentenced several of the boys to death.

Much evidence was also supplied, by colleagues of Oeschey and Rothaug and other officials and lawyers of the Nuremberg Courts, of the offensive behaviour of these two accused towards defendants and their autocratic and arbitrary conduct of judicial proceedings.

(xiii) *Altstötter*

Altstötter, after a pre-war record of service in the Bavarian and Reich Ministries of Justice and in a judicial capacity, served from 1939 to 1943 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, 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 organisation, he automatically became a member of the SA. Prior to May, 1937, he resigned from the SA to become a member of the SS on Himmler's request. His membership in the SS, according to his personnel files, dated from 15th May, 1937. He applied for membership in the Nazi Party in 1938 and his membership was dated back to 1st May, 1937. He was awarded the Golden Party Badge for service to the Party. He received several promotions in the SS, and finally, by a letter dated 16th June, 1944, he was notified that the Reichsführer SS had promoted him to the rank of Oberführer. The evidence established that the defendant joined and retained his membership in the SS on a voluntary basis, and that he took considerable interest in his SS rank and honours. Evidence of his high reputation in SS circles was provided, for instance, by the fact that Himmler on 18th September, 1942, at a meeting with Thierack and Rothenberger, referred to him as a reliable SS Obersturmführer.

5. THE JUDGMENT OF THE TRIBUNAL

The Judgment was delivered on 3rd-4th December, 1947. In it the Tribunal summarised the main events of the trial and the evidence which had been brought regarding the accused, and dealt with a number of questions of law. These last, together with the findings and sentences, are set out in the following pages.

(i) *The Relevance of Control Council Law No.* 10 *and of Ordinance No.* 7 *of the United States Zone of Germany.*[1]

The Tribunal cited and commented briefly upon the main relevant provisions of Control Council Law No. 10 and of Ordinance No. 7 of the United States Military Government in Germany, in the following words:

> " 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 authorised representatives of the Four Powers: The United States, Great Britain, France, and the Soviet Union.

(1) As to the United States law and practice regarding Military Tribunals and Commissions and Military Government Courts for the trial of war criminals in general, see p. 2, note 1.

" 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 30th October, 1943, and the London Agreement of 8th 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 30th October, 1943, " Concerning Responsibility of Hitlerites for Committed Atrocities " and the London Agreement of 8th 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, Article 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 2 of C.C. Law 10 defines acts, each of which ' is recognised as a crime ', namely : (*a*) crimes against peace ; (*b*) war crimes ; (*c*) crimes against humanity ; (*d*) membership in criminal organisations. We are concerned here with categories *b*, *c*, *d*, only, each of which will receive later consideration.

" C.C. Law 10 provides that :

' 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 . . . ' (Article III, paragraph 1 (*a*)), and ' shall have the right to cause all persons so arrested and charged . . . to be brought to trial before an appropriate tribunal '. (Article III, paragraph 1 (*d*).) ' The Tribunal by which persons charged with offences hereunder shall be tried, and the rules and procedure thereof, shall be determined or designated by each zone commander for his respective zone. . . . ' (Article III, paragraph 2.)

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

' Article I. Purpose.—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 offences recognised as crimes in Article II of Control Council Law No. 10, including conspiracies to commit any such crimes. . . . '

' Article II. Military Tribunal Constituted : (*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 8th August, 1945, certain tribunals to be known as " Military Tribunals " shall be established hereunder.'

" The Tribunals authorised by Ordinance 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 Goyernor may agree with other zone commanders for a joint trial. (Ordinance 7, Article 2 (*c*).) The Chief of Counsel for War Crimes, United States, may invite others of the United Nations to participate in the prosecution. (Ordinance 7, Article 3 (*b*).)

" The Ordinance provides :

' 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 in so far 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.' (Ordinance No. 7, Article X.)

" The sentences authorised by Ordinance No. 7 are made definite only by reference to those provided for by C.C. Law 10. (Ordinance No. 7, Article 16.)

" As thus established the Tribunal is authorised 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 offences defined in C.C. Law 10."

(ii) *The Source of Authority of Control Council Law No.* 10 *and of the Charter of the International Military Tribunal*

Having identified the instruments which purported to establish its jurisdiction, the Tribunal next considered the legal basis of those instruments. The Judgment reads as follows :

" The unconditional surrender of Germany took place on 8th May, 1945. (Department of State publication No. 2423, page 24.) 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 5th 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'. (Berlin Declaration of 5th June, 1945, Department of State publication No. 2423, pages 62, 63.)

" On 2nd 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 authority 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 demilitarisation 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 reorganise the judicial system in accordance with the principles of democracy and of equal rights ; to accomplish the decentralisation 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 re-affirmed their intention to bring the Nazi war criminals to swift and sure justice. (Department of State publication No. 2423, pages 10 *et seq.*)

" 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 reorganise 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 belligerent entity, necessarily implied in the Declaration of Berlin of 5th June, 1945, signifies that a true state of war—and hence *belligerent* occupation—no longer exists within the meaning of international law.' (Freeman, in *The American Journal of International Law*, July, 1947, page 605.)

'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, favoured 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 favoured 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 7th 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.' (Fried, *The American Journal of International Law*, Vol. 40, No. 2, April, 1946, page 327.)

"The view expressed by the two authorities cited appears to have the support of the International Military Tribunal judgment in the case against Göring *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 aggressive war. The reason given is significant. The Tribunal said:

'The doctrine was never considered to be applicable so long as there was an army in the field attempting to restore the occupied territories to their true owners, and in this case, therefore, the doctrine could not apply to any territories occupied after 1st September, 1939.' (Volume 1, Official Text, IMT Trials, page 254.)

"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 recognising 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, *The American Journal of International Law*, 1945.

" ' Germany's Present Status ', by F. A. Mann, Doctor of Law (Berlin) (London), paper read on 5th 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 Trials ', 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 statutory and constitutional changes brought about since 7th 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 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 by 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 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 is the same as the situation 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 authorises 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 reorganising 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 executive 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 the 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 law-making power throughout the Reich. The first International Military Tribunal in the case against Göring *et al.* recognised 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 recognised by the civilised world. . . . These provisions are binding upon the Tribunal *as the law to be applied to the case.*' (*Trial of the Major War Criminals* (Official Text—Nuremberg, 1947), Volume 1, pages 218 and 174.)

" Since the Charter 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. 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 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.*' (*Trial of the Major War Criminals*, Volume 1, page 219.)

" 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.' (' Issues of the Nuremberg Trials,' by Herbert Wechsler, *Political Science Quarterly*, March, 1947, page 14.)

" 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 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.

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

" 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 Charter as an exercise of sovereign legislative power. The opinion went on to show that the Charter was also ' an expression of international law 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 pre-existing 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. In so far as C.C. Law 10 may be thought to be 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 civilised 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 authorised 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 civilised nations, which acceptance is manifested by international treaties, conventions, authoritative text-

books, practice and judicial decisions.' (Hackworth, *Digest of International Law*, Volume 1, Pages 1–4.)

" 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 civilised States.

' 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.' (Hyde, *International Law* (2nd rev. ed.), Vol. 1, page 4.)

' 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.' (Hyde, *supra*, page 5.)

' 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.' (Hyde, *supra*, page 9.)

' States may through the medium of an international organisation 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 organisation 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.' (Hyde, *supra*, page 11.)

' 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 deliberately and overtly recognised by the consensus of civilised mankind. The experience of two great world wars within a quarter of a 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.' (Lord Wright, ' War Crimes under International Law ', *The Law Quarterly Review*, Vol. 62, January, 1946, page 51.)

" For the reasons stated by Lord Wright, this growth by accretion has been greatly accelerated since the First World War. (Hyde, *International Law* (2nd rev. ed.), Volume 1, page 8.) The Charter,

the I.M.T. 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 authorised representatives of the four greatest powers on earth, is entitled to judicial respect when it states, ' Each of the following acts is *recognised* as a crime '. Surely the requisite international approval and acquiescence is established when twenty-three States, including all of the great powers, have approved the London Agreement and the I.M.T. Charter without dissent from any State. Surely the 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 recognises the obligation laid upon it by Article 13, paragraph 1, sub-paragraph (*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 8th 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 19th January, 1946 ;
>
> ' Therefore,
>
> ' Affirms the principles of international law recognised by the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal ;
>
> Directs the committee on codification of international law established by the resolution of the General Assembly of . . . December, 1946, to treat as a matter of primary importance plans for the formulation, in the text of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal.' (*Journal of the United Nations*, No. 58, Supp. A–A/P. V./55, page 485 ; ' The Crime of Aggression and the Future of International Law ', by Philip C. Jessup, *Political Science Quarterly*, Vol. LXII, March, 1947, Number 1, page 2.)

" Before the International Military Tribunal had convened for the trial of Göring *et al.*, the opinion had been expressed that through the process of accretion the provisions of the I.M.T. 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 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.' (Lord Wright, ' War Crimes under International Law ', *The Law Quarterly Review*, Vol. 62, January, 1946, page 41.)

" 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.' (*I.M.T. Judgment*, page 218.)

" 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 :

' 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.' (Hyde, *International Law* (2nd rev. ed.), Vol. 1, pages 16, 17.)

" 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 recognised that tribunals may be established and punishment imposed by the State into whose hands the perpetrators fall. Those rules of international law were recognised 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, 90 L. ed. 343.) However, enforcement of international law has been traditionally subject to practical limitations. Within the territorial boundaries of a State having a recognised, 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 authorised 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 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 harmonised 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."

(iii) *The Construction of the Provisions of Control Council Law No.* 10 *Regarding War Crimes and Crimes Against Humanity*

The Tribunal dealt next with the problem of the construction of Control Council Law No. 10, for, in its opinion, " 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 Judgment states :

" The first penal provision of Control Council Law No. 10 with which we are concerned is as follows :

' Article II, 1.—Each of the following acts is recognised 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 and 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 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 VI of the 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 labour, or for any other purpose, of civilian population *of, or in*, occupied territory '. 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* '.

" This legislative intent becomes more manifest when we consider the provisions of the Charter and of C.C. Law 10 which deal with crimes against humanity. Article VI of the 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 ;(1) 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 definition 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

(1) It should be added that by the Berlin Protocol of 6th October, 1945, the semi-colon which appears in the above text was replaced by a comma. The effect of this amendment was that the words " in execution of or in connection with any crime within the jurisdiction of the Tribunal " governed the whole of the text of Article 6 (c) of the Charter which defined the term " crimes against humanity ".

German law should be no defence. 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 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 authorised by the occupying authorities.

" As recently asserted by General Telford Taylor before Tribunal No. IV, in the case of the United States *v.* 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 authorise German courts to try crimes committed by Germans against other Germans (and in the American Zone of Occupation no such authorisation 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 offences and inhumane acts and persecutions on political, racial, or religious grounds systematically organised and conducted by or with the approval of government.

" The opinion of the first International Military Tribunal in the case against Göring *et al.* lends support to our conclusion. That opinion recognised the distinction between war crimes and crimes against humanity, and said:

> ' . . . in so far 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, aggressive war and, therefore, constituted crimes against humanity.' (*Trial of Major War Criminals*, Vol. I, pages 254–255.)

" The evidence to be later reviewed established that certain inhumane acts charged in Count 3 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 I.M.T. 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."

(iv) *The Ex Post Facto Principle Regarded as Constituting No Legal or Moral Barrier to the Present Trial*

The Judgment states:

" The defendants claim protection under the principle *nullum crimen sine lege*, though they withheld from others the benefit of that rule during the Hitler régime. 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, 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 these 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 the 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, although 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 authority 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 I.M.T. in the case *versus* Göring *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 neighbouring 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 civilised 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.

' 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 offence was thus that of the man who passed by on the other side. That we have finally recognised our negligence and named the criminals for what they are is a piece of righteousness too long delayed by fear.' (' The Nuremburg Trial,' Landmark and Law ; *Foreign Affairs*, January, 1947.)

" 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 *v.* Eyre, L.R. 6 Q.B. 1, 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 ; as follows :

' 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 civilised 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.' (Fyfe, Foreword to *The Nuremberg Trial*, by R. W. Cooper.)

" 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 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 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 authorise England, and would have authorised us, to declare war on Germany in defence of Poland—and in this enterprise to kill countless thousands of German soldiers and civilians—can it be possible that it failed to authorise punitive action against individual Germans judicially determined to be responsible for the Polish attack ? To be sure, we would demand a more explicit authorisation 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 ? ' (Wechsler, ' Issues of Nuremberg Trial ', *Political Science Quarterly*, Vol. LXII, No. 1, March, 1947, pages 23–25.)

" 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 defence 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 organised system of injustice and persecution shocking to the moral sense of mankind, and that he knew or should have known that he would be subject to punishment if caught. Whether it be considered codification or substantive legisla-

tion, 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 30th October, 1943. Long prior to the Second World War the principle of personal responsibility had been recognised.

> ' 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 offences.' (Hyde, *International Law* (2nd rev. ed.), Vol. III, page 2409.)

" 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.' (Hyde, *International Law* (2nd rev. ed.), Vol. III, pages 2409–2410.)

" 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.' (*American Journal of International Law*, Vol. 14 (1920), page 117.)

" 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 prisoner or have otherwise fallen into 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.' (Hyde, *International Law* (2nd rev. ed.), Vol. III, page 2412.)

" According to the Treaty of Versailles, Article 228, the German government itself ' recognised the right of the Allied and associated powers to bring before military tribunals persons accused of offences against the laws and customs of war. Such persons who might be found guilty were to be sentenced to punishments " laid down by law ".'

Some Germans were, in fact, tried for the commission of such crimes. (See : Hyde, *International Law* (2nd rev. ed.), Vol. III, page 2414.)

" 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."

(v) *The Development of the Concept of Crimes Against Humanity as Violations of International Law.* The Judgment continues :

" 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 offences recognised by common international law. The force of circumstance, the grim fact of worldwide 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 endeavour to impose restraints ; and by its law none are imposed. The Covenant of the League of Nations takes exact cognisance 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.

" 'Inasmuch 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 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.' (Hyde, *International Law* (2nd rev. ed.), Vol. I, pages 7, 8.)

" '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 28th June, 1919, in respect to Labour, as well as in Article XXIII of that treaty embraced in the Covenant of the League of Nations.' (Hyde, *International Law* (2nd rev. ed.), Vol. I, page 38.)

" '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 were 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.[3] The propriety 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.

" 'Note 3.—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 Art. XI of the Covenant of the League of Nations, U.S. Treaty, Vol. III, 3339.' (Hyde, *International Law* (2nd rev. ed.), Vol. I, pages 249–250.)

" '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.' (Oppenheim, *International Law*, Vol. I (3rd ed.) (1920), page 229.)

" 'President Van Buren, through his Secretary of State, intervened with the Sultan of Turkey in 1840 on behalf of the persecuted Jews of Damascus and Rhodes.' (*State Department Publication No.* 9, pages 153–154.)

" 'The French intervened and by force undertook to check religious atrocities in Lebanon in 1861.' (Bentwich, 'The League of Nations and Racial Persecution in Germany', Vol. 19, *Problems of Peace and War*, page 75, (1934).)

" 'Various nations directed protests to the governments of Russia and Roumania 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 Roumania; and, in 1915, the German government joined in a remonstrance to Turkey on account of similar persecutions.' (Bentwich, *op. cit., supra.*)

" In 1902 the American Secretary of State, John Hay, addressed to Roumania 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 and other massacres in Russia in 1903, President Theodore Roosevelt stated :

' Nevertheless, there are occasional crimes committed on a vast scale and of such peculiar horror as to make us doubt whether it is not our manifest duty to endeavour at least to show our disapproval of the deed and our sympathy with those who have suffered by it. The case 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 the intolerable conditions in Cuba, are necessarily very few.' (President's Message to Congress, 1904.)

" 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 therefore none of our business. It is specially our duty, for it is right at our door.' (President's Special Message of 11th April, 1898. Hyde, *International Law*, Vol. 1 (2nd ed.), page 259 (1945).)

" The same principle was recognised 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.' (J. K. Bluntschel, Professor of Law, Heidelberg University, in *Das Moderne Volkerrecht der Civilisierten Staaten* (3rd ed.), page 270 (1878).)

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

' The right 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 law of nations. Here too, the Charter merely develops a pre-existing principle.' (*Transcript*, page 813.)

" We hold that crimes against humanity as defined in C.C. Law 10 must be strictly construed to exclude isolated cases of atrocities or persecutions whether committed by private individuals or by a governmental authority. As we construe it, that section provides for the punishment of crimes committed against German nationals only where there is proof of conscious participation in systematic governmentally organised or approved procedures, amounting to atrocities and offences of that 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 the construction of the type of criminal activity which prior to 1939 was and still is a matter of international concern. Whether or not such atrocities constituted technical violations of laws and customs of war, they were acts of such scope and malevolence, and they so clearly imperilled the peace of the world that they must be deemed to have become violations of international law.

This principle was recognised 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 the racial Germans by the government of that country was a matter of international concern warranting intervention by Germany. Organised Czechoslovakian persecution of racial Germans in Sudetenland was a fiction supported by ' framed ' incidents, but the principle invoked by Hitler was one which we have recognised, namely that governmentally organised racial persecutions are violations of international law.

" 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 recognised as a violation of common international law, we cite ' genocide ' which will 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 civilised 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 ; . . . ' (*Journal of the United Nations*, No. 58, Supp. A–C/P. V./55, page 485 ; *Political Science Quarterly* (March, 1947), Vol. LXII, No. 1, page 3.)

" 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."

(vi) *The Plea of Alleged Legality Under Municipal Law*

The Tribunal pointed out that " The defendants contend that they should not be found guilty because they acted within the authority and by the command of the German laws and decrees." On this point the Judgment runs as follows :

" 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, Article II, 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 responsibility for a crime, but may be considered in mitigation.' (C.C. Law 10, Article II, paragraph 4 (*b*).)

" The foregoing provisions constitute a sufficient, but not an entire, answer to the contention of the defendants. The argument that compliance with German law is a defence to the charge rests upon a misconception of the basic theory which supports our entire proceedings. The Nuremberg Tribunals are not German courts. They are not enforcing German law. The charges are not based on violations 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 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 authorised 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 Hitler decrees and the Draconic, corrupt, and perverted Nazi judicial system themselves constituted the substance of war crimes and crimes against humanity and that participation in the enactment and enforcement of them amounts to complicity in crime. 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 defence to the charge."

(vii) *United States Law and Procedure not Applicable in the Present Trial*

The Judgment pointed out that it was essential to recognise that:

" 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 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 civilised 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, have named 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 governmentally organised 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 Minister 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 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 offence with which these defendants stand charged."

(viii) *Nazi Judges not Entitled to the Benefits of the Doctrine of Judicial Immunity*

" 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 ", the Tribunal saw " no merit in the suggestion that Nazi judges are entitled to the benefit of the Anglo-American doctrine of judicial immunity ".

According to the Tribunal, " 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 write 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 judge 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 criticised and sometimes removed from office. To this group the defendant Cuhorst belonged. 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."

(ix) *Classification of Cases in which the Death Penalty had been Imposed by Various of the Accused*

The Judgment states that the prosecution had introduced " captured documents in great number which establish the Draconic character of the Nazi criminal laws ", documents which proved that " the death penalty was imposed by courts in thousands of cases." Cases in which the extreme penalty was imposed might in large measure be classified in the following groups:

(*a*) " Cases against proven habitual criminals ";

(*b*) " Cases of looting in the devastated areas of Germany ; committed after air raids and under cover of blackout " ;
(*c*) " Crimes against the war economy—rationing, hoarding, and the like " ;
(*d*) " Crimes amounting to an undermining of the defensive strength of the nation ; defeatist remarks, criticisms of Hitler, and the like " ;
(*e*) " Crimes of treason and high treason " ;
(*f*) " Crimes committed under the ' Nacht und Nebel ' programme and similar procedures " ;
(*g*) " Crimes of various types committed by Poles, Jews, and other foreigners ".

(x) *Instances where the Death Penalty might be Considered Justifiable*

The Judgment continues :

" 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 régime 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 civilised 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 time, but that the imposition of the death penalty was a crime against humanity here when the nation was in the throes of war. The same considerations apply largely in the case of looting. Every nation recognises 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 realise that the safety of the civilian population demanded that the ' were-wolves ' 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 of hoarders and violators of war economy decrees.

" Questions of far greater difficulty are involved when we consider the cases involving punishment for undermining military morale. 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 these 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 colours 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 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 Göbbels 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 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."

The Tribunal was of the opinion that a different situation was presented by the last three types of cases. Its views on these are set out under the next three headings.

(xi) *The Inflicting of the Death Penalty for Alleged Treason and High Treason*

On this category of executions, the Tribunal stated : " 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 27th 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.' (*Department of State Bulletin*, 4th November, 1939, page 458 ; Hyde, *International Law*, Vol. I (2nd Ed.), page 391.) The foregoing fact alone demonstrates that the Polish government was still in existence and was recognised 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.' (*Legal Facts of War* (2nd Ed.) (Cambridge, 1944), page 320, Note.)
>
> " We recognise that in territory under belligerent occupation the military authorities of the occupant may, under the laws of 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 Reich could, under the laws of war, be punished for the violation of non-discriminatory German penal statutes.
>
> " These considerations, however, do not justify the action of the Reich prosecutors who in numerous cases charged the 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 24th 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 could 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.
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> " Prosecution in these cases represented an unwarrantable extension 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 offence 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 offence."

(xii) *The Inflicting of the Death Penalty Under the Night and Fog Decree*

The Judgment states : " Paragraph 13 of Count II 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 ' (Nacht und Nebel) 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, trials, and subsequent disposition were kept completely secret, thus serving the dual purpose of terrorising the victim's relatives and associates and barring recourse to evidence, witnesses, or counsel for defence. If the accused was acquitted, or if convicted, after serving his sentence, he was handed over to the Gestapo for ' 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 offences are alleged to be war crimes in violation of certain established international rules and customs of warfare and as recognised in Control Council Law No. 10.

" Paragraph 25 of Count III of the indictment incorporates by reference paragraph 13 of Count II of the indictment and alleges that the same acts, offences, and crimes are crimes against humanity as defined by Allied Control Council Law No. 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 II of the indictment, which particularly describes the Hitler NN plan or scheme, charges the defendants Altstötter, 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 II of the indictment charges all of the defendants with having committed the war crimes set forth in paragraphs 9 to 18 inclusive of Count II, 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 offences 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 III of the indictment charges all of the defendants with having committed the same acts as contained in paragraph 8 of Count II as being crimes against humanity. Paragraphs 21 to 30 inclusive of Count III refer to and adopt the facts alleged in paragraphs 9 to 18 inclusive of Count II, 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 II.

" 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 period between 1st September, 1939 and April, 1945."

The Judgment points out that :

" The Night and Fog Decree (Nacht und Nebel Erlass) arose as the plan or scheme of Hitler to combat so-called resistance movements in occupied territories. Its enforcement brought about a systematic rule of violence, brutality, outrage, and terror against the civilian population 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 7th December, 1941, Hitler issued the directive since known as the "Nacht und Nebel Erlass " (Night and Fog Decree), under which persons who committed offences 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 family of the arrested person. Hitler's purpose in issuing this decree was stated by the defendant Keitel in a covering letter, dated 12th 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.'

" The Tribunal also found that :

' One of the most notorious means of terrorising the people in occupied territories was the use of the concentration camps.'

" Reference is here made to the detailed description by the IMT Judgment of the manner of operation of concentration camps and to the appalling 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. . . .

" 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 offence believed to endanger the security of the occupying forces was 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."

After a general review of the evidence regarding the Nacht und Nebel Decree, the Tribunal continued :

" 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 effected and under which thousands of the civilian population of occupied areas were imprisoned, terrorised, 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 recognised human rights, and of Article II, 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 labour and other purposes, Hitler's Night and Fog programme 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 remained secret. This practice created an atmosphere of constant fear and anxiety amongst relatives, friends, and the population of the occupied territories.

" The report of the Paris Conference of 1919, above referred to, listed 32 crimes as constituting ' the most striking list of crimes that has ever been drawn up, to the eternal shame of those who committed them'. This list of crimes was considered and recognised by the Versailles Treaty and was later recognised 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, recognises as war crimes the ' deportation to slave labour or for any other purpose of civilian population from occupied territory '. .(Article II, 1*b*.) C.C. Law 10 (1*c*) also recognises as crimes against humanity the ' enslavement, deportation, imprisonment of 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 Control Council Law No. 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 '. Control Council Law No. 10 makes deportation of civilian population ' for any purpose ' a crime recognised 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 offences 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 amongst 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 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 penalised 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 for 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 further inquiry or information. The population, relatives, or friends were not informed for what character of offence the victim had been arrested. Thus they had no guide or standard by which to avoid committing the same offence 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 programme 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 régime which sought to control and terrorise 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 fitted perfectly into the larger plan or scheme of transportation of millions of persons from occupied territories to Germany.

" Control Council Law No. 10 makes deportation of the civilian population for any purpose an offence. 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 civilised 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, 18th July, 1898 (*Foreign Relations of the United States*, page 783), the President declared that the inhabitants of the occupied territory ' are entitled to the security of their person and property and in all their private rights and religions.' He further declared that it was the duty of the commander of the army of occupation ' to protect them in their homes, in their employment, and in their personal and religious rights ', and that ' the municipal laws of the conquered territories, 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 civilised 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 rules of principles of law of nations as they result from usage established among the civilised peoples from the laws of humanity and the dictates of 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 218, 28th 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 régime was to terrorise 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 23rd 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 later issued, over his own signature, the Hitler NN Decree which provided that :

' An 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 régime in the prosecution of its aggressive war. This general policy was to terrorise, 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 régime and system. These laws of occupation were cruel and extreme beyond belief, and were enforced by the Nazi courts 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 Control Council Law No. 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 peoples by the Nazi Ministry of Justice and prosecutors to such an extent that jurists as well as civilians of civilised 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 its 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 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 enforced in the country.

' Article 46. Family honour 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 Control Council Law No. 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 Control Council Law No. 10.

" Such imprisonment and ill-treatment were also in violation of the rule prescribed by the Conference of Paris of 1919 which prohibits the ' internment of civilians under inhumane conditions '. The Night and Fog Decree was in violation of the international law as recognised by the Paris Conference of 1919 in that the NN prisoners were deported to Germany and forced to labour in the munition plants of the enemy power.

" The foregoing documents establish beyond dispute that they were so employed in munition plants with the sanction and approval of the Reich Ministry of Justice under the approval of the defendant von Ammon."

Turning to the plea of Act of State, the Tribunal said:

" Each defendant has pleaded in effect as a defence 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 recognised. 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 offences 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.' (*IMT Judgment*, Vol. 1, pages 222, 223.) "

Later, during its treatment of the evidence against Schlegelberger, the Tribunal made the following general statement :

" 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 inhuman plan or scheme and was intended to serve as a terroristic measure in aid of the military régime."

Finally, in dealing with the evidence relating to Mettgenberg, the Tribunal said :

" 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, provided :

' 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 Führer 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 authorise 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 17th 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 defence 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 7th December, 1941, was a legal regulation for the handling of offences 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 recognised by all civilised nations as heretofore set out in this judgment."

(xiii) *Racial Persecution*

On this issue the Judgment begins as follows :

" 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 offence charged in the indictment. The defendants are not now charged with conspiracy as a separate and substantive offence, but it is alleged that they participated in carrying out a governmental plan and programme 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 behaviour. 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."

At a later point in its Judgment, the Tribunal stated that :

" It will be recalled that the law of 4th December, 1941, against Poles and Jews applied to the ' incorporated Eastern territories '. These territories were seized in the course of criminal aggressive war, but aside from that 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 those 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," in its Preamble and Articles 43 and 46.(1)

(1) See pp. 90 and 92.

The Tribunal continued :

" The prosecutions which were proposed by Lautz cannot be justified upon any honest claim of military necessity.(1)

" Although the authorities are not in accord as to the proper construction of Article 23*h* 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 suspended, or inadmissible in a court of law the right and actions of the nationals of the hostile party.' (Hyde, *International Law*, Vol. 2 (2nd Ed.), page 1714.)

The Tribunal stated that it found the claim of the defendants that they were unaware of the atrocities committed by the Gestapo and in concentration camps subject to serious question, and concurred in the finding of the International Military Tribunal regarding the use of concentration camps, which read as follows :

" 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 organised 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 colonisation 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 Germanise 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 '." (*IMT Judgment*, pages 234, 237.)

The Judgment of the Tribunal in the case now being reported continued :

" A large proportion of all of the Jews in Germany were transported to the East. Millions of persons disappeared from Germany and the

(1) See p. 19. The Tribunal was of the opinion that Lautz's proposal that the German courts should try and convict Poles for acts which violated no statute of any kind, if they deserved punishment according to sound German sentiment, "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 Control Council Law No. 10." The evidence disclosed " that cases similar to that of Golek had been tried by the People's Court and that more prosecutions were expected in the future."

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 organisations 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 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 authorised 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 4th 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 *Der Stürmer*. 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 established the adoption and application of systematic governmentally organised and approved procedures amounting to atrocities and offences of the kind made punishable by Control Council 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."(1)

(1) As previously stated, the Tribunal as well as delivering the legal opinions reproduced in these pages, summarised the evidence against each accused before delivering its findings and passing sentences.

(xiv) *Membership in Criminal Organisations*

On this point the Judgment reads as follows :

" Control Council Law 10 provides :

' (1) Each of the following acts is recognised as a crime :

* * *

' (*d*) Membership in categories of a criminal group or organisation declared criminal by the International Military Tribunal.' (Article II, Section I (*d*).)

" Article 9 of the Charter provides :

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

" Article 10 is as follows :

' In cases where a group or organisation 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 organisation is considered proved and shall not be questioned.' (*IMT Charter*, Articles 9 and 10.)

"' Concerning the effect of the last-quoted section, we quote from the opinion of the IMT in the case of the United States *et al. v.* Göring *et al.*, as follows :

' Article 10 of the Charter makes claim that the declaration of criminality against an accused organisation is final and cannot be challenged in any subsequent criminal proceeding against a member of the organisation '. (*IMT Trial of the Major War Criminals*, Vol. I, page 255.)

" We quote further from the opinion in that case :

' In effect, therefore, a member of an organisation 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 organisation is analogous to a criminal conspiracy in that the essence of both is co-operation for criminal purposes. There must be a group bound together and organised 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 organisations 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 organisation 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 organisation. Membership

alone is not enough to come within the scope of these declarations.' (*IMT Judgment*, Vol. I, pages 255–256.)

" The Tribunal in that case recommended uniformity of treatment so far as practicable in the administration of this law, recognising, 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 organisations by the Judgment of the first International Military Tribunal. The test to be applied in determining the guilt of individual members of a criminal organisation is repeatedly stated in the opinion of the first International Military Tribunal. The test is as follows: those members of an organisation which has been declared criminal ' who became or remained members of the organisation 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 organisation in the commission of such crime ' are declared punishable.

" Certain categories of the Leadership Corps are defined in the first International Military Tribunal Judgment as criminal organisations. We quote:

' The Gauleiters, the Kreisleiters, and the Ortsgruppenleiters participated, to one degree or another, in these criminal programmes. The Reichsleitung as the staff organisation of the Party is also responsible for these criminal programmes as well as the heads of the various staff organisations of the Gauleiters and Kreisleiters. The decision of the Tribunal on these staff organisations includes only the Amtsleiters who were heads of offices on the staffs of the Reichsleitung, Gauleitung, and Kreisleitung. With respect to other staff officers and party organisations attached to the Leadership Corps other than the Amtsleiters referred to above, the Tribunal will follow the suggestion of the prosecution in excluding them from the declaration.' (*Trial of Major War Criminals*, Vol. I, page 261.)

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

' In dealing with the SD the Tribunal includes Amter 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.' (*Trial of the Major War Criminals*, Vol. I, pages 267–268.)

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

' 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.' (*Trial of the Major War Criminals*, Vol. I, page 273.)

" Control Council Law 10 provides that we are bound by the findings as to the criminal nature of these groups or organisations. However, it should be added that the criminality of these groups and organisations 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 organisations 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."

Accordingly, in finding Oeschey guilty under Count Four, the Tribunal said:

" 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 membership declared criminal according to the Judgment of the first International Military Tribunal in the case against Göring *et al.* . . . 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 1st 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 co-ordinate with the Gauleiters and Kreisleiters the measures taken in the pogroms of 9th and 10th 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 9th October, 1942, a confidential information bulletin was sent to all Gauleiters and Kreisleiters entitled ' Preparatory Measures for the Final Solution of the Jewish Question in Europe—Rumours Concerning the Conditions of the Jews in the East '. This bulletin stated that rumours 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 labour 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 labour programme. A Sauckel decree dated 6th April, 1942, appointed the Gauleiters as plenipotentiaries for labour mobilisation for their Gaue with authority to co-ordinate all agencies dealing with labour 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

Gauleiters assumed control over the allocation of labour in their Gaue, including the forced labourers from foreign countries. In carrying out this task the Gauleiters used many Party offices within their Gaue, including subordinate political leaders. For example, Sauckel's decree of 8th September, 1942, relating to the allocation for household labour of 400,000 woman labourers brought in from the East, established a procedure under which applications filed for such workers should be passed on by Kreisleiters, whose judgment was final.

' Under Sauckel's directive the Leadership Corps was directly concerned with the treatment given foreign workers, and the Gauleiters 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 5th 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 25th November, 1943, Bormann sent a circular instructing the Gauleiters to report any lenient treatment of prisoners of war. On 13th September, 1944, Bormann sent a directive down to the level of Kreisleiter ordering that liaison be established between the Kreisleiters 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 utilised in attempts made to deprive Allied airmen of the protection to which they were entitled under the Geneva Convention. On 13th 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 1st December, 1931. He was head of the Lawyers' League for the Gau Franconia and a judicial officer of considerable importance within the Gaue. 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."

On the other hand, of Rothaug it was said: " 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 Gauleiter 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 Göring *et al.*"

Furthermore, Cuhorst was acquitted under Count Four, on the following grounds :

> " As to Count Four, the proof established 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 organisation, states the following :
>
> ' The decision of the Tribunal on these staff organisations includes only the Amtsleiters who were heads of offices on the staffs of the Reichsleitung, Gauleitung, and Kreisleitung. With respect to other staff officers and Party organisations attached to the Leadership Corps other than the Amtsleiters 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 organisation 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 :
>
> ' 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."

Finally, the findings of the Tribunal regarding Altstötter's guilt under Count Four are worth quoting at length, since they illustrate for instance the attitude taken by the Tribunal to the question of knowledge and assumed knowledge in respect of membership of criminal organisations :

> " The evidence in this case clearly established 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 honours. 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 Göring *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 Reichsführer 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 organisation 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 Germanisation 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 onwards 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 labour. An agreement made with the Ministry of Justice on 18th September, 1942, provided that anti-social 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 10th November, 1938. The evacuation of the Jews from occupied territories was carried out under the direction 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 Organisations. 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

organisation to the extent hereinafter described. It does appear that an attempt was made to keep secret some phases of its activities, but its criminal programmes were so widespread, and involved slaughter on such a gigantic scale, that its criminal activities must have been widely known. It must be recognised, moreover, that the criminal activities of the SS followed quite logically from the principles on which it was organised. Every effort had been made to make the SS a highly disciplined organisation composed of the élite 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 co-operation 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 organisation 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 Oberführer in the SS, could have been unaware of its illegal activities, particularly a member of the organisation 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.

" Altstötter 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 associated with the officials of the Ministry, including those in charge of penal matters.

" The record in this case shows as part of the defence 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.

" 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 organisation 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 13th 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 honours, and its contacts with the high figures of the Nazi régime. 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 organisation from the eyes of the German people.

" Upon the evidence in this case it is the judgment of this Tribunal that the defendant Altstötter is guilty under Count Four of the Indictment."

(xv) *General Remarks Regarding the Responsibility of the Accused*

At an early point in its Judgment the Tribunal stated that:

> " 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 2, 3 and 4, but as stated by the prosecution, ' None of these acts is charged as an independent offence 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 2, 3 and 4 of the indictment. In measuring the conduct of the individual defendants by the standard of Control Council Law 10, we are also to be guided by Article 2, paragraph 2, of that law, which provides that a person is deemed to have committed a crime as defined in paragraph 1 of Article 2, 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 organisation or group connected with the commission of any such crime . . . ' "

Immediately before reviewing the evidence relating to the changes to the German legal system made under Nazi rule from 1933 onwards, the Tribunal said:

> " 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 the defendants are charged occurred after September, 1939, the evidence now to be considered will make clear the conditions under which the defendants 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 moulding the judicial system which they later employed."

Finally, before delivering sentence, the Tribunal added: " As we have said, the defendants are not charged with specific overt acts against named victims: They are charged with criminal participation in governmentally organised 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."

6. DISSENTING JUDGMENT BY JUDGE BLAIR

After the reading of the Judgment of the Tribunal, Judge Blair stated: " I wish to file a dissenting opinion with regard to one aspect of the source of authority of Control Council Law 10."

" In Judge Blair's opinion, ' No authority or jurisdiction to determine the question of the present status of belligerency as 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."

Judge Blair quoted a number of provisions from the United States Basic Field Manual (*Rules of Land Warfare*), and claimed that : " 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." His conclusion was as follows :

" The declaration made in the Judgment that Germany has been subjugated by military conquest and that therefore her sovereignty 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 régime 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."

Judge Blair's dissenting opinion was elaborated at some length. He concluded by making some remarks regarding the findings of the Tribunal on Count One of the indictment.(1)

7. THE FINDINGS AND SENTENCES

Schlegelberger was found guilty of having committed war crimes and crimes against humanity. After finding that there was sufficient evidence to state that it was a draft of Schlegelberger's which constituted the basis of the law against Poles and Jews of 4th December, 1941, the Tribunal held that : " 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." The defendant was sentenced to imprisonment for life.

(1) See p. 110.

Klemm was also found guilty of having committed war crimes and crimes against humanity. The Tribunal added: " We find no evidence warranting mitigation of his punishment." Klemm also received a sentence of imprisonment for life.

Of Rothenberger the Tribunal concluded that: " The defendant Rothenberger is guilty of taking a minor but consenting part in the Night and Fog programme. He aided and abetted in the programme 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." He was sentenced to imprisonment for seven years.

Concerning Lautz's connection with the Nacht und Nebel Decree the Tribunal said that: " 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 Control Council Law 10." The Tribunal also concluded that: " The defendant Lautz is guilty of participating in the national programme of racial extermination of Poles by means of the perversion of the law of high treason . . . 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." The Tribunal added:

> " 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 offences 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 favour that if German law were a defence, 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."

Lautz received a sentence of ten years' imprisonment.

Of Mettgenberg it was said: " 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." This defendant was also awarded a sentence of ten years' imprisonment.

Von Ammon was also found guilty of having committed war crimes and crimes against humanity. His sentence was also one of imprisonment for ten years.

It was held that Joel " took an active part in the execution of the plan or scheme for the persecution and extermination of Jews and Poles ". The Tribunal added : " Concerning Joel's membership in the SS and SD, a consideration of all the evidence convinces us beyond a reasonable doubt that he retained such membership with full knowledge of the criminal character of those organisations. 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 organisations.

" We find defendant Joel guilty under Counts Two, Three and Four." Joel also received a sentence of ten years' imprisonment.

Rothaug was found not guilty of committing war crimes or of membership in criminal organisations, but guilty under Count Three (Crimes against Humanity). The Tribunal commented : " In his case we find no mitigating circumstances ; no extenuation." Rothaug was sentenced to imprisonment for life.

The Tribunal found " 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." Oeschey also received a life sentence.

Altstötter was found not guilty of committing war crimes and crimes against humanity but guilty of membership of a criminal organisation. He was sentenced to imprisonment for five years.

The defendants Barnickel, Petersen, Nebelung and Cuhorst were found not guilty under the counts charged against them.(1)

At the time when this volume went to press, the sentences had not yet been approved by the Military Governor.

B. NOTES ON THE CASE

1. The Limitations Placed Upon the Present Commentary

The Justice Trial is the first of the Nuremberg " Subsequent Proceedings " to be reported in these volumes.(2) While the trial is unique among these cases in so far as the defendants were all former officials of the Reich Ministry of Justice or otherwise directly concerned in the administration of justice in Germany, many of its features and of the problems discussed in the Judgment of the Tribunal before which it was conducted were common to several or most of the other trials held before United States Military Tribunals in Nuremberg. Since it is hoped to publish in the present series

(1) Regarding the reasons for Cuhorst's acquittal, see p. 69.
(2) See p. 2, footnote 1, and pp. 26-38.

reports on a majority of these trials, it has been thought desirable not to comment at length at this stage on certain points which also arise in other trials to be reported upon later.

Thus, for instance, it will suffice at this point to state, regarding the question of *Criminal Organisations*, first that the Tribunal found Altstötter guilty only under Count Four, which alleged membership of such organisations, and that the punishment awarded to the accused for such guilt was imprisonment for five years ; secondly that, in finding Rothaug and Cuhorst not guilty under Count Four the Tribunal ruled that neither a Gaustellenleiter nor a " sponsoring " member of the SS, nor a member of the German Lawyers' League could be regarded as a member of an organisation declared criminal by the International Military Tribunal ;(1) and thirdly that in the course of its Judgment the United States Military Tribunal made some interesting observations relating to the requirement of knowledge which enters into the definition set out by the International Military Tribunal of responsibility on the grounds of membership of such organisations.(2) The attitude taken by the Tribunal on this question of knowledge may be judged for instance from its statement that no man with Joel's intimate contacts with the Reich Security Main Office, the SS, the SD and the Gestapo " *could possibly have retained membership* of the second and third mentioned organisations *without knowledge* of their criminal character." (3) The crimes of the Leadership Corps of the Nazi Party, ruled the Tribunal at another point in its Judgment, were of such wide scope and were so intimately connected with the activities of the Gauleitung that " it *would be impossible* for a man of the defendant's (Oeschey's) intelligence *not to have known* of the commission of these crimes, at least in part if not entirely."(4) Finally, of Altstötter's guilt under Count Four, the Tribunal said, *inter alia* : " 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 Oberführer in the SS, could have been unaware of its illegal activities, particularly a member of the organisation 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. . . . He was a member of the SS at the time of the pogroms in November, 1938, ' Crystal Week ', in which the International Military Tribunal 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 organisation of which he was an officer."(5) These extracts from its Judgment are sufficient to show that the Tribunal was willing, in suitable instances, to assume knowledge on the part of defendants of the criminal purposes of the organisations referred to, though it should be added that Altstötter for instance was not found guilty on the basis of presumed knowledge alone.(6)

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(1) See pp. 68-9.
(2) See pp. 66 and 69.
(3) See p. 76. (Italics inserted.)
(4) See p. 68. (Italics inserted.)
(5) See pp. 71 and 72. (Italics inserted.)
(6) See pp. 71-72.

The plea of *alleged legality or compulsion under municipal law* was raised during the *Justice Trial*[1] but it is not discussed at length here since it has already received treatment in a previous volume of this series, where a reference to the contribution made to the law on this point by the present Tribunal is included.[2]

If compliance with domestic law and superior orders does not automatically free from criminal responsibility administrative officials and members of military and para-military forces, it is certainly not possible to recognise such a defence in the case of judges whose position *vis-à-vis* their own governments and their statutes is certainly stronger and more independent than that of an administrative official or of a member of the forces, even taking into account the evidence produced during the present trial of the pressure brought to bear upon the German judges by the Nazi Party hierarchy. The statutes and regulations under which the defendants acted constituted superior orders of a less rigorous type than those applicable to military personnel, because, in general, judges are freer to resign from their positions or refuse a certain assignment than are military personnel; military discipline, especially in time of war, is more severe and of a different type, military orders are stricter and less general than are statutory norms and allow less exercise of discretion, and disobedience to a military order may bring swifter and sterner punishment to military personnel than would the lenient interpretation of a statute by judicial personnel.

Counsel for Cuhorst claimed that a judge " enjoys a special position in penal law ", but added that: " All this does not, of course, preclude one from calling a judge to account for wilful miscarriage of justice." The Tribunal saw " no merit in the suggestion that Nazi judges are entitled to the benefit of the Anglo-American doctrine of judicial immunity "[3] and treated the accused according to the established principles relating to superior orders.

2. CRIMES AGAINST HUMANITY

It is not proposed to deal at any length with the difficult question of crimes against humanity in the present notes since it is prominent in many

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(1) See pp. 48-49. The prosecution quoted in argument not only paragraph 4 (b) of Article II of Law No. 10, but also paragraph 4 (a), which provides that:

" (a) The official position of any person, whether as Head of State or as responsible official in a Government Department, does not free him from responsibility for a crime or entitle him to mitigation of punishment."

The defence claimed that it was " doubtful whether a German judge can be regarded at all as a government official in the sense of the Control Council Law. The defence also maintained that Control Council Law No. 10, Article II, paragraph 4 (b) referred to orders of a government or superior but could not be taken to include within its scope " formal law " which a judge " was bound to take into consideration." These arguments were rejected by the Tribunal and, whatever the wording of Law No. 10, it is settled law that legality or compulsion under municipal law does not constitute a complete defence in war crime trials. As defence counsel pointed out, the Courts and legal authorities of various countries have declared that municipal law must prevail over international law; but a Court administering the laws and customs of war, a part of international law, is not bound by such a rule. (See the reference contained in the next footnote.)

(2) See Volume V, pp. 22-4.

(3) See p. 50.

of the other Subsequent Proceedings trials which have not yet been reported and can profitably receive further treatment in a later volume.(1) All that will appear in these pages is a brief indication of some aspects of the attitude to the point taken by the Tribunal conducting the present trial, particularly regarding the difference between war crimes and crimes against humanity.

In the first place it is clear that war crimes may also constitute crimes against humanity; the same offences may amount to both types of crime. If war crimes are shown to have been committed in a widespread, systematic manner, on political, racial or religious grounds, they may amount also to crimes against humanity. The wording of the indictment shows that the prosecution regarded certain alleged acts as constituting both war crimes and crimes against humanity; the details set out under Count Two were incorporated under Count Three " by reference ",(2) and it seems that the Tribunal was willing to agree that acts taken in pursuance of the Nacht und Nebel plan constituted crimes against humanity as well as war crimes.(3) So also the prosecution on charges of high treason of Poles who attempted to escape from the Reich,(4) and other forms of racial persecution carried out in occupied territory.(5) In general the Tribunal pointed out that Article II, paragraph 1(*c*), Control Council Law No. 10, which defines crimes against humanity, prohibited " *not only war crimes*, but also acts not included within the preceding definition of war crimes."(6)

In the second place, it is established that the possible victims of crimes against humanity form a wider group than the possible victims of war crimes. The latter category comprises broadly speaking(7) the nationals or armed forces of belligerent countries or inhabitants of territories occupied after conquest against whom offences are committed by enemy nationals as long as peace has not been declared.

Crimes against humanity on the other hand may be committed also by German nationals against other German nationals or any stateless person.(8)

It must be noted, thirdly, that isolated offences do not constitute crimes against humanity; fourthly, that the Tribunal regarded the proof of systematic governmental organisation of the acts as a necessary element of crimes against humanity; and fifthly, that according to the Tribunal, if the offences are not " Atrocities and offences ", as defined in Law No. 10, and committed against civilian populations, but amount to persecutions, they must be

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(1) See, however, an exhaustive examination of the development of the concept of crimes against humanity up to the end of 1946 by Dr. Egon Schwelb in *British Yearbook of International Law*, 1946, pp. 178-226.

(2) See p. 4.

(3) See pp. 56 and 75-6.

(4) See p. 53.

(5) See p. 64.

(6) See p. 39. (Italics inserted.)

(7) As an illustration of the difficulty involved in an attempt to define shortly yet with complete accuracy and generality the possible victims of war crimes, compare Article 1 of the French Ordinance of 28th August, 1944, quoted on p. 93 of Volume III of this series, and also Article 1 of the Norwegian Law of 13th December, 1946, quoted on p. 83 of the same volume. See p. 39 of the present volume.

(8) See p. 40.

persecutions *on political, racial or religious grounds.* The Judgment stated that :

> " We hold that crimes against humanity as defined in Control Council Law 10 must be strictly construed to exclude isolated cases of atrocities or persecutions whether committed by private individuals or by a governmental authority. As we construe it, that section provides for the punishment of crimes committed against German nationals only where there is proof of conscious participation in systematic governmentally organised or approved procedures, amounting to atrocities and offences of that kind specified in the act and committed against populations or amounting to persecutions on political, racial, or religious grounds."(1)

It is clear that all three of the criteria contained in the last paragraph would prevent some war crimes from constituting also crimes against humanity, and lest the evidence set out previously in this volume,(2) relating to any individual accused found guilty of having committed crimes against humanity, should appear to bear out insufficiently the finding that more than isolated acts must be proved, it should be said that the summary of evidence provided in these pages relates only a fraction of the evidence which the Tribunal recalled in its Judgment, and that the Tribunal itself pointed out that " 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 nine 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."

The need for proof of systematic governmental organisation is of interest in connection with the plea of superior orders ; the Tribunal pointed out that : " It can scarcely be said that governmental participation, the proof of which is necessary for conviction [on a charge of committing crimes against humanity], can also be a defence to the charge."(3)

The Tribunal regarded Oeschey's decision condemning to death the accused Count as an act of political persecution constituting participation

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(1) See p. 47, and p. 40 where it is said that : " 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 ". In their closing speech the prosecution had claimed that, once the necessary knowledge and intent had been proved, " in order to establish the guilt of any of the foregoing defendants of a Crime Against Humanity, it is only necessary to establish by the evidence beyond a reasonable doubt, one further ultimate fact ; namely, that on *one* occasion, the defendant acted as a principal, or an accessory or aided or abetted a murder, an act of extermination, an enslavement, an imprisonment or an act of persecution on racial, political or religious grounds or that the defendant, on *one* occasion, took a consenting part in or was connected with a plan or enterprise which resulted in a murder, an act of extermination, an enslavement, an imprisonment or an act of persecution on racial, political or religious grounds."

(2) See pp. 10-26.

(3) See p. 49.

in crimes against humanity,(1) and on the other hand, it should be noted that, whereas the indictment charged the taking part in Hitler's programme of inciting the German civilian population to murder Allied airmen forced down within the Reich as both a war crime and a crime against humanity,(2) the Judgment, in dealing with Klemm's responsibility in this connection, spoke only of such participation as being in violation of the laws of war.

The Judgment contains some further interesting passages indicating the limits to which the Tribunal was willing to go in regarding as crimes against humanity injuries done by Germans to other Germans. The Tribunal indicated four types of law the enforcement of which it would not normally regard as being illegal,(3) but, it went on, " 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 the conscience of mankind *and punishable here.*"(4) At a later point, the Tribunal ruled that: " This was the situation in a number of cases tried by Rothaug and Oeschey " ; and proceeding to cite instances of the arbitrary behaviour of these two accused, and of their insulting attitude toward accused persons, while acting in a judicial capacity. On the other hand, of Cuhorst the Tribunal said : " 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 ", but " 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."

In view of the Tribunal's findings regarding Cuhorst, it seems safe to say that Rothaug and Oeschey were found guilty of crimes against humanity not merely because arbitrary behaviour in court was proved but because it had been shown that such behaviour amounted to a participation in a persecution on political, racial or religious grounds.

It appears probable that the same approach explains the true meaning

(1) See pp. 99-100. The Tribunal did not, however, attempt to define the word " political " or directly to answer the interesting point, raised implicitly in a passage in the Prosecutor's closing speech,—in whose mind must the act have appeared to have a political motive ? The passage reads as follows :

> " Coming into the category of cases upon political grounds, we must remember that ' political ' in Law No. 10, written to apply in the Third Reich, cannot be read in the sense of ' political ' as that is known in countries which enjoy a two or more party system. ' Political ' as all Nazi judges construed it—and the defendant Cuhorst construed it—meant any person who was opposed to the policies of the Third Reich, and being opposed to the policies of the Third Reich was in turn construed as meaning the doing of an act which was contrary to the successful conduct of the war.
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> " Under this definition of ' political ', the prosecution contends that the death sentence against the 65 year old senile Schmidt for taking cigarettes from postal packages was an act of extermination on political grounds. Schmidt, in fact, was a rather useless eater, and for this reason, he would constitute a person in the community who should be exterminated by Cuhorst's standards, but in addition, his taking of cigarettes that were allegedly intended for soldiers certainly constituted political opposition to the aims of the Reich as Cuhorst saw it, and justified his death sentence on that ground."

(2) See p. 4.
(3) See pp. 51-2.
(4) See p. 52. (Italics inserted.)

of those passages in the Judgment which seem at first glance to indicate that the Tribunal regarded the degradation of the German legal system as itself being criminal in character. Thus, the Tribunal devoted a considerable part of its Judgment to a preliminary account of the steps whereby, from 1933 onwards, this legal system was turned into an instrument of Nazi policy, whereby, for instance, the control of Hitler and his associates over the judicial machine was promoted, the degree of discretion left to the judges and the Ministry of Justice, and the severity of the criminal law was increased, and " a loose concept concerning the definition of crime " developed. The evidence which was cited by the Tribunal relating to individual accused included much of the same character ; such facts concerning Rothenberger and Lautz which appear earlier in these pages were set out at greater length in the Judgment.[1] The main provisions of a decree of 21st March, 1942, signed by Hitler, and those of a decree of 31st August, 1942, signed by Schlegelberger, were alike quoted in the Judgment ; each decree provided for the achievement of shorter legal proceedings, but neither was on its face obviously illegal. The Tribunal also related in its Judgment how Schlegelberger quashed a sentence passed on a German police officer who had obtained a confession by beating an accused named Bloeding.(2)

As a final example of the many passages in the Judgment devoted to a description of the degradation of the German legal system, it would be in place to quote one of three " case histories " by which the Tribunal sought to " illustrate three different methods by which Hitler, through the Ministry of Justice, imposed his will in disregard of judicial proceedings". It will be noted that the offence committed by the victim is not stated :

> " 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 24th March, 1942, wrote in part as follows :
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> 'I entirely agree with your demand, my Führer, 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 '."

It seems probable that the Tribunal set out the sets of facts referred to above not as evidence of crime *eis ipsis* but as examples of what would constitute crimes against humanity *if the necessary legal elements contained in the definition of crimes against humanity were also present.* In other words, it is probably true to say that the Tribunal regarded as constituting crimes against humanity not merely a series of changes made in the legal system

(1) See pp. 16 and 17. (2) See p. 11.

of Germany but a series of such alterations as involved or were pursuant to persecutions on political, racial or religious grounds, or (perhaps) such as led to the commission of " Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population ". The Tribunal did not attempt to throw light on the exact significance of the words just quoted, however, and it seems that it preferred to regard as its main criterion the words : " persecutions on political, racial or religious grounds ", which also appear in the definition of crimes against humanity in Article II (*c*) of Law No. 10. Had the Tribunal been willing to interpret widely the words " Atrocities and offences . . . ", etc., it seems likely that Cuhorst would have been found guilty of committing crimes against humanity since the " arbitrary, unfair and unjudicial manner in which he conducted his trials ", and the resulting penalties, were both proved, and what saved him from a finding of guilty was the fact that he did not take part in a persecution on racial grounds.(1)

The prosecution appears indeed to have regarded the whole of the definition of crimes against humanity contained in Law No. 10 as being governed by the words " on political, racial or religious grounds ", as can be seen from the following passage taken from their closing speech :

> " We contend, therefore, that Law 10, when properly construed, makes the crimes of murder, enslavement and imprisonment, normally national in character, international, when they follow a pattern of persecution on racial, political and religious grounds, or are performed, as they were in this case, in connection with a national plan or enterprise, shown in this case to be national in scope, to commit them on racial, political or religious grounds."

The Tribunal seems, however, to have treated the " Atrocities and offences . . . " committed against any civilian population as being in some way different from " persecutions on political, racial or religious grounds ".

One final point should be mentioned in connection with the notion of crimes against humanity as defined by the Tribunal. The latter pointed out that the words " in execution of or in connection with any crime within the jurisdiction of the Tribunal ", which appeared in Article 6 (*c*) of the Charter of the International Military Tribunal, were not contained in Law No. 10. The Tribunal did not attempt to elaborate upon the significance of this omission.(2)

Rothaug was found guilty of having committed crimes against humanity and on no other count. It will be recalled that his punishment was one of imprisonment for life.(3)

(1) See p. 81. (2) See, however, Schwelb *loc. cit.*, pp. 218 and 203-6.

(3) The Tribunal also stated specifically that Rothaug had " participated in the crime of genocide ". See p. 99 and also pp. 48 and 75. The crime of genocide will be the subject of further examination in a later volume of these Reports. All that need be said here is that the concept of crimes against humanity is greater than that of genocide. The latter crime is aimed against groups, whereas crimes against humanity do not necessarily involve offences against or persecutions of groups. The inference may be justified that deeds are to be considered " persecutions " within the meaning of Law No. 10 if the political, racial or religious background of the wronged person is the main reason for the wrong done to him, and if the wrong done to him as an individual is done as part of a policy or trend directed against persons of his political, racial or religious background ; but that it is not necessary that the wronged person belong to an organised or well-defined group. In fact, it was the aim of such measures as, for instance, the hanging of a person for a trifling remark about the war, to *prevent* the formation of groups of dissenters against the continuation of the aggressive war.

3. THE NATURE AND SCOPE OF COMPLICITY AS SEEN BY THE TRIBUNAL

The Tribunal in its Judgment called for a recognition of the fact that, *inter alia*, the form of the indictment was " not governed by the familiar rules of American criminal law and procedure ". It was pointed out that no defendant was specifically charged with the murder or abuse of any particular person. The charge did not concern isolated offences, but was one of " conscious participation in a nation-wide governmentally organised 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 . . . Thus it is that 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 offence with which these defendants stand charged."(1)

A glance at the terms of the indictment reveals the characteristic to which the Tribunal made reference.(2) It will be seen, for instance, that the defendants were accused of committing war crimes and crimes against humanity 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 offences against thousands of persons."(3) That the Tribunal approved this wording may be judged from the fact that it stated more than once that: " The essential elements to prove a defendant guilty under the indictment in this case are that a defendant had knowledge of an offence charged in the indictment and established by the evidence, and that *he was connected* with the commission of that offence ".(3)

In view of the nature of the offences alleged, as reflected by the indictment, it was not unnatural that a considerable proportion of the evidence placed before the Tribunal aimed at showing the general character of the degradation of the German judicial system after 1933, of the use made by that system, in pursuance of Nazi policy, of the Nacht und Nebel scheme and of the persecution of Jews and Poles ; and that the Tribunal devoted a considerable portion of its Judgment to a description of these features before passing on to ascertaining the extent to which each accused could be held liable for the many offences inevitably involved in their furtherance. Nor is it surprising that the Judgment contains some interesting illustrations of the ways in which an accused can be said to be sufficiently " connected with " the offences to make him guilty of complicity therein.(4)

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(1) See p. 50.

(2) See pp. 2-5.

(3) Italics inserted. Control Council Law No. 10, in its Article II, 2, uses language equally broad in scope:

" 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 organisation 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."

(4) It may be said at the outset that the Tribunal would seem to have approved the following submission, made in the Prosecution's Opening Speech:

" The International Military Tribunal has given two persuasive interpretations of the meaning of the words ' being connected with ' which we cite.

continued on next page.

The capacities in which the various accused acted when committing the crimes of which they were found guilty were those of ministerial official, judge or prosecutor.(1)

In its summary statement on the capacities of the accused,(2) the Tribunal did not mention that of prosecutor, but it must be taken that this statement was not intended to be exhaustive, since Lautz and Joel were both found guilty of crimes committed by them when acting as such.(3)

Counsel for Lautz claimed that a German prosecutor was bound to obey the instructions of his hierarchical superior, provided they were legal, and he quoted the decision of the French Military Tribunal in the *Wagner Trial*(4) to acquit, on the ground that he had acted according to superior orders from Gauleiter Wagner, the accused Luger, who as Public Prosecutor at the Special Court at Strasbourg had secured the passing of the sentence of death (which was carried out) on thirteen Alsatians, the President of the Court being sentenced (in his absence) to death on the grounds that the death sentences which he passed on the thirteen victims, and one other, were unjustified. Counsel weakened his case, however, by claiming that the French Tribunal which tried Wagner, Luger and others derived its competence from Law No. 10, and the prosecutor was able to point out that this was not so, that the French Tribunal applied French law in acquitting Luger and that Law No. 10 disallowed the pleading of superior orders as a complete defence.

It will be recalled that a study of the *Wagner Trial* and of the trials reported upon in Volume V of the present series showed(5) that the courts and the confirming authorities have been less willing to punish persons accused

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continued from previous page.

" In the case of the defendant Streicher, who was found guilty of committing Crimes Against Humanity, the I.M.T. said :

" ' Streicher's incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connection with war crimes as defined in the Charter and constitutes a Crime Against Humanity.'

" The case of von Schirach is also most enlightening. Anschluss with Austria took place on 12th March, 1938. Von Schirach was appointed Gauleiter of Vienna in July, 1940. Von Schirach was found guilty of committing Crimes Against Humanity.

" The International Military Tribunal said :

" ' As has already been seen, Austria was occupied pursuant to a common plan of aggression. Its occupation is, therefore, a " crime within the jurisdiction of the Tribunal ", as that term is used in Article 6 (c) of the Charter. As a result, " murder, extermination, enslavement, deportation and other inhumane acts,and persecutions on political, racial or religious grounds " in connection with this occupation constitute a Crime Against Humanity under that Article.

" ' The Tribunal finds that von Schirach, while he did not originate the policy of deporting Jews from Vienna, knew that the best the Jews could hope for was a miserable existence in the Ghettoes of the East. Bulletins describing the Jewish extermination were in his office.'

" It seems clear from these cases that *there need not be pre-arrangement with or subsequent request by the person or persons who actually commits the crime and a defendant to make him guilty as the International Military Tribunal interpreted the words ' being connected with '*. It would appear to be sufficient that the defendant knew that a crime was being committed, and with that knowledge acted in relation to it in any of the relationships set out in paragraph 2 of Article II which we have heretofore been discussing." (Italics inserted.)

(1) Compare the analysis on pp. 77-81 of Volume V of the capacities in which the accused in the trials therein reported had acted in committing alleged offences.

(2) See p. 62.

(3) See pp. 17-18, 21, 75 and 76.

(4) See Volume III of this series, pp. 23-55 (especially 42 and 54-5) and page 93.

(5) See Volume V, p. 78.

of committing war crimes purely in the capacity of a prosecutor than they have been in the case of judges. This may arise out of a feeling that, while a judge has a duty to be impartial, a prosecutor is of course expected to do his best, within certain limits, to secure a conviction. It may also be the result of a feeling that the acts of a prosecutor are more remote from the carrying out of sentence than are those of a judge. Counsel for Lautz claimed that: " in no way was he sure what would be the actual consequences of this indictment, especially what would be the results of the evidence, how the court would appreciate this result, that is, whether and how the accused would be sentenced, and finally, what would be the result of the decision concerning the pardon ".

An offender cannot rely upon the fact that some intervening cause may upset his purposes, however, and, in finding Lautz and Joel guilty, the Tribunal clearly held that the argument based on lack of causation must fail. Its decision is an indication that public prosecutors can be found guilty of war crimes and crimes against humanity for acts performed by them when acting as such.

The approach of the Tribunal to the general question of responsibility and the proving thereof may be illustrated by its treatment of the case of the accused Joel.

Referring back to an earlier general discussion of the Night and Fog plan, the Tribunal stated that:

> " 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."

While it should be pointed out that the Tribunal, at other points in its judgment, referred to further evidence implicating Joel in the operation of the Night and Fog plan,[1] it is fair to assume from the sentence just quoted that the Tribunal regarded the evidence mentioned in the course of " our discussion of the Night and Fog Decree " as itself constituting sufficient proof of Joel's complicity. It is interesting therefore to examine the references made to Joel in that previous discussion.

In the first reference, it is simply related that Joel and others are charged with " special responsibility for and participation in " crimes arising out of the Nacht und Nebel plan. The other references, however, are to matters of evidence.

It is first stated that at a conference at Hamm between von Ammon and Mettgenberg and leading officials of the Court of Appeals at Hamm, held on 9th November, 1943, Joel " thought the housing of NN prisoners, also such of Dutch nationality, at Papenburg would be possible and unobjectionable ".

It is then added that: " A secret letter dated 29th December, 1943, addressed to defendant von Ammon from the Presiding Judge and Chief Prosecutor[2] of Hamm Court of Appeals notified von Ammon of an imminent conference concerning transfer of the NN trials to the NN Special Courts."

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[1] See pp. 21-2 for the evidence concerning Joel.
[2] That is to say Joel.

It is next stated that, in response to a decree whereby Dutch, Belgian, and Northern French Nacht und Nebel cases were to be transferred to Silesia for trial, " 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."

In the fourth place, the Judgment refers to a directive by the Reich Minister of Justice with respect to the treatment of Nacht und Nebel cases which has already been quoted(1) and which was sent to Joel, Lautz and others.

Finally, it is recorded that " A letter from Hamm (Westphalia), 26th January, 1944, to the Reich Minister Thierack, signed by defendant Joel, suggests the speeding up of proceedings to avoid delays in Nacht und Nebel 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 '."

Two aspects of these five items of evidence are to be noted. In the first place, it will be seen that Joel is not said to have been directly responsible for the death or ill-treatment of specific persons ; the aim instead is to show his relation to a scheme or system of which the final results were in fact criminal. In the second place, the Tribunal clearly regarded as important not only evidence of positive action on the part of Joel but also proof of knowledge of acts on the part of others which were done in furtherance of the Nacht und Nebel plan.

No official was protected by his high rank, and the wording of the Judgment suggests that the Tribunal was willing to hold persons who held the positions of overall responsibility in the Ministry of Justice responsible for the large-scale enterprises carried out by the Ministry, which were involved in the Nacht und Nebel scheme and the persecutions on political and racial grounds, provided that those accused could be said to have had knowledge of these schemes. Thus, for instance, Klemm's counsel claimed that Klemm's only connection with a journey made by von Ammon on Nacht und Nebel business was that " he merely approved the trip ", but the attitude of the Tribunal was expressed in the following significant words :

> " 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."(2)

Since the defendants were accused of participation in certain illegal *enterprises*, however, it was naturally not necessary in every case to show that the illegal acts for which Ministry officials were alleged to be responsible

(1) See p. 21.

(2) Compare the attitude taken by war crime courts to the responsibility of commanders for offences committed by their subordinates, as reflected in the trials reported in Volume IV of this series. See especially pages 85-95 of that Volume.

were actually committed under the auspices of the Ministry of Justice. Thus, it has been seen(1) that the Tribunal, after holding that Rothenberger must have known that the inmates of Mauthausen concentration camp were illegally imprisoned, went on to state that: " We concede that the concentration camps were not under 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."

The question of knowledge was treated by the Tribunal as one of the highest importance, and repeated reference was made in the Judgment to the fact that various accused had knowledge, or must be assumed to have had knowledge, of the use made of the German legal system by Hitler and his associates, of the Nacht und Nebel plan and of the schemes for racial persecution. It would seem inevitable that this stress should be placed upon evidence of knowledge in a trial where the main allegations made related not to individual offences but to complicity in carrying out large-scale schemes which involved at some point the commission of criminal acts.

The necessity for knowledge to be shown or to be legitimately assumed caused the Tribunal to refer very frequently in its Judgment to the fact that documents, reports and orders were not *issued* but *received* by various accused. For instance, the Tribunal described a conference in which decisions were reached as to the need for " special treatment " to be meted out to " Jews, Poles, gipsies, Russians and Ukranians ", and then pointed out that: " The defendant Rothenberger testified that he was not present when those agreements were made. However that may be, it is clear that they *came to his notice* shortly thereafter."(2)

Sometimes it appears at first sight that the Tribunal regarded mere knowledge as sufficient evidence of guilt. The Tribunal in its Judgment said that:

> " 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.*"(3)

At another point the Judgment laid down that: " The defendant Joel *is chargeable with knowledge* that the Night and Fog programme from its inception to its final conclusion constituted a violation of the laws and customs of war."(3)

It seems safe to assume, however, that it was the intention of the Tribunal to signify that when the accused von Ammon and Joel took part in the Night and Fog programme it was not without knowledge of its criminal features that they did so.(4)

At a number of points in its Judgment the Tribunal presumed knowledge

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(1) See p. 17, footnote 1.
(2) Italics inserted. As another example, see p. 15 regarding evidence of von Ammon's reporting to Klemm on Nacht und Nebel matters.
(3) Italics inserted.
(4) Compare the Tribunal's words adopting the conclusion of the General Assembly of the United Nations set out on p. 48 which include the statement " They are *chargeable with knowledge* that such acts were wrong and were punishable when committed ".

on the part of an accused and in view of the nature of the facts of the case it was inevitable that the Tribunal should regard this course in certain instances as a necessary and a safe one to take. The words of the Judgment regarding knowledge and presumed knowledge of the anti-Jewish policy of the Nazi government have been quoted,(1) and as a further instance of the attitude of the Tribunal on this point reference can be made to the following passage from the Judgment :

> " 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 practising 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."

The novel difficulties arising from the need to show a relation between an accused and certain large-scale illegal enterprises carried out by many persons at many places and over a period of time may be thought to explain also the introduction of two further types of evidence (also summarised in the Judgment of the Tribunal)—first, evidence showing the support given by certain accused to Nazi doctrines, and secondly, evidence of acts of the accused before the outbreak of war in 1939.

The Judgment quotes evidence, for instance, to prove that : " The conception of Hitler as the Supreme Judge was supported by the defendant Rothenberger " and it is related that " on February, 1943, the defendant Under-Secretary Dr. Rothenberger summed up his legal philosophy with the words :

> ' The judge is on principle bound by the law. The laws are the orders of the Führer '."

Counts Two and Three of the indictment charged the commission of war crimes and crimes against humanity " between September, 1939 and April, 1945 ", and Count Four membership of criminal organisations by certain accused after 1st September, 1939.(2) Count One (*Common Design and Conspiracy*), however, made charges of acts committed " between January, 1933 and April, 1945 ", and in making its ruling as to the sufficiency of this Count,(3) the Tribunal stated that :

> " This ruling must not be construed as limiting the force or effect of Article 2, paragraph 2, of Control Council Law No. 10, or as denying to either prosecution or defence the right to offer in evidence any facts or circumstances occurring either before or after September, 1939, if

(1) See pp. 63-4. Compare also p. 15, footnote 3. The question of knowledge and presumed knowledge arises also in questions relating to membership of criminal organisations ; see p. 77.
(2) See pp. 3-4.
(3) See p. 5.

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."

Nevertheless, at an early point in its Judgment the Tribunal said: "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 2, 3 and 4 of the indictment."(1) Immediately before reviewing the evidence relating to the changes to the German legal system made under Nazi rule from 1933 onwards, the Tribunal said: " . . . Though the overt acts with which the defendants are charged occurred after September, 1939, the evidence now to be considered will make clear the conditions under which the defendants 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 moulding the judicial system which they later employed."(2)

The evidence which the Tribunal then proceeded to summarise included considerable information on the acts of the accused between 1933 and 1939 and the Tribunal was also careful to set out the relevant official positions held in and after 1933 by all those accused who were found guilty of any of the charges against them.

4. THE APPLICATION OF THE HAGUE CONVENTION TO THE FACTS OF THE CASE

It has been seen(3) that the indictment charged the violation of certain specific articles of the Hague Convention,(4) including Articles 43, 45, 46 and 50 thereof, which fall within Section III—*Military Authority over the Territory of the Hostile State*. These Articles provide the following:

> "*Art.* 43. The authority of the power of the State having passed *de facto* into the hands of the occupant, the latter shall do all in his power to restore, and ensure, as far as possible, public order and safety, respecting at the same time, unless absolutely prevented, the laws in force in the country.
>
> "*Art.* 45. It is forbidden to force the inhabitants of occupied territory to swear allegiance to the hostile power.
>
> "*Art.* 46. Family honour and rights, individual life, and private property, as well as religious convictions and worship, must be respected. Private property may not be confiscated.
>
> "*Art.* 50. No collective penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which it cannot be regarded as collectively responsible."

The indictment also charged the violation of Article 23 of the Convention, which runs in part as follows:

> "*Art.* 23. In addition to the prohibitions provided by special conventions, it is particularly forbidden—
>
> "(*h*) to declare abolished, suspended or inadmissible, the right

(1) See p. 73.
(2) See p. 73. (Italics inserted.) Pages 6-8 set out some of the evidence to which the Tribunal referred.
(3) See p. 4.
(4) Offences against the Geneva Convention, Articles 2, 3 and 4, were also charged, but the protection of prisoners of war did not constitute a major issue in the present trial. The Articles were quoted in view of the allegation that Klemm and Lautz in particular had participated in a plan for instigating the lynching of captured Allied airmen.

of the subjects of the hostile party to institute legal proceedings."(1)

The defence claimed that parts of Poland and Czechoslovakia had been legally annexed to Germany; their aim in attempting to establish this point was to demonstrate that it was consequently not contrary to international law for the German State (i) to introduce new laws into these territories, despite Article 43 quoted above; (ii) to condemn to death inhabitants of these territories on charges of high treason, after trial.

The defence could not agree " that in international affairs an annexation never has occurred or never has been recognised while an army of one of the belligerent parties was still under arms " and added " It is generally recognised and never has been contested by anyone that there existed no regulation in international law until the latter half of the nineteenth century which made the annexation of militarily occupied territories dependent on the existence of certain prerequisites. The belligerents could annex the conquered enemy territories and demand the oath of allegiance from the subjects, irrespective of whether or not the enemy had been completely subjugated." Even the Hague Rules " do not contain clauses stipulating conditions in which a belligerent may proceed to annex conquered enemy territory ". Counsel proceeded to cite instances in recent times of annexations by one State of territories belonging to another while fighting between the two was still in progress.(2)

Counsel claimed that after the invasion of Poland in 1939 both Germany and the Soviet Union " expressed their opinion that they considered the Polish State non-existent ", and he went on:

> " That other States besides these two were also of the opinion that the former Polish State had ceased to exist is shown by the fact that parts of these territories were ceded to other countries; thus the Soviet Union gave the territory of the City of Wilna to Lithuania, by the agreement of 10th October, 1939 (Schlegelberger Exhibit 150) and Germany gave a strip of territory in the Carpathians to Slovakia, by the agreement of 21st October, 1939 (Schlegelberger Exhibit 151).
>
> " In summing up it can be stated that the actual facts justify the point of view which considers the former Polish State as dissolved and that thus the incorporation of parts of the Polish Republic into the German Reich did not contradict the practice of international law."

He added that: " As far as German laws have been introduced in the so-called Protectorate of Bohemia and Moravia, it would suffice to say that a state of war never existed between Czechoslovakia and Germany. This

(1) The remaining Articles from the Hague Convention which appear in the indictment refer to the protection of prisoners of war.

(2) Counsel wound up his interpretation of International Practice on this point by making the following claim:

> " The above-mentioned International Practice has been maintained even recently. The Potsdam Declaration of 2nd August, 1945, recognised the Soviet Union's annexation of the northern part of the German province of East Prussia including Koenigsberg. There can be no doubt that Germany was at that time completely subjugated. But Germany's ally, Japan, was then actually still fighting. If it is held that this annexation differs from Germany's and Russia's annexation of Poland in so far as the subjugation of Japan was only a matter of a short time when the Potsdam Declaration was drawn up, I can only reply that in 1939 and 1940 Germany and its ally at that time, the Soviet Union, were in undisputed mastery over the European continent and that according to the situation then existing—or at least the situation as it was justifiably looked upon by the defendants—a reconstitution of Poland through the landing of British troops on the Continent was beyond all possibilities based on realistic thought."

eliminates the prerequisite for a war crime ; namely, the violation of the customs and laws of war." A Protectorate over Bohemia and Moravia had been set up by treaty with Germany. " Apart from the new Slovakian State ", Czechoslovakia " had been merged into other States and had lost its sovereignty ".

Counsel concluded that the claim that " the introduction of new laws in the occupied Eastern territories and in the Protectorate was contrary to international law cannot be maintained for factual reasons ".

If, however, it was assumed that no valid annexation of part of Poland had taken place, counsel then continued, it should be recognised that Article 43 of the Hague Regulations " only regulates the normal case ' as far as no compelling obstacle exists '."(1) A compelling obstacle to the application of Polish law, claimed counsel, was presented by the " dissolution of the entire governmental administration " which " comprised the former Polish judicature ".

Counsel for the acquitted Nebelung also stressed the proviso implicit in Article 43 :

> " Occupation law is dominated by military necessity, even though it is of course always, at any time and in all occupied countries, resented by those concerned as being specially rigorous measures. Each member of the occupation authorities must and is entitled to demand, in particular during the time of battle, that the inhabitants of the occupied territories refrain from any action in any way directed against him, and if necessary enforce loyalty by means of severe punishment and security measures. . . . The Hague Convention governing War on Land and the Usages of War have taken the middle course between the sovereignty of the occupying forces and the human rights of the individual. They do not, however, protect any political rights of the inhabitants of the occupied territories."

Counsel for Lautz claimed that the latter was convinced " that the criminal prosecution of the resistance movements in the Protectorate and in the incorporated Eastern territories was justified by military necessity ".

The Tribunal, however, could not agree with the defence arguments regarding the non-applicability to certain of the facts of the case of the protection given by Section III of the Hague Convention. It held for instance that " the so-called annexed territories in Poland were in reality nothing more than territory under belligerent occupation of the military forces of Germany " ; which signifies that the acts of the occupying Power were subject to the provisions of the Convention, of which it then proceeded to quote Articles 23 (*h*), 43 and 46 and the following passage from the preamble :

> " Until a more complete code of the laws of war can be drawn up, the High Contracting Parties deem it expedient to declare that, in cases not covered by the rules adopted by them, the inhabitants and the belligerents remain under the protection and governance of the principles of the law of nations, derived from the usages established among civilised peoples, from the laws of humanity, and from the dictates of the public conscience."(2)

(1) See the text of Article 43, on p. 90.
(2) See p. 62 and pp. 28-29, 32 and 52.

All of these texts were here held to have been violated by the enforcement of the law of 4th December, 1941, against the Jews and Poles in the incorporated Eastern territories, and at another point in the Judgment it was stated that the " foregoing procedure under the N N Decree was clearly in violation of " Articles 23 (*h*), 43 and 46 of the Hague Convention.(1) The prosecution of a Pole on a charge of treason for an act committed in Poland before the war was also deemed to be a violation of the Convention.(2)

The law of 4th December, 1941, and the enforcement of the Nacht und Nebel Decree were, of course, not alone among German war-time legislative and administrative acts in this respect, but were outstanding examples of their type of illegality.

The International Military Tribunal at Nuremberg, in a passage already quoted in these volumes,(3) also rejected the submission that Germany was no longer bound by the rules of land warfare in many of the territories occupied during the war because Germany had completely subjugated those countries and incorporated them into the German Reich, a fact which allegedly gave Germany authority to deal with the occupied territories as though they were part of Germany. It may be added that even had the plea succeeded in the *Justice Trial* it would not have saved the accused from being found guilty, on production of adequate proof, of offences against inhabitants of other occupied territories than those claimed to have been annexed. This fact demonstrates one further defect of the plea put forward ; it would not be satisfactory to allow the rights under international law of inhabitants of one occupied territory to be rendered less than those of another by the mere stroke of a pen signing a decree ordering an " annexation ".

It has been seen that the indictment made reference to Article 45 of the Convention.(4) It seems to be implied by that Article that an inhabitant of occupied territory does not in fact owe allegiance to the occupying Power in the sense that a person owes allegiance to the State of which he is a national. In their closing speech the prosecution referred to the Article and went on to state that if no duty of allegiance existed between Poles and the German State the former could not legally be punished by the latter for high treason. Counsel for Klemm denied that it was necessary for a duty of loyalty to exist for a charge of treason to be valid.

The Tribunal did not enter into an analysis of the law regarding the duty of allegiance, but pointed out that certain Polish victims had not been guilty of high treason.(5) This conclusion would seem, however, to follow automatically from the finding that the " Eastern Incorporated Territories " had not in fact ceased to be under the protection of Section III of the Hague Convention, which includes Article 45.

To say that no duty of allegiance is owed by the inhabitant of an occupied territory to the occupant does not mean, however, that the former cannot be punished if his acts constituted war treason.(6) Counsel for Lautz

(1) See p. 59.
(2) See p. 63, footnote 1.
(3) See Volume II, p. 151.
(4) See p. 90.
(5) See p. 53.
(6) See Volume V of this series, pp. 27-30 and 56.

claimed that: "About the following no doubt was left by the Powers which were represented at the Hague Conference of 1907: As soon as an area is firmly occupied by the enemy, every resistance by its inhabitants must cease. . . . The revolutionary movements in the Polish and Czech territories aimed not only at the overthrow of the then Reich government, but also at the annexation of territories of the Altreich." The Tribunal conceded 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", but stated that this rule would not justify punishment by death of Poles who attempted to escape from the Reich in order to join the Allied forces.(1)

The enforcement of such laws as that of 4th December, 1941, so clearly exceeded what was demanded by the needs of "public order and safety" that the Tribunal was not called upon to analyse Article 43 of the Hague Convention any more than it was Article 23 (*h*), yet as to the precise significance of Article 43 there is also a difference of opinion(2) and in this connection it is of interest to refer to an article entitled "War Crimes by Enemy Nationals Administering Justice in Occupied Territory" by Alwyn V. Freeman(3) in *American Journal of International Law*, Vol. 41, No. 3 (July, 1947), at page 579.

The author here demonstrates (on pages 581–608) the differences in the interpretations which have been placed on Article 43 both by text-book writers and by governments in their practice during the two World Wars, and he then claims (on pages 608–610) that: "In view of the uncertainties reflected above, therefore, it may be dangerous to rest a case against judicial or administrative officials solely upon the ground that every action of a tribunal illegally instituted under international law automatically entails the criminal liability of all persons concerned. Moreover, so to hold would inject the element of criminality into a class of cases in which, while a belligerent may have technically exceeded his powers under international law, the fundamental rights of an accused were at all times respected. It might involve the unreasonable proposition that, irrespective of the guilt of an accused, a judge who impartially presided at proceedings which provided adequate safeguards for the defendant's rights, and which terminated in a just sentence, was nevertheless a war criminal. The situation may be wholly hypothetical but it assumes greater significance when it is realised that the powers of an occupant in the domain of legislative and judicial action are extremely broad and that while, for policy reasons, he may refrain from interfering in local administration, he is not required to do so. The circumstances confronting military authorities (refusal of local judges to serve; breakdown of local justice, and so on) may leave no other alternative than to create new courts staffed with enemy personnel. Certainly the creation of military tribunals manned by enemy judges in occupied areas is an acknowledged right of every belligerent, as is the right to refer to them offences committed by his armed forces. While numerous text-writers,

(1) See p. 53.
(2) Cf. the remark of the Tribunal that "the authorities are not in accord as to the proper construction of Article 23 (h) . . . " on p. 63.
(3) Member of the Michigan Bar; formerly Assistant to the Legal Adviser, United States Department of State. The article was published before the delivery of judgment by the Tribunal which tried Altstötter and others.

interpreting Article 43, accept as a general rule that the organisation of the occupied country's courts should remain intact, the practice of belligerents even prior to World War II recognised that special tribunals could be established to deal with offences by the inhabitants against (*a*) the authority of the occupant, or (*b*) against persons belonging to his armed forces, or (*c*) in violation of the occupant's decrees and regulations. On the other hand, there may be cases in which the establishment of new courts or vesting of jurisdiction in enemy appointees is clearly unrelated to military necessity. But the limitations imposed upon a belligerent's conduct are not sharply defined by international law. It may not be easy to determine objectively whether an alleged ' usurpation ' was an excessive exercise of power. Similar observations apply with respect to modifications of the local criminal law and procedure. The general principle of respect for existing laws and institutions does not require a belligerent to retain such judicial *impedimenta* of the political system in the occupied area as might seriously threaten the security of the occupation. Accordingly Article 43 was not infringed by the abolition of such Nazi institutions as the People's Court (*Volksgerichtshof*) or by the abrogation of those civil and criminal laws whose retention might furnish an incitement to disorder and hamper the successful administration of the territory. As already intimated, the Hague injunctions with respect to lives and persons of all the inhabitants may compel the occupant to annul laws which contemplate the degradation and spoliation of individuals as a class.

" To sum up : action of a court itself, rather than any alleged illegality in its inception, should furnish the test of judicial criminality. The decisive consideration would seem to be whether trial of an accused by such a court deprived him of the protection to which he is entitled under international law, that is, whether judicial action produced either a violation of some specific prohibition in the regulations, or was in disregard of those fundamental principles of human justice recognised by civilised peoples and which are incorporated in the preamble of Hague Convention IV of 1907. Thus, for example, denial to an accused of the right to plead not guilty, to introduce evidence or to present witnesses ; application of principles of law condemned by the practice of civilised nations such as punishment by analogy ; imposition of an outrageously excessive penalty in relation to the offence alleged ; imposition of harsh penalties upon relatives of a person charged with acts in which their participation is not established ; and such Draconic action as execution of the relatives of one who is accused of violating curfew regulations, all are properly classed as war crimes subjecting every judicial or administrative official associated with the proceedings, the judgment, or execution of the sentence, to punishment as a war criminal. The summary execution of individuals without any judicial proceedings whatsoever likewise provides an unquestionable basis of guilt. Nor should any greater weight be given to the pleas of ' act of State ' and ' superior orders ' than is given in other cases of illegalities by members of enemy forces. Analogous principles should govern the problems raised by illegally constituted civil and commercial courts, whose action results in illegal condemnations, seizure or destruction of a litigant's property and judicial process in aid of the ' economic ' war crimes. In all cases the deceptive cloak of a formalistic legality may be pierced to determine whether substantive rights have been violated. And the reasonableness of a given

measure, in relation to the occupant's security and to public order and safety, defines its propriety under international law."

An examination of the Judgment and of the paragraphs appearing under the next heading shows that the Tribunal did not in fact rely so much upon a claim that German courts were illegally set up in occupied territories(1) as upon the illegality under international law of the law which they applied and upon the many departures from " fundamental principles of human justice recognised by civilised peoples and which are incorporated in the preamble of Hague Convention IV of 1907 " which occurred during trials held before such courts.

5. THE CRIMINAL ASPECTS OF THE DENIAL OF A FAIR TRIAL

It will be recalled that the main interest of the trials reported upon in Volume V of this series lay in the light which they threw upon the nature of the proceedings the proof of whose having taken place would turn an unlawful killing or imprisonment into a lawful one under international law. Just as in municipal law systems a hanging or imprisonment following upon a legal sentence pronounced in court does not involve the hangman or prison warder in subsequent criminal proceedings so under international law the proof that a prisoner of war or a civilian inhabitant of occupied territories has been imprisoned, killed or otherwise punished only after proceedings possessing certain characteristics will constitute a defence to a charge of war criminality brought against persons involved in the inflicting of that punishment, such as a prosecutor, a judge, a prison warder or an executioner. The characteristics referred to are those calculated to ensure the application of minimum principles of civilised justice and, in so far as their nature is indicated or suggested by the reports contained in Volume V, it has been set out on pages 73–7 of that volume.

The trial of Altstötter and others involved a number of issues, but one of the most important facets of the trial concerns the same topic as Volume V of this series as this has been described above.(2) In dealing with the Nacht und Nebel plan and the guilt particularly of Oeschey and Rothaug the Tribunal stressed the various ways in which the victims of that plan and of those accused had been denied the right to a fair trial before punishment. The Tribunal did not lay down a catalogue of minimum requirements of a fair trial, as did the Judge Advocate acting with the courts which conducted the three Australian trials reported upon in Volume V, and all that can be safely conjectured here is that the United States Military Tribunal regarded certain facts as evidence that such " trials " as were held under the Nacht und Nebel scheme and the proceedings with which Oeschey, Rothaug and Lautz were connected did not approximate to fair trials sufficiently to constitute a defence to a charge brought against those accused and others of

(1) This aspect was not entirely ignored. The indictment pointed out that " extraordinary irregular courts, superimposed upon the regular court system ", were used by the accused to suppress opposition in occupied territories to the Nazi régime, and the Judgment declared that " Germany violated during the recent war every principle of the law of military occupation. Not only under Nacht und Nebel 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 régime and system ". (See p. 59.)

(2) See also pp. 102-3 on the possibility of regarding the denial of a fair trial as itself constituting a positive offence.

taking part in certain governmentally organised plans having a criminal outcome.(1)

It should be added of course that, in Volume V, the victims of the crimes proved were captured military personnel or inhabitants of occupied territories, and the crimes therefore all constituted war crimes. The present trial, however, involved allegations of crimes against humanity as well as of war crimes, according partly to the nationality of the victims, but the differences between the two types of crimes, as defined by the Tribunal, lay in aspects other than that now under discussion.(2) There is nothing to indicate that the Tribunal, in judging whether proceedings constituted a fair trial so as to be a defence against charges of crimes against humanity, applied different tests from those applied when war crimes were alleged.

It will be recalled that such victims of the offences charged in the trials reported upon in Volume V as were inhabitants of occupied territories had been charged and found guilty by the Japanese occupying forces of war crimes. As has already been stated, however,(3) there can be no doubt that inhabitants of occupied territories are entitled to at least the same degree of protection under international law when accused of committing any other kind of offence. Many of the equivalent victims of offences charged in the *Justice Trial* reported upon in the present volume had certainly not been charged with offences which would have constituted war crimes even if the charges had been well founded ; a charge of " race defilement ", for instance, could in no instance have represented an allegation of the committing of a war crime. Yet the Tribunal made no distinction between the victims according to the offences charged, when elaborating the ways in which these persons had been denied their right to a fair trial, and this suggests that the inhabitants of occupied territories have indeed the same rights during proceedings taken against them, whatever the offence charged.

The following passage from the Judgment of the Tribunal indicates certain features of the Nacht und Nebel plan which it regarded as constituting evidence of its illegal character :

> " 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."

The Tribunal also reproduced in its Judgment a statement of von Ammon that foreign witnesses could be heard in Night and Fog " trials " only with the approval of the Public Prosecutor, since " it was to be avoided that the fate of NN prisoners became known outside Germany ".

(1) See p. 84 regarding this characteristic of Counts Two and Three
(2) See pp. 79-80.
(3) See Volume V, p. 73, note 3.

The Tribunal made it clear that it was in no sense acting as an appeal court reviewing in every detail the facts of the cases tried by Rothaug and Oeschey or those in which Lautz was responsible for the prosecution. After describing a prosecution conducted by Lautz's deputy of a Pole who was sentenced to death for using violence against a German official and " depriving the German people of his labour ", the Tribunal said : " We are not here to retry the case." Of another case in which the indictment was " filed by authority of the defendant Lautz ", and in which three Poles were sentenced to death for high treason because they attempted to cross into Switzerland in order to join a Polish Legion supposed to exist there for the purpose of restoring the Polish State,(1) the Tribunal said : " 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." Similarly, after describing the trial by Oeschey of a Pole and a Ukrainian,(2) the Tribunal said of the facts of the case that : " 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.*"(3)

It appears from a study of the Judgment that the Tribunal was concerned with whether (*a*) the evidence concerning the applications of substantive law which were made in pronouncing sentences, and (*b*) the evidence concerning the departures made during the conduct of these trials from elementary principles of justice, constituted proof of war crimes or crimes against humanity.

(*a*) Of the first of the three trials conducted by Rothaug which have been described above,(4) the Tribunal said : " 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 policy of persecution and extermination."

The Tribunal pointed out that the Polish farmhand, who was the accused in another trial conducted by Rothaug,(5) had already been tried previously : " He first was tried in the District Court at Neumarkt. That court sentenced him to a term of two 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 Nuremberg for a new trial and a 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 was applicable—a thing which seemed probable—a much more severe sentence was deemed necessary.

" The case was therefore again tried in violation of the *fundamental principle of justice that no man should be tried twice for the same offence.*"(6)

(1) See p. 18.
(2) See p. 25.
(3) Italics inserted.
(4) See p. 23.
(5) See p. 23.
(6) Italics inserted.

Of the third set of proceedings conducted before Rothaug and described above,(1) the United States Tribunal expressed the following opinion: " One undisputed fact . . . is sufficient to establish this case as being an act in furtherance of the Nazi programme to persecute and exterminate Jews. The fact is that nobody but a Jew could have been tried for racial pollution. To this offence was added the charge that it was committed by [the victim] through exploiting war conditions and the blackout. This brought the offence under the Ordinance Against Public Enemies and made the offence capital. The victim was tried and executed only because he was a Jew. As stated by Elkar, Rothaug's assistant, 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."(2)

The Tribunal then added that the evidence had established beyond a reasonable doubt that the victims in the three cases tried before Rothaug and described above(3) were condemned and executed because they were Jews or 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 programme of persecution and extermination. From the evidence it is clear that these trials lacked the essential elements of legality. . . . 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 programme of racial persecution. It is of the essence of the proof that he identified himself with this national programme and gave himself utterly to its accomplishment. He participated in the crime of genocide. . . ."

Of the first of the three trials conducted before Oeschey in his judicial capacity and referred to in this volume,(4) the Tribunal said: " The fact that the discriminatory law against Poles was invoked in this case is established." The opinion signed by Oeschey showed this to be so. The Judgment added: " In this case Oeschey, with evil intent, participated in the governmentally organised 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."

Of the second trial the Tribunal stated:

" Such a mock trial is not a judicial proceeding but a murder.

" It is provided in Control Council Law 10 that persecutions on political as well as racial grounds are recognised as crimes. While the mere fact alone that [the Count] was prosecuted for remarks hostile to the Nazi régime may not constitute a violation of Control Council Law 10, the circumstances under which the defendant was brought to trial and the manner in which he was tried convince us that [the Count] was not convicted for undermining the already collapsed defensive strength of the defeated nation, but on the contrary, that the law was

(1) See pp. 23-4. These trials were of course examples only.
(2) In view of this ruling it has not been thought necessary to quote chapter and verse the German provisions applied against the victims.
(3) See pp. 23-4.
(4) See p. 25. These trials were, again, examples only.

deliberately invoked by Gauleiter Holz and enforced by Oeschey as a last vengeful act of political persecution. If the provisions of Control Council Law 10 do not cover this case, we do not know what kind of political persecution it would cover."

A reference has been made above to the way in which Rothaug made an offence capital by bringing it within the scope of the Ordinance Against Public Enemies; the Tribunal dismissed such interpretations as "legal sophistries" which did not save the accused from being regarded as "merely an instrument in the programme of the leaders of the Nazi State of persecution and extermination. In dealing with the trial of a Nuremberg Jew for "race pollution",(1) the Tribunal pointed out that in the indictment before the Special Court, which was drawn up "according to the order of Rothaug", the accused "was not charged only with race defilement . . . 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.(2) 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 was not, apparently, alone, however, in this manipulation of laws already discriminatory to promote even further the persecution of racial and political minorities, for after describing one of the above-mentioned(3) trials conducted against Poles in which the prosecution was carried out under Lautz's authority, the Tribunal said: "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 labour 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 programme of racial extermination of Poles by means of the perversion of the law of high treason."

These remarks make it clear that the Tribunal, in deciding whether the acts of the accused constituted a participation in war crimes or in racial or political persecutions amounting to crimes against humanity, was willing

(i) to disregard the question whether or not the acts were legal under German law;

(ii) to regard the enforcement of certain laws as indeed constituting such participation;

(iii) to look upon a violation of the principle *non bis in idem* as evidence of guilt;

(iv) (apparently) to deem it further evidence of guilt that a forced manipulation of German laws was made so as to "legalise" a more severe sentence than would have been allowed otherwise under German law.

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(1) See pp. 23-4.
(2) This was the person with whom the male accused was said to have associated.
(3) See p. 18.

(*b*) It remains to analyse the aspects of these trials by Rothaug and Oeschey which the United States Tribunal thought fit to mention as representing departures from elementary standards of justice.

First there were examples of a refusal on the part of the two former judges to allow a full hearing of the evidence. For instance, the Tribunal pointed out that, in the third of Rothaug's trials, " both defendants were hardly heard by the court. Their statements were passed over or disregarded " and other witnesses had difficulty in being heard.(1) The following words taken from the Judgment in the same case were quoted by the Tribunal: " It does not matter whether during these visits extra-marital sexual relations took place or whether they only conversed as when the husband was present, as [the victim] claims. *The request to interrogate the husband was therefore overruled.*"(2) Dealing with the second of Rothaug's trials, the Tribunal said: " 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."(3) It will also be remembered that the lady who could and would have testified in defence of the Count who was tried by Oeschey was not heard by the German court.(4)

In the second place, there was evidence of Rothaug's proceeding with a trial irrespective of the fact that defence counsel had had no opportunity to prepare a defence(5) and of Oeschey's trying a case without a defence counsel, having told the prosecutor that he would do so because the " legal prerequisites for trial without defence counsel did exist ".(6)

Of the proceedings before Rothaug referred to in the last paragraph the Tribunal stated also that " the prosecutor in the case, Markl, was directed to draw up an indictment based upon the Gestapo interrogation. This was at eleven o'clock of the day they were tried ". While the Tribunal did not indicate to what extent it held the accused responsible for this summary procedure, he could certainly have ensured that the hearing was an adequate one, whereas, as the Tribunal related, the trial itself, according to Kern, lasted about half an hour, and according to the defendant approximately an hour ; while according to Markl it was conducted with the speed of a court martial.

There was much other evidence of the lack of an impartial approach by Rothaug and Oeschey to the cases which came before them. The Tribunal found that Rothaug " did not believe the statements of Polish defendants, according to the testimony in this case ", and of one such person he stated in a written judgment: " 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 sub-humanity, or in his belonging to Polish sub-humanity."(7) Before the end of the trial of a Jewish defendant, Rothaug told the prosecutor that he was prepared to condemn the defendant to death and suggested arguments which the latter might use, and even before the trial he said that the proceedings would be a mere formality, since the

(1) See p. 24.
(2) Italics inserted.
(3) See p. 23.
(4) See p. 25.
(5) See p. 23.
(6) See p. 25.
(7) See p. 23.

victim " would be beheaded anyhow ".(1) The Tribunal found that " 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 ". Of Oeschey, apart from the facts set out above, there was much evidence of autocratic behaviour in court and of conduct insulting to the defendants.(2)

Finally it may be mentioned that having sentenced the Polish farmhand to death, Rothaug disapproved an application for clemency made by the condemned man and his action was mentioned in the United States Military Tribunal. There are no other references to such denials of applications for clemency in the passages of the Judgment dealing with Rothaug and Oeschey, but it is worth noting that the Tribunal drew attention to the fact that the defendant Klemm " admits passing upon clemency pleas in NN death cases and refusing all of them ", as Under-Secretary at the Ministry of Justice, and that the victims involved numbered eight.(3)

There are two alternative ways of regarding evidence of the denial of a fair trial. One could in the first place deem such denial a war crime or a crime against humanity in itself, so that the person responsible would be guilty of this offence quite apart from the subsequent suffering of the victim. On the other hand it could be said that proof of a fair trial having been accorded constitutes a defence to a charge of causing death or other harm to a prisoner of war or inhabitant of occupied territory, and that *proof of the denial of a fair trial nullifies the operation of that defence*; according to this approach, the onus of proof would rest upon the defence.

In the *Justice Trial* as in the relevant trials reported upon in Volume V, the prosecution was at pains to prove even in their own presentation of evidence those aspects of the proceedings taken against the victims which tended to show that a fair trial was not accorded them, and did not wait to cross-examine the defence witnesses on this point.

The major stress placed by the prosecution and by the Tribunal in the *Justice Trial* was upon the " murder, torture and illegal imprisonment of, and brutalities, atrocities, and other inhumane acts against thousands of persons ", to use the words of the indictment. Nevertheless there is a strong suggestion that the Tribunal regarded the denial of a fair trial as itself a possible criminal act. From the evidence, said the Judgment, it was clear that certain cases tried by Rothaug " lacked the essential elements of legality ".(4) Again, the Tribunal declared that " the trials of the accused Nacht und Nebel persons did not approach even a semblance of fair trial or justice ".(5)

Volume V also provided instances of the two approaches which may be adopted in dealing with evidence of the denial of a fair trial. Thus, in the trial of Shinohara and two others by an Australian court, the charge of which the accused were found guilty was that they " failed to ensure that

(1) See p. 24.
(2) See p. 26.
(3) See p. 15, footnote 1.
(4) See p. 99.
(5) See p. 97.

such natives were afforded a fair and proper trial ".[1] On the other hand, the confirming authority did not approve the findings and sentences in this case, and the charges in the other two Australian trials were charges of murder and the accused put forward the defence that the victim had been killed only after a trial or investigation of their acts.[2] The charge in the trial of Isayama and seven others by a United States Military Commission, however, mentioned " permitting and participating in an illegal and false trial *and* unlawful killing " of prisoners of war,[3] and the charge in the trial of Hisakasu and five others, also by a United States Military Commission, again indicated that an " illegal, unfair, false and null trial " was to be regarded as in some way separate from an unlawful " killing ".[4] The same can be said of the trial of Shigeru Sawada and three others.[5]

It may be argued that whatever approach is adopted the practical result is much the same ; on the other hand it is interesting from the point of view of legal analysis and classification that the denial of a fair trial has been recognised as a war crime and (almost certainly) a crime against humanity *eo ipso*.

It remains to arrive at some tentative conclusions on the attitude of the Tribunal which tried Altstötter and others regarding the nature of those aspects of purported trial proceedings which may be used as proof of the offence of denial of a fair trial or as evidence in rebutting the defence that execution or other injury was done in pursuance of a judicial sentence.[6] These aspects, which are in addition to those set out in the last section,[7] may be summarised as follows :

(i) the right of accused persons to know the charge against them,[8] and this a reasonable time before the opening of trial, was denied ;[9]

(ii) the right of accused to the full aid of counsel of their own choice was denied, and sometimes no counsel at all was allowed to defend the accused ;[10]

(iii) the right to be tried by an unprejudiced judge was denied to accused persons ;[11]

(iv) the right of accused to give or introduce evidence was wholly or partly denied ;[12]

(v) the right of accused to know the evidence against them was denied ;[13]

(vi) the general right to a hearing adequate for a full investigation of a case was denied.[14]

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[1] See Volume V, pp. 32 and 34.
[2] See Volume V, pp. 25-6 and 37.
[3] See Volume V, p. 60.
[4] See Volume V, p. 66.
[5] See Volume V, pp. 10-11.
[6] The following account should be compared with the summary contained on pages 73-77 of Volume V, which as already stated attempt to summarise the results of the trials reported upon in that volume on the same issue.
[7] See p. 100.
[8] See p. 97 ; and compare p. 119.
[9] Compare item (i) on p. 75 of Volume V.
[10] See pp. 97 and 101. Compare item (ii) on p. 74 of Volume V and the footnote thereto.
[11] See pp. 101-2 and 119. Compare the last complete paragraph on p. 75 of Volume V.
[12] See pp. 97 and 101. Compare item (iv) on pp. 74-5 of Volume V, and p. 119 of the present volume.
[13] See p. 97. Compare item (ii) on p. 75 of Volume V, and p. 119 of the present volume.
[14] See p. 101. Compare item (iii) on page 75 of Volume V.

In addition it is at least possible that the Tribunal regarded the persistent denial of clemency as a further incriminating factor.(1)

The footnote cross-references by which the points enumerated above have been related to the similar catalogue contained in Volume V of this series reveal a striking uniformity in the attitude of different courts to the characteristics of a fair trial under international law, or conversely to those characteristics which would brand purported judicial proceedings as a denial of a fair trial.(2) It can fairly be said that a body of rules is emerging or has emerged in this branch of international law. The analyses contained in these pages and in Volume V of the characteristics just mentioned have, it should be noted, been based on one or more of the following:

(i) The actual findings of United States Military Commissions in trials reported upon in Volume V;

(ii) The advice of the Judge Advocate in the Australian trials reported in the same volume. This source is less authoritative than the last; nevertheless while the Judge Advocate's advice need not have been taken by the court, such advice (as in British and Canadian trials) carries great weight;

(iii) The evidence which was at any rate admitted by the courts conducting trials reported on in Volume V, and which may have been taken into account by the courts in deciding on their verdicts and sentences; and

(iv) Passages from the Judgment in the *Justice Trial.*

Due to the construction of this last Judgment it is not always possible to state with certainty what the Tribunal regarded as criminal and what merely as evidence of knowledge, intent or motive. Again, the other three sources set out above are not all of equal authoritativeness. Nevertheless, it must be recognised that even the first, namely the findings of courts upon certain charges, are not of more than persuasive authority, and it is submitted that the analysis that has been attempted here and in Volume V of the nature of the denial of a fair trial, even though based on such differing categories of authority, is not without interest in the building up of a jurisprudence of war crimes law.

6. THE ATTITUDE TAKEN BY THE UNITED STATES MILITARY TRIBUNALS TO COUNTS ALLEGING CONSPIRACY

On 9th July, 1947, a joint session of five United States Military Tribunals was held in order to hear counsel argue regarding the sufficiency of counts which charged defendants with conspiracy to commit war crimes and crimes against humanity as a separate offence. Such counts had been brought not only against the accused in the *Justice Trial* but also against the defendants in the trial of Karl Brandt and others (*The Doctors' Trial*) and in the trial of Oswold Pohl and others, which were also being held before certain of the Military Tribunals mentioned above. Counsel for the defendants in these

(1) See p. 102.

(2) The denial of one of the rights enumerated above would not necessarily amount to the denial of a fair trial, however, and the courts have had to decide in each instance whether a sufficient number of the rights which they have regarded as forming part of the general right to a fair trial were sufficiently violated to warrant the making of one or other of the legal deductions discussed on pages 102-3.

three trials challenged the sufficiency of these counts while General Telford Taylor, who led the prosecution in these trials, upheld it.

The main arguments put forward by the defence were the following:

(i) neither the Charter of the International Military Tribunal nor Law No. 10, in dealing with war crimes and crimes against humanity, " speak of common planning as a punishable separate crime, whereas both laws have in common that in their respective figure (*a*), dealing with the crimes against peace, participation in a common plan or conspiracy for the accomplishment of one of the listed crimes against the peace, is expressly declared punishable " ;

(ii) the International Military Tribunal held that whereas the prosecution in the trial of the German Major War Criminals charged a conspiracy to commit not only aggressive war but also war crimes and crimes against humanity, the Charter did not in fact define as a crime any conspiracy except the one to commit acts of aggressive war ;([1])

(iii) the wording " was connected with plans or enterprises involving its commission " contained in Article II, 2 (*d*) of Law No. 10([2]) could not be taken to admit charges of conspiracy to commit war crimes and crimes against humanity since " the system of Law No. 10 makes it clear beyond doubt that the facts of crimes are exhaustively defined in sub-paragraph 1, whereas in sub-paragraph 2 only the forms of complicity in these crimes are defined ;([3])

(iv) " The occupation of Germany was carried out together by the four victorious Powers, who according to the Berlin declaration have confirmed again and again that Germany is to be neither annexed nor divided up but on the contrary to be maintained as an entity of which the political form is to be determined. Consequently, Germany is subject to the united occupation Powers as represented in the control council, but not to the Russian, the English, the French, the American law as such." The introduction of the Anglo-American concept of conspiracy was not therefore admissible ;

(v) the words " including conspiracy to commit any such crimes ", contained in Article I of Ordinance No. 7,([4]) must be taken to mean only conspiracy to commit crimes against peace, since Ordinance No. 7 did not set out to alter matters of substantive law contained in Law No. 10 ;

(vi) the concept of conspiracy is not found in modern continenta

([1]) See British Command Paper, Cmd. 6964, p. 44.
([2]) See p. 84, footnote 3.
([3]) See pp. 38-9.
([4]) Article I of Ordinance No. 7 provides 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 offences recognised as crimes in Article II of Control Council Law No. 10, including conspiracies to commit any such crimes. Nothing herein shall prejudice the jurisdiction or the powers of other courts established or which may be established for the trial of any such offences." See p. 115 of Volume III of this series, and pp. 26-8 of the present volume.

codes, and is an Anglo-American notion.(1) It would therefore be a violation of the maxim *nullum crimen sine lege* to apply it to German accused.(2)

The principal prosecution arguments were the following:

(i) " The classical definition of conspiracy at English common law is that it is a confederation to effect an unlawful object, or to effect a lawful object by unlawful means. Within the scope of this definition, conspiracy is very little more than an elaboration of the law of attempts, in cases where the conspiracy was unsuccessful in attaining its object, or of the law of principals and accessories and accomplices, if the conspiracy succeeded in attaining an unlawful object. Within this sphere, the law of conspiracy is really just another manifestation of the very familiar problem in all legal systems of how closely or in what way an individual must be connected with a crime in order to attribute to him, in a judicial sense, guilt. . . . However, over the course of years there have occurred, both in English common law and in the continental law, a number of efforts to apply the doctrine of conspiracy to acts which, if committed by a single person, would not have been indictable or, in a judicial sense, unlawful . . . it is important to point out, therefore, that none of these questionable and perhaps dangerous developments of the law of conspiracy are in any way involved under the London Charter or under Law No. 10, or in any of the three cases before these tribunals in which this jurisdictional question is raised. Neither one, neither the London Charter nor these indictments, seeks to impose criminal liability for conspiring in pursuit of a lawful objective. On the contrary, the conspiracies involved in these cases are conspiracies to commit acts well established as crimes at international law, under the specific language of the London Charter and Law No. 10 and, in most cases, under the penal law system of all civilised countries." Moreover, these were

(1) In his reply, General Telford Taylor mentioned that: " Legal concepts, analogous to that of conspiracy, are by no means unknown in continental law ".

Thus, for instance, Article 265 of the French *Code Pénal* provides that " Any association formed, whatever its duration or the number of its members, and any undertaking arrived at for the purpose of preparing or committing crimes against persons or against property, constitutes a crime against the public peace ". This provision, *inter alia*, was relied upon in the trial of Henri Georges Stadelhofer by a French Military Tribunal at Marseilles, 15th April, 1948; in finding him guilty of the crime of *association de malfaiteurs*, among other offences, the Tribunal gave an affirmative answer to the question whether he, a German national, was guilty, during time of war, of " having formed with various members of the German Gestapo an association with the aim of preparing or committing crimes against persons or property, without justification under the laws and usages of war. Other accused war criminals have also been found guilty of *association de malfaiteurs* by French Military Tribunals.

(2) In his reply, General Taylor admitted that: " These and other internationally constituted Tribunals cannot work exclusively in the medium of German law, or American law, or even a combination of the two. That is not the genius of international law ". But, he added " if the objections of defence counsel to an infusion of legal principles from non-German legal systems were to be taken at face value, certain consequences would flow therefrom which, I am sure, they would find most unwelcome ". For instance, " Under German law, a defendant cannot testify under oath in his own behalf. It is because of an infusion of non-German legal principles that the defendants in these proceedings are entitled to take an oath and enter that box."

crimes which according to the claim of the prosecution had in fact been committed.

(ii) All systems of law had " concepts, such as accessories, accomplices, conspirators, etc.", whose purpose was to ensure that all connected with a crime should be punished, and in approaching the question of what degree of connection with these crimes must be established in order to attribute guilt to a defendant, we must not become enmeshed in the intricacies of the American or English law of principals and accessories, or of conspiracy, or indeed in the refinements or peculiar prejudices of any single judicial system. International law, with respect to these questions, must be derived and applied from a variety of sources and legal systems, including both civil and common law. And the notion of conspiracy, if sensibly and fairly confined, is, we submit, a useful body of doctrine to draw upon.(1)

(iii) " The law of war crimes is, fundamentally, an attempt to define the circumstances under which a state of belligerent hostilities makes lawful acts which would otherwise be clearly unlawful", acts such as " murder, torture, enslavement, rape, plunder, destruction, devastation, etc." The General continued: " It is well settled, and we think this is an important point, that a conspiracy to commit felonies of these types is an indictable offence at common law, and regardless of whether any statute expressly so provides. This has been settled in a multitude of English and American decisions over a number of years. It was, undoubtedly, for this reason that the draftsmen of the London Charter and Control Council Law No. 10 saw no need to include an express reference to conspiracy in the definition of war crimes and crimes against humanity, any more than they felt it necessary to make express reference to the liability of accessories and accomplices or to the law of attempts. All these things adhere to such crimes automatically.

" Why, then, did the draftsmen of the London Charter make specific reference to ' common plan or conspiracy ' in the definition of crimes against peace? Clearly, we submit, this was done out of abundance of caution because of certain differences between the nature of crimes against peace on the one hand and war crimes and crimes against humanity on the other hand. . . . But the crime of planning and waging an aggressive war is, in many respects, peculiarly an international law crime, and particularly subject to international jurisdiction. The acts condemned as criminal in the definition of crimes against peace are not acts which are declared to be criminal

(1) The defence replied that: " Participation, instigation, all such matters are, as a matter of course, punishable under continental law too; and, of course, no international penal law can be imagined without punishing those who in reality desired the perpetration and carried it into effect in some way.

" The great difference, however, between that and conspiracy, as we see it, is that many may be caught in the conspiracy charge who did not themselves desire such a deed but who got involved not through their own volition and then are brought into the conspiracy."

under the internal penal law of most States.(1) Furthermore, while war crimes and crimes against humanity can certainly be committed by a single individual, it is hard to think of any one man as committing the crime of waging an aggressive war as a solo venture. It is peculiarly a crime brought about by the confederation or conspiracy of a number of men acting pursuant to well-laid plans. It matures over a long period of time, and many steps are involved in its consummation. The interrelations between the confederates or conspirators are likely to be extremely complicated and far-flung. For all these reasons, and particularly because planning an aggressive war is not, like murder, a standard felony to which the orthodox paraphernalia of doctrine as to the liability of accomplices automatically applies, the draftsmen of the London Charter and Law No. 10 included an express reference to conspiracy in the definition of crimes against peace."

(iv) " I am sure that it never occurred to the Allied Control Council when it adopted Law No. 10 in December, 1945, during the proceedings before the International Military Tribunal, that by following the language of the London Charter they had excluded from the scope of Law No. 10 conspiracies to commit war crimes and crimes against humanity. And finally, so far as I am aware, such an idea never occurred to any of the defence counsel during the entire course of the international trial." General Taylor suggested that the International Military Tribunal came to the decision quoted above because of "an underlying hostility, particularly on the part of the continental members of the court, to the concept of conspiracy as such ", and the prosecutor urged that the Military Tribunal should refuse to follow this ruling, which seemed to be contrary to the express language of Article 6 of the Charter of the International Military Tribunal which stated that: " Leaders, organisers, 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 ". He claimed that " Ordinance No. 7, under which these Tribunals are constituted, does not make the decisions of the International Military Tribunal on points of law binding ".

(v) Article II, 2(2) of Law No. 10 was differently worded from the passage just quoted from the Charter, but " its purpose is fundamentally the same. . . . Indeed, the scope of paragraph 2 of Article II of Control Council Law No. 10 which I have just quoted is, we believe, broader than that of the doctrine of conspiracy."

(1) It would be interesting, however, to find how far the provisions of many continental codes regarding " offences against the external security of the State " provide against acts which amount to planning or carrying out aggressive warfare. Compare, for instance, Articles 79-82 of the French *Code Pénal* and Articles 93, 96, 98 and 99 of the Polish Criminal Code which are treated in an Annex on Polish Law Concerning Trials of War Criminals to be contained in Volume VII of these Reports.

(2) See p. 84, note 3.

(vi) " In applying international penal law, just as in applying domestic penal law, we must determine the substantial degree or quality of participation in crimes upon the basis of which a fair judgment of guilt must be rendered. And in making these determinations under international law, it is surely not only appropriate but wise to draw upon such well-established bodies of legal doctrine in highly developed legal systems as will assist us in arriving at a result which commends itself to our sense of justice. The International Military Tribunal did not find that any considerations of general jurisprudence stood in the way of applying the doctrine of conspiracy in the case of crimes against peace."

(vii) " Conspiracy to achieve an unlawful objective or to use unlawful means to attain an objective is not, properly speaking, a separate subsequent crime at all, any more than being an accessory or an accomplice is a crime ; it is an adjunct of the crime ; "

(viii) " It is important, also, to bear in mind that neither the London Charter nor Law No. 10 purports to be a complete, or even a nearly complete codification of international penal law " . . . Particularly in respect to the necessary degree of connection with a crime, the provisions of the London Charter and Law No. 10 are illustrative rather than exhaustive attempts at statutory definition. Neither of them, for example, makes mention of attempts, yet it surely was not the intention in either case to eliminate attempts from international penal law."(1)

(ix) Ordinance No. 7 expressly makes conspiracy punishable.(2)

The Tribunals decided in favour of the defence submission, and the Tribunal conducting the Justice Trial ruled accordingly,(3) on the grounds that the Tribunal were bound by the provisions of Law No. 10 and of

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(1) Some recognition has been given to the possibility that a person may be guilty of a war crime even though he merely attempted to commit an offence and the offence was never completed. Thus, Article 4 of the Norwegian Law of 13th December, 1946, on the punishment of foreign war criminals, provides that :

" The attempted commission of any crime referred to in Article No. 1 of the present law is subject to the same punishment as an accomplished act. Complicity is likewise punishable."

For an application of this provision, reference should be made to p. 120 of this volume.

Again, Article 13 (1) of a Yugoslav Law of 25th August, 1945, which provides for the trial of war criminals and traitors, lays down that :

" An attempt to commit acts outlined in this Law shall be punishable as a complete criminal act."

Under the Dutch Extraordinary Penal Law Decree of 22nd December, 1943 (Statute Book D. 61), an attempt to commit a war crime is equally punishable with the crime itself.

Neither are convictions for attempts at war crimes unknown in French practice. Thus, Jean Georges Stucker was sentenced to imprisonment for two years, for the offence of having attempted to secure the arrest or detention of a French national, by a French Military Tribunal at Metz, 25th November, 1947. This case will receive further treatment in Volume VII of these reports. (In the notes to the trial of Becker and others.)

The relevant French provision is Article 2 of the *Code Pénal* which states that :

" Any attempted crime which is manifested by the commencement of its execution, if it has been stopped or has lost its effect only by virtue of circumstances independent of the will of its author, is considered to be the same as the completed crime ".

(2) See p. 105, note 4.

(3) See pp. 5-6.

the Charter of the International Military Tribunal(1) which do not define conspiracy to commit a war crime or a crime against humanity as a separate substantive crime. The Tribunal affirmed the right of prosecution and defence to introduce evidence, relating to events before 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 ".(2)

In the course of his dissenting judgment, Judge Blair made some remarks concerning this decision of the Tribunal. His opinion was that: " 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 authorised 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 offences recognised as crimes in Article II of Control Council Law No. 10, including conspiracies to commit any such crimes '."

The Tribunal, he concluded, " 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 ".

(1) Which was incorporated into Law No. 10 by Article 1 thereof.
(2) See also p. 90.