International Law Studies—Volume 45

International Law Documents

V. TRIALS OF WAR CRIMINALS

TRIALS IN EUROPE

NOTE.—1. The prosecution of enemy persons responsible for acts of violence inflicted upon the civilian populations of occupied countries was envisaged in a Declaration signed at London on 13 January 1942 by representatives of Belgium, Czechoslovakia, Free France, Greece, Luxembourg, The Netherlands, Norway, Poland and Yugoslavia. 37 American Journal of International Law (1943), p. 84.

2. In 1943, a United Nations Commission for the Investigation of War Crimes was established at London, to investigate war crimes against nationals of the United Nations, to assemble the information available, and to report from time to time to the Governments concerned.

3. In a conference at Moscow on 30 October 1943, the Foreign Secretaries of the United States of America, the United Kingdom and the Soviet Union, speaking in the interests of the United Nations, issued a declaration giving "full warning" that German officers and men and members of the Nazi party responsible for atrocities, massacres and executions would be sent back to the countries in which their deeds were done for punishment according to the laws of those countries. This declaration was made without prejudice to the cases of the major criminals whose offenses had no particular geographical localization, as it was contemplated that such persons would be punished by the joint decision of the Governments of the Allies. 38 American Journal of International Law (Supp. 1944), p. 7.

4. On 8 August 1945, the Governments of the United States, France, the United Kingdom and the Soviet Union, "acting in the interests of all the United Nations," concluded an Agreement at London for the establishment, "after consultation with the Control Council for Germany," of an International Military Tribunal for the trial of certain war criminals whose offenses had no particular geographical localization. Naval War College, International Law Documents 1944–45, p. 249. The Agreement entered into force at once; it was to continue in force for a period of one year and thereafter subject to termination by any signatory on one month's notice. The Agreement was open to adherence by "any Government of the United Nations," and the Governments of the following 19 states adhered to it: Australia, Belgium, Czechoslovakia, Denmark, Ethiopia, Greece, Haiti, Honduras, India, Luxembourg, Netherlands, New Zealand, Norway, Panama, Paraguay, Poland, Uruguay, Venezuela, Yugoslavia. 14 Department of State Bulletin (1946) 261, 954.

5. The Charter annexed to the Agreement of 8 August 1945 set up an International Military Tribunal for the "trial and punishment of the major war criminals of the European Axis." Slight errors in the English and French versions of Article 6, paragraph c, as compared with the Russian version, were rectified by a protocol signed at Berlin on 6 October 1945. Executive Agreement Series No. 472.

6. Members of the International Military Tribunal, and alternates, were appointed by each of the four States signatory to the London Agreement of 8 August 1945. All were civilians except the member and the alternate designated by the Soviet Union. The Tribunal first met at Berlin on 15 October 1945.

7. On 18 October 1945, twenty-four Germans were indicted before the Inter-

national Military Tribunal, in the name of the four States signatory to the London Agreement. Each of the defendants was charged on one or more of the following counts: 1) a common plan or conspiracy; 2) crimes against peace; 3) war crimes; 4) crimes against humanity. The Tribunal was also asked to declare that the Reich Cabinet, various Nazi organizations, and the General Staff and High Command of the German Armed Forces were criminal. Department of State Publication 2420, p. 23. One of the defendants (Robert Ley) having died, twenty-three were arraigned before the Tribunal; the trial of one defendant (Gustav Krupp) was postponed; and one defendant (Martin Bormann) was tried in his absence.

8. The trial at Nürnberg began on 20 November 1945, and ended on 31 August 1946. The Tribunal held 403 open sessions; 33 witnesses were heard for the prosecution, while 61 witnesses, in addition to nineteen of the defendants, testified for the defense; 143 additional witnesses gave evidence for the defense by means of written answers to interrogatories. The Tribunal heard 22 witnesses for organizations, in addition to the evidence taken by commissioners. In the judgment rendered on 30 September and 1 October 1946, 19 of the 22 defendants who came to trial were found guilty on one or more counts of the indictment, and three were acquitted. Twelve were sentenced to death by hanging; one committed suicide, and eleven were executed. Three Nazi organizations and the Secret State Police were declared to have been criminal in character.

9. Though it had been contemplated that in subsequent proceedings the International Military Tribunal would proceed to other trials, no such proceedings were held by the Tribunal, and it did not later convene.

10. In a report made to President Truman on 9 November 1946, Francis Biddle, American Member of the International Military Tribunal, recommended "that the United Nations as a whole reaffirm the principles of the Nürnberg Charter in the context of a general codification of offences against the peace and security of mankind." In reply, President Truman stated that the setting up of "a code of international criminal law to deal with all who wage aggressive war . . . deserves to be studied and weighed by the best legal minds the world over"; and he expressed the hope that the United Nations would carry out Judge Biddle's recommendation. 15 Department of State Bulletin 954–957. A proposal in this sense was made by the American Delegation to the General Assembly of the United Nations on 15 November 1946. United Nations Document A/C.6/69. On 11 December 1946, the General Assembly took note of the London Agreement and annexed Charter, as well as the Tokyo Charter, and adopted a resolution affirming the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal.

11. On 20 December 1945, by its Law No. 10, the Control Council for Germany provided for national tribunals to be set up in the various zones of Germany for the trial of persons accused of war crimes. Ordinance No. 7, adopted by the Military Government for Germany, United States Zone, on 18 October 1946, made provision for tribunals in the United States Zone and set out the procedure for them to follow.

(20) Excerpts from the Judgment of the International Military Tribunal, Nürnberg, 30 September–1 October 1946

THE INTERNATIONAL MILITARY TRIBUNAL

NÜRNBERG, GERMANY

LORD JUSTICE LAWRENCE, Member for the United Kingdom of Great Britain and Northern Ireland, President

Mr. JUSTICE BIRKETT, Alternate Member

Mr. FRANCIS BIDDLE, Member for the United States of America

Judge JOHN J. PARKER, Alternate Member

M. Le PROFESSEUR DONNEDIEU DE VABRES, Member for the French Republic

M. Le CONSEILLER R. FALCO, Alternate Member

MAJOR GENERAL I. T. NIKITCHENKO, Member for the Union of Soviet Socialist Republics

LIEUTENANT COLONEL A. F. VOLCHKOV, Alternate Member

PROSECUTION COUNSEL

Chief Prosecutor for the United States of America: Mr. Justice Robert H. Jackson

Chief Prosecutor for the United Kingdom of Great Britain and Northern Ireland: H. M. Attorney-General, Sir Hartley Shawcross, K. C., M. P.

Chief Prosecutor for the French Republic: M. François de Menthon; M. Auguste Champetier de Ribes

Chief Prosecutor for the Union of Soviet Socialist Republics: General R. A. Rudenko

The United States of America, the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics

against

Hermann Wilhelm Goering, Rudolf Hess, Joachim von Ribbentrop, Robert Ley, Wilhelm Keitel, Ernst Kaltenbrunner, Alfred Rosenberg, Hans Frank, Wilhelm Frick, Julius Streicher, Walter Funk, Hjalmar Schacht, Gustav Krupp von Bohlen und Halbach, Karl Doenitz, Erich Raeder, Baldur von Schirach, Fritz Sauckel, Alfred Jodl, Martin Bormann, Franz von Papen, Artur Seyss-Inquart, Albert Speer, Constantin von Neurath, and Hans Fritzsche, Individually and as Members of Any of the Following Groups or Organizations to Which They Respectively Belonged, Namely: Die Reichsregierung (Reich Cabinet); Das Korps Der Politischen Leiter Der Nationalsozialistischen Deutschen Arbeiterpartei (Leadership Corps of the Nazi Party); Die Schutzstaffeln Der Nationalsozialistischen Deutschen Arbeiterpartei (commonly known as the "SS") and including Die Sicherheitsdienst (commonly known as the "SD"); Die Geheime Staatspolizei (Secret State Police, commonly known as the "Gestapo"); Die Sturmabteilungen Der N. S. D. A. P. (commonly known as the "SA") and the General Staff and High Command of the German Armed Forces all as defined in Appendix B of the Indictment, defendants.

* * * In Berlin, on the 18th October 1945, in accordance with Article 14 of the Charter, an indictment was lodged against the defendants named in the caption above, who had been designated by the Committee of the Chief Prosecutors of the signatory powers as major war criminals.

A copy of the indictment in the German language was served upon each defendant in custody at least 30 days before the trial opened. . . .

The defendant Robert Ley committed suicide in prison on the 25th October 1945. On the 15th November 1945 the Tribunal decided that the defendant Gustav Krupp von Bohlen und Halbach could not then be tried because of his physical and mental condition, but that the charges against him in the indictment should be retained for trial thereafter, if the physical and mental condition of the defendant should permit. On the 17th November 1945 the Tribunal decided to try the defendant Bormann in his absence under the provisions of Article 12 of the Charter. After argument, and consideration of full medical reports, and a statement from the defendant himself, the Tribunal decided on the 1st December 1945 that no grounds existed for a postponement of the trial against the defendant Hess because of his mental condition. A similar decision was made in the case of the defendant Streicher.

In accordance with Articles 16 and 23 of the Charter, counsel were either chosen by the defendants in custody themselves, or at their request were appointed by the Tribunal. In his absence the Tribunal appointed counsel for the defendant Bormann, and also assigned counsel to represent the named groups or organizations.

The trial which was conducted in four languages—English, Russian, French, and German—began on the 20th November 1945, and pleas of "Not guilty" were made by all the defendants except Bormann.

The hearing of evidence and the speeches of counsel concluded on 31 August 1946.

Four hundred and three open sessions of the Tribunal have been held; 33 witnesses gave evidence orally for the prosecution against the individual defendants, and 61 witnesses, in addition to 19 of the defendants, gave evidence for the defense.

A further 143 witnesses gave evidence for the

defense by means of written answers to interrogatories.

The Tribunal appointed commissioners to hear evidence relating to the organizations, and 101 witnesses were heard for the defense before the commissioners, and 1,809 affidavits from other witnesses were submitted. Six reports were also submitted, summarizing the contents of a great number of further affidavits.

Thirty-eight thousand affidavits, signed by 155,000 people, were submitted on behalf of the Political Leaders, 136,213 on behalf of the SS, 10,000 on behalf of the SA, 7,000 on behalf of the SD, 3,000 on behalf of the General Staff and OKW, and 2,000 on behalf of the Gestapo.

The Tribunal itself heard 22 witnesses for the organizations. The documents tendered in evidence for the prosecution of the individual defendants and the organizations numbered several thousands. A complete stenographic record of everything said in court has been made, as well as an electrical recording of all the proceedings.

Copies of all the documents put in evidence by the prosecution have been supplied to the defense in the German language. The applications made by the defendants for the production of witnesses and documents raised serious problems in some instances, on account of the unsettled state of the country. It was also necessary to limit the number of witnesses to be called, in order to have an expeditious hearing, in accordance with Article 18 (c) of the Charter. The Tribunal, after examination, granted all those applications which in its opinion were relevant to the defense of any defendant or named group or organization, and were not cumulative. Facilities were provided for obtaining those witnesses and

documents granted through the office of the General Secretary established by the Tribunal.

Much of the evidence presented to the Tribunal on behalf of the prosecution was documentary evidence, captured by the Allied armies in German Army headquarters, Government buildings, and elsewhere. Some of the documents were found in salt mines, buried in the ground, hidden behind false walls, and in other places thought to be secure from discovery. The case, therefore, against the defendants rests in a large measure on documents of their own making, the authenticity of which has not been challenged except in one or two cases. * * *

For the purpose of showing the background of the aggressive war and war crimes charged in the indictment, the Tribunal will begin by reviewing some of the events that followed the First World War, and in particular, by tracing the growth of the Nazi Party under Hitler's leadership to a position of supreme power from which it controlled the destiny of the whole German people, and paved the way for the alleged commission of all the crimes charged against the defendants. * * * [The Tribunal reviewed the history of the Party's rise to power.]

The Common Plan of Conspiracy and Aggressive War

The Tribunal now turns to the consideration of the crimes against peace charged in the indictment. Count one of the indictment charges the defendants with conspiring or having a common plan to commit crimes against peace. Count two of the indictment charges the defendants with committing specific crimes against peace by planning, preparing, initiating, and waging wars of aggression against a number of other States. It will be convenient to consider the question of the existence of a common

plan and the question of aggressive war together, and to deal later in this judgment with the question of the individual responsibility of the defendants.

The charges in the indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world.

To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.

The first acts of aggression referred to in the indictment are the seizure of Austria and Czechoslovakia; and the first war of aggression charged in the indictment is the war against Poland begun on the 1st September 1939.

Before examining that charge it is necessary to look more closely at some of the events which preceded these acts of aggression. The war against Poland did not come suddenly out of an otherwise clear sky; the evidence has made it plain that this war of aggression, as well as the seizure of Austria and Czechoslovakia, was premeditated and carefully prepared, and was not undertaken until the moment was thought opportune for it to be carried through as a definite part of the preordained scheme and plan.

For the aggressive designs of the Nazi Government were not accidents arising out of the immediate political situation in Europe and the world; they were a deliberate and essential part of Nazi foreign policy.

From the beginning, the National Socialist movement claimed that its object was to unite the German people in the consciousness of their mission and destiny, based on inherent qualities of race, and under the guidance of the Fuehrer.

For its achievement, two things were deemed to be essential: The disruption of the European order as it had existed since the Treaty of Versailles, and the creation of a Greater Germany beyond the frontiers of 1914. This necessarily involved the seizure of foreign territories.

War was seen to be inevitable, or at the very least, highly probable, if these purposes were to be accomplished. The German people, therefore, with all their resources, were to be organized as a great political-military army, schooled to obey without question any policy decreed by the State. * * *

[The Tribunal reviewed at length German preparation for aggression, the seizures of Austria and Czechoslovakia, the aggression against Poland, the successive invasions of Denmark, Norway, Belgium, the Netherlands, Luxemburg, Yugoslavia, Greece, and the U. S. S. R., and the commencement of war against the United States.]

Violations of International Treaties

The Charter defines as a crime the planning or waging of war that is a war of aggression or a war in violation of international treaties. The Tribunal has decided that certain of the defendants planned and waged aggressive wars against 10 nations, and were therefore guilty of this series of crimes. This makes it unnecessary to discuss the subject in further detail, or even to consider at any length the extent to which these aggressive wars were also "wars in violation of international treaties, agreements, or assurances." These treaties are set out in appendix C of the indictment. Those of principal importance are the following:

(A) HAGUE CONVENTIONS

In the 1899 Convention the signatory powers agreed: "before an appeal to arms . . . to have re-

course, as far as circumstances allow, to the good offices or mediation of one or more friendly powers." A similar clause was inserted in the Convention for Pacific Settlement of International Disputes of 1907. In the accompanying Convention Relative to Opening of Hostilities, article I contains this far more specific language:

> "The Contracting Powers recognize that hostilities between them must not commence without a previous and explicit warning, in the form of either a declaration of war, giving reasons, or an ultimatum with a conditional declaration of war."

Germany was a party to these conventions.

(B) VERSAILLES TREATY

Breaches of certain provisions of the Versailles Treaty are also relied on by the prosecution—not to fortify the left bank of the Rhine (art. 42–44): to "respect strictly the independence of Austria" (art. 80); renunciation of any rights in Memel (art. 99) and the Free City of Danzig (art. 100); the recognition of the independence of the Czecho-Slovak State; and the Military, Naval, and Air Clauses against German rearmament found in part V. There is no doubt that action was taken by the German Government contrary to all these provisions, the details of which are set out in appendix C. With regard to the Treaty of Versailles, the matters relied on are:

1. The violation of articles 42 to 44 in respect of the demilitarized zone of the Rhineland.

2. The annexation of Austria on the 13th March 1938, in violation of aticle 80.

3. The incorporation of the district of Memel on the 22d March 1939, in violation of article 99.

4. The incorporation of the Free City of Danzig on the 1st September 1939, in violation of article 100.

5. The incorporation of the provinces of Bohemia

and Moravia on the 16th March 1939, in violation of article 81.

6. The repudiation of the military, naval and air clauses of the treaty, in or about March of 1935.

On the 21st May 1935, Germany announced that, whilst renouncing the disarmament clauses of the treaty, she would still respect the territorial limitations, and would comply with the Locarno Pact. (With regard to the first five breaches alleged, therefore, the Tribunal finds the allegation proved.)

(C) TREATIES OF MUTUAL GUARANTEE, ARBITRATION, AND NON-AGGRESSION

It is unnecessary to discuss in any detail the various treaties entered into by Germany with other powers. Treaties of Mutual Guarantee were signed by Germany at Locarno in 1925, with Belgium, France, Great Britain, and Italy, assuring the maintenance of the territorial status quo. Arbitration treaties were also executed by Germany at Locarno with Czechoslovakia, Belgium, and Poland.

Article I of the latter treaty is typical, providing:

"All disputes of every kind between Germany and Poland * * * which it may not be possible to settle amicably by the normal methods of diplomacy, shall be submitted for decision to an arbitral tribunal . . ."

Conventions of arbitration and conciliation were entered into between Germany, the Netherlands, and Denmark in 1926; and between Germany and Luxemburg in 1929. Nonaggression treaties were executed by Germany with Denmark and Russia in 1939.

(D) KELLOGG-BRIAND PACT

The Pact of Paris was signed on the 27th August 1928 by Germany, the United States, Belgium, France, Great Britain, Italy, Japan, Poland, and

other countries; and subsequently by other powers. The Tribunal has made full reference to the nature of this Pact and its legal effect in another part of this judgment. It is therefore not necessary to discuss the matter further here, save to state that in the opinion of the Tribunal this pact was violated by Germany in all the cases of aggressive war charged in the indictment. It is to be noted that on the 26th January 1934, Germany signed a Declaration for the Maintenance of Permanent Peace with Poland, which was explicitly based on the Pact of Paris, and in which the use of force was outlawed for a period of 10 years.

The Tribunal does not find it necessary to consider any of the other treaties referred to in the appendix, or the repeated agreements and assurances of her peaceful intentions entered into by Germany.

(B) THE LAW OF THE CHARTER

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

The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world. The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law.

The Signatory Powers created this Tribunal, de-

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

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. But in view of the great importance of the questions of law involved, the Tribunal has heard full argument from the prosecution and the defense, and will express its view on the matter.

It was urged on behalf of the defendants that a fundamental principle of all law—international and domestic—is that there can be no punishment of crime without a preexisting law. "*Nullum crimen sine lege, nulla poena sine lege.*" It was submitted that *ex post facto* punishment is abhorrent to the law of all civilized nations, that no sovereign power had made aggressive war a crime at the time the alleged criminal acts were committed, that no statute had defined aggressive war, that no penalty had been fixed for its commission, and no court had been created to try and punish offenders.

In the first place, it is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously un-

true, 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. Occupying the positions they did in the government of Germany, the defendants, or at least some of them must have known of the treaties signed by Germany, outlawing recourse to war for the settlement of international disputes; they must have known that they were acting in defiance of all international law when in complete deliberation they carried out their designs of invasion and aggression. On this view of the case alone, it would appear that the maxim has no application to the present facts.

This view is strongly reinforced by a consideration of the state of international law in 1939, so far as aggressive war is concerned. The General Treaty for the Renunciation of War of August 27, 1928, more generally known as the Pact of Paris or the Kellogg-Briand Pact, was binding on 63 nations, including Germany, Italy, and Japan at the outbreak of war in 1939. In the preamble, the signatories declared that they were—

"Deeply sensible of their solemn duty to promote the welfare of mankind; persuaded that the time has come when a frank renunciation of war as an instrument of national policy should be made to the end that the peaceful and friendly relations now existing between their peoples should be perpetuated . . . all changes in their relations with one another should be sought only by pacific means . . . thus uniting civilized nations of the world in a common renunciation of war as an instrument of their national policy . . ."

The first two articles are as follows:

"Article I. The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations to one another."

"Article II. The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means."

The question is, what was the legal effect of this pact? The nations who signed the pact or adhered to it unconditionally condemned recourse to war for the future as an instrument of policy, and expressly renounced it. After the signing of the pact, any nation resorting to war as an instrument of national policy breaks the pact. In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing. War for the solution of international controversies undertaken as an instrument of national policy certainly includes a war of aggression, and such a war is therefore outlawed by the pact. As Mr. Henry L. Stimson, then Secretary of State of the United States, said in 1932:

"War between nations was renounced by the signatories of the Kellogg-Briand Treaty. This means that it has become throughout practically the entire world . . . an illegal thing. Hereafter, when engaged in armed conflict, either one or both of them must be termed violators of this general treaty law . . . We denounce them as law breakers."

But it is argued that the pact does not expressly enact that such wars are crimes, or set up courts to try those who make such wars. To that extent the same is true with regard to the laws of war contained in the Hague Convention. The Hague Convention of 1907 prohibited resort to certain methods of waging war. These included the inhumane treatment of prisoners, the employment of poisoned weapons, the improper use of flags of truce, and similar matters.

Many of these prohibitions had been enforced long before the date of the Convention; but since 1907 they have certainly been crimes, punishable as offenses against the laws of war; yet the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders. For many years past, however, military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention. In the opinion of the Tribunal, those who wage aggressive war are doing that which is equally illegal, and of much greater moment than a breach of one of the rules of the Hague Convention. In interpreting the words of the pact, it must be remembered that international law is not the product of an international legislature, and that such international agreements as the Pact of Paris have to deal with general principles of law, and not with administrative matters of procedure. The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing.

The view which the Tribunal takes of the true interpretation of the pact is supported by the international history which preceded it. In the year 1923 the draft of a Treaty of Mutual Assistance was sponsored by the League of Nations. In Article I the treaty declared "that aggressive war is an in-

ternational crime," and that the parties would "undertake that no one of them will be guilty of its commission." The draft treaty was submitted to twenty-nine states, about half of whom were in favor of accepting the text. The principal objection appeared to be in the difficulty of defining the acts which would constitute "aggression," rather than any doubt as to the criminality of aggressive war. The preamble to the League of Nations 1924 Protocol for the Pacific Settlement of International Disputes, ("Geneva Protocol"), after "recognising the solidarity of the members of the international community," declared that "a war of aggression constitutes a violation of this solidarity and is an international crime." It went on to declare that the contracting parties were "desirous of facilitating the complete application of the system provided in the Covenant of the League of Nations for the pacific settlement of disputes between the states and of ensuring the repression of international crimes." The Protocol was recommended to the members of the League of Nations by a unanimous resolution in the Assembly of the 48 members of the League. These members included Italy and Japan, but Germany was not then a member of the League.

Although the Protocol was never ratified, it was signed by the leading statesmen of the world, representing the vast majority of the civilized States and peoples, and may be regarded as strong evidence of the intention to brand aggressive war as an international crime.

At the meeting of the Assembly of the League of Nations on the 24th September 1927, all the delegations then present (including the German, the Italian, and the Japanese), unanimously adopted a

declaration concerning wars of aggression. The preamble to the declaration stated:

"The Assembly: Recognizing the solidarity which unites the community of nations;

Being inspired by a firm desire for the maintenance of general peace;

Being convinced that a war of aggression can never serve as a means of settling international disputes, and is in consequence an international crime * * *."

The unanimous resolution of the 18th February 1928, of 21 American republics at the sixth (Havana) Pan-American Conference, declared that "war of aggression constitutes an international crime against the human species."

All these expressions of opinion, and others that could be cited, so solemnly made, reinforce the construction which the Tribunal placed upon the Pact of Paris, that resort to a war of aggression is not merely illegal, but is criminal. The prohibition of aggressive war demanded by the conscience of the world, finds its expression in the series of Pacts and Treaties to which the Tribunal has just referred.

It is also important to remember that Article 227 of the Treaty of Versailles provided for the constitution of a special tribunal, composed of representatives of five of the Allied and Associated Powers which had been belligerents in the First World War opposed to Germany, to try the former German Emperor "for a supreme offence against international morality and the sanctity of treaties." The purpose of this trial was expressed to be "to vindicate the solemn obligations of international undertakings, and the validity of international morality." In Article 228 of the Treaty, the German Government expressly recognized the right of the Allied Powers "to bring before military tribunals persons accused

of having committed acts in violation of the laws and customs of war."

It was submitted that international law is concerned with the actions of sovereign States, and provides no punishment for individuals; and further, that where the act in question is an act of State, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, both these submissions must be rejected. That international law imposes duties and liabilities upon individuals as well as upon states has long been recognized. In the recent case of Ex parte Quirin (1942, 317 U. S. 1), before the Supreme Court of the United States, persons were charged during the war with landing in the United States for purposes of spying and sabotage. The late Chief Justice Stone, speaking for the court, said:

> "From the very beginning of its history this Court has applied the law of war as including that part of the law of nations which prescribes for the conduct of war, the status, rights, and duties of enemy nations as well as enemy individuals."

He went on to give a list of cases tried by the courts, where individual offenders were charged with 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.

The provisions of Article 228 of the Treaty of Versailles already referred to illustrate and enforce this view of individual responsibility.

The principle of international law, which under certain circumstances, protects the representatives

of a State, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings. Article 7 of the Charter expressly declares:

"The official position of defendants, whether as heads of State, or responsible officials in government departments, shall not be considered as freeing them from responsibility, or mitigating punishment."

On the other hand the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law.

It was also submitted on behalf of most of these defendants that in doing what they did they were acting under the orders of Hitler, and therefore cannot be held responsible for the acts committed by them in carrying out these orders. The Charter specifically provides in Article 8:

"The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment."

The provisions of this Article are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.

The Law as to the Common Plan or Conspiracy

In the previous recital of the facts relating to aggressive war, it is clear that planning and preparation had been carried out in the most systematic way at every stage of the history.

Planning and preparation are essential to the making of war. In the opinion of the Tribunal aggressive war is a crime under international law. The Charter defines this offense as planning, preparation, initiation, or waging of a war of aggression "or participation in a common plan or conspiracy for the accomplishment . . . of the foregoing." The indictment follows this distinction. Count one charges the common plan or conspiracy. Count two charges the planning and waging of war. The same evidence has been introduced to support both counts. We shall therefore discuss both counts together, as they are in substance the same. The defendants have been charged under both counts, and their guilt under each count must be determined.

The "common plan or conspiracy" charged in the indictment covers 25 years, from the formation of the Nazi Party in 1919 to the end of the war in 1945. The party is spoken of as "the instrument of cohesion among the defendants" for carrying out the purposes of the conspiracy—the overthrowing of the Treaty of Versailles, acquiring territory lost by Germany in the last war and "lebensraum" in Europe, by the use, if necessary, of armed force, of aggressive war. The "seizure of power" by the Nazis, the use of terror, the destruction of trade unions, the attack on Christian teaching and on churches, the persecution of the Jews, the regimentation of youth—all these are said to be steps deliberately taken to carry out the common plan. It found expression, so it is alleged, in secret rearmament, the withdrawal by Germany from the Disarmament Conference and the

League of Nations, universal military service, and seizure of the Rhineland. Finally, according to the indictment, aggressive action was planned and carried out against Austria and Czechoslovakia in 1936–38, followed by the planning and waging of war against Poland; and, successively, against ten other countries.

The prosecution says, in effect, that any significant participation in the affairs of the Nazi Party or government is evidence of a participation in a conspiracy that is in itself criminal. Conspiracy is not defined in the Charter. But in the opinion of the Tribunal the conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and of action. The planning, to be criminal, must not rest merely on the declarations of a party program, such as are found in the 25 points of the Nazi Party, announced in 1920, or the political affirmations expressed in "Mein Kampf" in later years. The tribunal must examine whether a concrete plan to wage war existed, and determine the participants in that concrete plan.

It is not necessary to decide whether a single master conspiracy between the defendants has been established by the evidence. The seizure of power by the Nazi Party, and the subsequent domination by the Nazi State of all spheres of economic and social life must of course be remembered when the later plans for waging war are examined. That plans were made to wage wars, as early as November 5, 1937, and probably before that, is apparent. And thereafter, such preparations continued in many directions, and against the peace of many countries. Indeed the threat of war—and war itself if necessary—was an integral part of the Nazi policy. But the evidence establishes with certainty the existence of many separate plans rather than a single conspiracy embracing them all. That Germany was rapidly moving

to complete dictatorship from the moment that the Nazis seized power, and progressively in the direction of war, has been overwhelmingly shown in the ordered sequence of aggressive acts and wars already set out in this judgment.

In the opinion of the Tribunal, the evidence establishes the common planning to prepare and wage war by certain of the defendants. It is immaterial to consider whether a single conspiracy to the extent and over the time set out in the indictment has been conclusively proved. Continued planning, with aggressive war as the objective, has been established beyond doubt. The truth of the situation was well stated by Paul Schmidt, official interpreter of the German Foreign Office, as follows:

"The general objectives of the Nazi leadership were apparent from the start, namely the domination of the European Continent, to be achieved first by the incorporation of all German-speaking groups in the Reich, and, secondly, by territorial expansion under the slogan "Lebensraum." The execution of these basic objectives, however, seemed to be characterized by improvisation. Each succeeding step was apparently carried out as each new situation arose, but all consistent with the ultimate objectives mentioned above."

The argument that such common planning cannot exist where there is complete dictatorship is unsound. A plan in the execution of which a number of persons participate is still a plan, even though conceived by only one of them; and those who execute the plan do not avoid responsibility by showing that they acted under the direction of the man who conceived it. Hitler could not make aggressive war by himself. He had to have the cooperation of statesmen, military leaders, diplomats, and businessmen. When they, with knowledge of his aims, gave him their cooperation, they made themselves parties to the plan he had initiated. They are not to be deemed innocent because Hitler made use of them, if they knew what

they were doing. That they were assigned to their tasks by a dictator does not absolve them from responsibility for their acts. The relation of leader and follower does not preclude responsibility here any more than it does in the comparable tyranny of organized domestic crime.

Count one, however, charges not only the conspiracy to commit aggressive war, but also to commit war crimes and crimes against humanity. But the Charter does not define as a separate crime any conspiracy except the one to commit acts of aggressive war. Article 6 of the Charter provides:

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

In the opinion of the Tribunal, these words do not add a new and separate crime to those already listed. The words are designed to establish the responsibility of persons participating in a common plan. The Tribunal will therefore disregard the charges in count one that the defendants conspired to commit war crimes and crimes against humanity, and will consider only the common plan to prepare, initiate, and wage aggressive war.

War Crimes and Crimes Against Humanity

The evidence relating to war crimes has been overwhelming, in its volume and its detail. It is impossible for this judgment adequately to review it, or to record the mass of documentary and oral evidence that has been presented. The truth remains that war crimes were committed on a vast scale, never before seen in the history of war. They were perpetrated in all the countries occupied by Germany, and on the high seas, and were attended by every

conceivable circumstance of cruelty and horror. There can be no doubt that the majority of them arose from the Nazi conception of "total war," with which the aggressive wars were waged. For in this conception of "total war" the moral ideas underlying the conventions which seek to make war more humane are no longer regarded as having force or validity. Everything is made subordinate to the overmastering dictates of war. Rules, regulations, assurances, and treaties, all alike, are of no moment; and so, freed from the restraining influence of international law, the aggressive war is conducted by the Nazi leaders in the most barbaric way. Accordingly, war crimes were committed when and wherever the Fuehrer and his close associates thought them to be advantageous. They were for the most part the result of cold and criminal calculation.

On some occasions war crimes were deliberately planned long in advance. In the case of the Soviet Union, the plunder of the territories to be occupied, and the ill-treatment of the civilian population, were settled in minute detail before the attack was begun. As early as the autumn of 1940, the invasion of the territories of the Soviet Union was being considered. From that date onwards, the methods to be employed in destroying all possible opposition were continuously under discussion.

Similarly, when planning to exploit the inhabitants of the occupied countries for slave labor on the very greatest scale, the German Government conceived it as an integral part of the war economy, and planned and organized this particular war crime down to the last elaborate detail.

Other war crimes, such as the murder of prisoners of war who had escaped and been recaptured, or the murder of commandos or captured airmen, or the destruction of the Soviet commissars, were the result

of direct orders circulated through the highest official channels.

The Tribunal proposes, therefore, to deal quite generally with the question of war crimes, and to refer to them later when examining the responsibility of the individual defendants in relation to them. Prisoners of war were ill-treated and tortured and murdered, not only in defiance of the well-established rules of international law, but in complete disregard of the elementary dictates of humanity. Civilian populations in occupied territories suffered the same fate. Whole populations were deported to Germany for the purposes of slave labor upon defense works, armament production and similar tasks connected with war effort. Hostages were taken in very large numbers from the civilian populations in all the occupied countries, and were shot as suited the German purposes. Public and private property was systematically plundered and pillaged in order to enlarge the resources of Germany at the expense of the rest of Europe. Cities and towns and villages were wantonly destroyed without military justification or necessity.

(A) MURDER AND ILL-TREATMENT OF PRISONERS OF WAR

Article 6 (b) of the Charter defines war crimes in these words:

"War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or 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."

In the course of the war, many Allied soldiers who had surrendered to the Germans were shot immedi-

ately, often as a matter of deliberate, calculated policy. On the 18th October 1942, the defendant Keitel circulated a directive authorized by Hitler, which ordered that all members of Allied "commando" units, often when in uniform and whether armed or not, were to be "slaughtered to the last man," even if they attempted to surrender. It was further provided that if such Allied troops came into the hands of the military authorities after being first captured by the local police, or in any other way, they should be handed over immediately to the SD. This order was supplemented from time to time, and was effective throughout the remainder of the war, although after the Allied landings in Normandy in 1944 it was made clear that the order did not apply to "commandos" captured within the immediate battle area. Under the provisions of this order, Allied "commando" troops, and other military units operating independently, lost their lives in Norway, France, Czechoslovakia, and Italy. Many of them were killed on the spot, and in no case were those who were executed later in concentration camps ever given a trial of any kind. For example, an American military mission which landed behind the German front in the Balkans in January 1945, numbering about 12 to 15 men and wearing uniform, were taken to Mauthausen under the authority of this order, and according to the affidavit of Adolf Zutte, the adjutant of the Mauthausen Concentration Camp, all of them were shot.

In March 1944 the OKH issued the "Kugel" or "Bullet" decree, which directed that every escaped officer and NCO prisoner of war who had not been put to work, with the exception of British and American prisoners of war, should on recapture be handed over to the SIPO and SD. This order was distributed

by the SIPO and SD to their regional offices. These escaped officers and NCOs were to be sent to the concentration camp at Mauthausen, to be executed upon arrival, by means of a bullet shot in the neck.

In March 1944, 50 officers of the British Royal Air Force, who escaped from the camp at Sagan where they were confined as prisoners, were shot on recapture, on the direct orders of Hitler. Their bodies were immediately cremated, and the urns containing their ashes were returned to the camp. It was not contended by the defendants that this was other than plain murder, in complete violation of international law.

When Allied airmen were forced to land in Germany they were sometimes killed at once by the civilian population. The police were instructed not to interfere with these killings, and the Ministry of Justice was informed that no one should be prosecuted for taking part in them.

The treatment of Soviet prisoners of war was characterized by particular inhumanity. The death of so many of them was not due merely to the action of individual guards, or to the exigencies of life in the camps. It was the result of systematic plans to murder. More than a month before the German invasion of the Soviet Union the OKW were making special plans for dealing with political representatives serving with the Soviet armed forces who might be captured. One proposal was that "political Commissars of the army are not recognized as prisoners of war, and are to be liquidated at the latest in the transient prisoner of war camps." The defendant Keitel gave evidence that instructions incorporating this proposal were issued to the German army.

On the 8th September 1941, regulations for the treatment of Soviet prisoners of war in all prisoner

of war camps were issued, signed by General Reinecke, the head of the prisoner of war department of the high command. These orders stated:

> "The Bolshevist soldier has therefore lost all claim to treatment as an honorable opponent, in accordance with the Geneva Convention * * * The order for ruthless and energetic action must be given at the slightest indication of insubordination, especially in the case of Bolshevist fanatics. Insubordination, active or passive resistance, must be broken immediately by force of arms (bayonets, butts, and firearms) * * * Anyone carrying out the order who does not use his weapons, or does so with insufficient energy, is punishable * * * Prisoners of war attempting escape are to be fired on without previous challenge. No warning shot must ever be fired * * * The use of arms against prisoners of war is as a rule legal."

The Soviet prisoners of war were left without suitable clothing; the wounded without medical care; they were starved, and in many cases left to die.

On the 17th July 1941, the Gestapo issued an order providing for the killing of all Soviet prisoners of war who were or might be dangerous to National Socialism. * * *

In some cases Soviet prisoners of war were branded with a special permanent mark. There was put in evidence the OKW order dated the 20th July 1942, which laid down that:

> "The brand is to take the shape of an acute angle of about 45 degrees, with the long side to be 1 cm. in length, pointing upwards and burnt on the left buttock * * * This brand is made with the aid of a lancet available in any military unit. The coloring used is Chinese ink."

The carrying out of this order was the responsibility of the military authorities, though it was widely circulated by the chief of the SIPO and the SD to German police officials for information.

Soviet prisoners of war were also made the subject of medical experiments of the most cruel and in-

human kind. In July 1943, experimental work was begun in preparation for a campaign of bacteriological warfare; Soviet prisoners of war were used in these medical experiments, which more often than not proved fatal. In connection with this campaign for bacteriological warfare, preparations were also made for the spreading of bacterial emulsions from planes, with the object of producing widespread failures of crops and consequent starvation. These measures were never applied, possibly because of the rapid deterioration of Germany's military position.

The argument in defense of the charge with regard to the murder and ill-treatment of Soviet prisoners of war, that the USSR was not a party to the Geneva Convention, is quite without foundation. On the 15th September 1941, Admiral Canaris protested against the regulations for the treatment of Soviet prisoners of war, signed by General Reinecke on the 8th September 1941. He then stated:

"The Geneva Convention for the treatment of prisoners of war is not binding in the relationship between Germany and the USSR. Therefore only the principles of general international law on the treatment of prisoners of war apply. Since the 18th century these have gradually been established along the lines that war captivity is neither revenge nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war. This principle was developed in accordance with the view held by all armies that it is contrary to military tradition to kill or injure helpless people . . . The decrees for the treatment of Soviet prisoners of war enclosed are based on a fundamentally different view-point."

This protest, which correctly stated the legal position, was ignored. The defendant Keitel made a note on this memorandum:

"The objections arise from the military concept of chivalrous warfare. This is the destruction of an ideology. Therefore I approve and back the measures."

(B) MURDER AND ILL-TREATMENT OF CIVILIAN POPULATION

Article 6 (b) of the Charter provides that "ill-treatment * * * of civilian population of or in occupied territory * * * killing of hostages * * * wanton destruction of cities, towns, or villages" shall be a war crime. In the main, these provisions are merely declaratory of the existing laws of war as expressed by the Hague Convention, Article 46, which stated:

"Family honor and rights, the lives of persons and private property, as well as religious convictions and practice, must be respected."

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 the 7th December 1941, Hitler issued the directive since known as the "Nacht und Nebel Erlass" (night and fog decree), under which persons who committed offenses against the Reich or the German forces in occupied territories, except where the death sentence was certain, were to be taken secretly to Germany and handed over to the SIPO and SD for trial or 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 12 December 1941, to be as follows:

"Efficient and enduring intimidation can only be achieved either by capital punishment or by measures by which the rela-

tives 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."

Even persons who were only suspected of opposing any of the policies of the German occupation authorities were arrested, and on arrest were interrogated by the Gestapo and the SD in the most shameful manner. On the 12th June 1942, the chief of the SIPO and SD published, through Mueller, the Gestapo chief, an order authorizing the use of "third degree" methods of interrogation, where preliminary investigation had indicated that the person could give information on important matters, such as subversive activities, though not for the purpose of extorting confessions of the prisoner's own crimes. This order provided:

"* * * Third degree may, under this supposition, only be employed against Communists, Marxists, Jehovah's Witnesses, saboteurs, terrorists, members of resistance movements, parachute agents, antisocial elements, Polish or Soviet Russian loafers or tramps; in all other cases my permission must first be obtained * * * Third degree can, according to circumstances, consist amongst other methods of very simple diet (bread and water), hard bunk, dark cell, deprivation of sleep, exhaustive drilling, also in flogging (for more than twenty strokes a doctor must be consulted)."

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. On the 19th July 1944, the commander of the SIPO and SD in the district of Radom, in Poland, published an order, transmitted through the higher SS and police leaders, to the effect that in all cases of assassination or attempted assassination of Germans, or where saboteurs had destroyed vital installations, not only the guilty person, but also

all his or her male relatives should be shot, and female relatives over 16 years of age put into a concentration camp. * * *

The practice of keeping hostages to prevent and to punish any form of civil disorder was resorted to by the Germans; an order issued by the defendant Keitel on the 16th September 1941, spoke in terms of fifty or a hundred lives from the occupied areas of the Soviet Union for one German life taken. The order stated that "it should be remembered that a human life in unsettled countries frequently counts for nothing, and a deterrent effect can be obtained only by unusual severity." The exact number of persons killed as a result of this policy is not known, but large numbers were killed in France and the other occupied territories in the west, while in the east the slaughter was on an even more extensive scale. In addition to the killing of hostages, entire towns were destroyed in some cases; such massacres as those of Oradour-sur-Glane in France and Lidice in Czechoslovakia, both of which were described to the Tribunal in detail, are examples of the organized use of terror by the occupying forces to beat down and destroy all opposition to their rule.

One of the most notorious means of terrorizing the people in occupied territories was the use of concentration camps. They were first established in Germany at the moment of the seizure of power by the Nazi Government. Their original purpose was to imprison without trial all those persons who were opposed to the Government, or who were in any way obnoxious to German authority. With the aid of a secret police force, this practice was widely extended, and in course of time concentration camps became places of organized and systematic murder, where millions of people were destroyed.

In the administration of the occupied territories the

concentration camps were used to destroy all opposition groups. The persons arrested by the Gestapo were as a rule sent to concentration camps. They were conveyed to the camps in many cases without any care whatever being taken for them, and great numbers died on the way. Those who arrived at the camp were subject to systematic cruelty. They were given hard physical labor, inadequate food, clothes, and shelter, and were subject at all times to the rigors of a soulless regime, and the private whims of individual guards. * * *

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. Most of the non-Jewish inmates were used for labor, although the conditions under which they worked made labor and death almost synonymous terms. Those inmates who became ill and were unable to work were either destroyed in the gas chambers or sent to special infirmaries, where they were given entirely inadequate medical treatment, worse food, if possible, than the working inmates, and left to die.

The murder and ill-treatment of civilian populations reached its height in the treatment of the citizens of the Soviet Union and Poland. * * *

The foregoing crimes against the civilian population are sufficiently appalling, and yet the evidence shows that at any rate in the east, the mass murders and cruelties were not committed solely for the purpose of stamping out opposition or resistance to the German occupying forces. In Poland and the Soviet Union these crimes were part of a plan to get rid of whole native populations by expulsion and annihilation, in order that their territory could be

used for colonization by Germans. Hitler had written in "Mein Kampf" on these lines, and the plan was clearly stated by Himmler in July 1942, when he wrote:

"It is not our task to Germanize the east in the old sense, that is to teach the people there the German language and the German law, but to see to it that only people of purely Germanic blood live in the east."

* * *

(C) PILLAGE OF PUBLIC AND PRIVATE PROPERTY

Article 49 of the Hague Convention provides that an occupying power may levy a contribution of money from the occupied territory to pay for the needs of the army of occupation, and for the administration of the territory in question. Article 52 of the Hague Convention provides that an occupying power may make requisitions in kind only for the needs of the army of occupation, and that these requisitions shall be in proportion to the resources of the country. These Articles, together with Article 48, dealing with the expenditure of money collected in taxes, and Articles 53, 55, and 56, dealing with public property, make it clear that under the rules of war, the economy of an occupied country can only be required to bear the expense of the occupation, and these should not be greater than the economy of the country can reasonably be expected to bear. Article 56 reads as follows:

"The property of municipalities, of religious, charitable, educational, artistic, and scientific institutions, although belonging to the State, is to be accorded the same standing as private property. All premeditated seizure, destruction or damage of such institutions, historical monuments, works of art, and science, is prohibited and should be prosecuted."

The evidence in this case has established, however, that the territories occupied by Germany were

exploited for the German war effort in the most ruthless way, without consideration of the local economy, and in consequence of a deliberate design and policy. There was in truth a systematic "plunder of public or private property," which was criminal under Article 6 (b) of the Charter. * * *

(D) SLAVE LABOR POLICY

Article 6 (b) of the Charter provides that the "ill-treatment or deportation to slave labor or for any other purpose, of civilian population of or in occupied territory" shall be a war crime. The laws relating to forced labor by the inhabitants of occupied territories are found in Article 52 of the Hague Convention, which provides:

"Requisition in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country."

The policy of the German occupation authorities was in flagrant violation of the terms of this convention. Some idea of this policy may be gathered from the statement made by Hitler in a speech on November 9, 1941:

"The territory which now works for us contains more than 250,000,000 men, but the territory which works indirectly for us includes now more than 350,000,000. In the measure in which it concerns German territory, the domain which we have taken under our administration, it is not doubtful that we shall succeed in harnessing the very last man to this work."

The actual results achieved were not so complete as this, but the German occupation authorities did succeed in forcing many of the inhabitants of the occupied territories to work for the German war effort,

and in deporting at least 5,000,000 person to Germany to serve German industry and agriculture.

In the early stages of the war, manpower in the occupied territories was under the control of various occupation authorities, and the procedure varied from country to country. In all the occupied territories compulsory labor service was promptly instituted. Inhabitants of the occupied countries were conscripted and compelled to work in local occupations, to assist the German war economy. In many cases they were forced to work on German fortifications and military installations. As local supplies of raw materials and local industrial capacity became inadequate to meet the German requirements, the system of deporting laborers to Germany was put into force. By the middle of April 1940 compulsory deportation of laborers to Germany had been ordered in the Government General; and a similar procedure was followed in other eastern territories as they were occupied. * * *

(E) PERSECUTION OF THE JEWS

The persecution of the Jews at the hands of the Nazi Government has been proved in the greatest detail before the Tribunal. It is a record of consistent and systematic inhumanity on the greatest scale. Ohlendorf, chief of Amt III in the RSHA from 1939 to 1943, and who was in command of one of the Einsatz groups in the campaign against the Soviet Union testified as to the methods employed in the extermination of the Jews. He said that he employed firing squads to shoot the victims in order to lessen the sense of individual guilt on the part of his men; and the 90,000 men, women, and children who were murdered in 1 year by his particular group were mostly Jews.

When the witness Bach-Zelewski was asked how Ohlendorf could admit the murder of 90,000 people, he replied:

"I am of the opinion that when, for years, for decades, the doctrine is preached that the Slav race is an inferior race, and Jews not even human, then such an outcome is inevitable."

But the defendant Frank spoke the final words of this chapter of Nazi history when he testified in this court:

"We have fought against Jewry; we have fought against it for years; and we have allowed ourselves to make utterances and my own diary has become a witness against me in this connection—utterances which are terrible * * *. A thousand years will pass and this guilt of Germany will still not be erased."

The anti-Jewish policy was formulated in point 4 of the party program which declared, "Only a member of the race can be a citizen. A member of the race can only be one who is of German blood, without consideration of creed. Consequently, no Jew can be a member of the race." Other points of the program declared that Jews should be treated as foreigners, that they should not be permitted to hold public office, that they should be expelled from the Reich if it were impossible to nourish the entire population of the State, that they should be denied any further immigration into Germany, and that they should be prohibited from publishing German newspapers. The Nazi Party preached these doctrines throughout its history. "Der Stuerner" and other publications were allowed to disseminate hatred of the Jews, and in the speeches and public declarations of the Nazi leaders, the Jews were held up to public ridicule and contempt.

With the seizure of power, the persecution of the Jews was intensified. A series of discriminatory laws was passed, which limited the offices and professions

permitted to Jews; and restrictions were placed on their family life and their rights of citizenship. By the autumn of 1938, the Nazi policy toward the Jews had reached the stage where it was directed toward the complete exclusion of Jews from German life. Pogroms were organized, which included the burning and demolishing of synagogues, the looting of Jewish businesses, and the arrest of prominent Jewish businessmen. A collective fine of 1 billion marks was imposed on the Jews, the seizure of Jewish assets was authorized, and the movement of Jews was restricted by regulations to certain specified districts and hours. The creation of ghettoes was carried out on an extensive scale, and by an order of the security police Jews were compelled to wear a yellow star to be worn on the breast and back.

It was contended for the prosecution that certain aspects of this anti-Semitic policy were connected with the plans for aggressive war. The violent measures taken against the Jews in November 1938 were nominally in retaliation for the killing of an official of the German Embassy in Paris. But the decision to seize Austria and Czechoslovakia had been made a year before. The imposition of a fine of 1 billion marks was made, and the confiscation of the financial holdings of the Jews was decreed, at a time when German armament expenditure had put the German treasury in difficulties, and when the reduction of expenditure on armaments was being considered. These steps were taken, moreover, with the approval of the defendant Goering, who had been given responsibility for economic matters of this kind, and who was the strongest advocate of an extensive rearmament program notwithstanding the financial difficulties. * * *

The Nazi persecution of Jews in Germany before the war, severe and repressive as it was, cannot com-

pare, however, with the policy pursued during the war in the occupied territories. Originally the policy was similar to that which had been in force inside Germany. Jews were required to register, were forced to live in ghettoes, to wear the yellow star, and were used as slave laborers. In the summer of 1941, however, plans were made for the "final solution" of the Jewish question in Europe. This "final solution" meant the extermination of the Jews, which early in 1939 Hitler had threatened would be one of the consequences of an outbreak of war, and a special section in the Gestapo under Adolf Eichmann, as head of section B–4, of the Gestapo, was formed to carry out the policy.

The plan for exterminating the Jews was developed shortly after the attack on the Soviet Union. Einsatzgruppen of the security police and SD, formed for the purpose of breaking the resistance of the population of the areas lying behind the German armies in the east, were given the duty of exterminating the Jews in those areas. The effectiveness of the work of the Einsatzgruppen is shown by the fact that in February 1942, Heydrich was able to report that Esthonia had already been cleared of Jews and that in Riga the number of Jews had been reduced from 29,500 to 2,500. Altogether the Einsatzgruppen operating in the occupied Baltic States killed over 135,000 Jews in 3 months.

Nor did these special units operate completely independently of the German armed forces. There is clear evidence that leaders of the Einsatzgruppen obtained the cooperation of army commanders. In one case the relations between an Einsatzgruppe and the military authorities was described at the time as being "very close, almost cordial"; in another case the smoothness of an Einsatzcommando's operation

was attributed to the "understanding for this procedure" shown by the army authorities. * * *

(F) THE LAW RELATING TO WAR CRIMES AND CRIMES AGAINST HUMANITY

[After quoting Article 6 (b) and (c) of the Charter, the Tribunal continued:]

* * * The Tribunal is of course bound by the Charter, in the definition which it gives both of war crimes and crimes against humanity. With respect to war crimes, however, as has already been pointed out, the crimes defined by Article 6, section (b), of the Charter were already recognized as war crimes under international law. They were covered by Articles 46, 50, 52, and 56 of the Hague Convention of 1907, and Articles 2, 3, 4, 46, and 51 of the Geneva Convention of 1929. That violation of these provisions constituted crimes for which the guilty individuals were punishable is too well settled to admit of argument.

But is is argued that the Hague Convention does not apply in this case, because of the "general participation" clause in Article 2 of the Hague Convention of 1907. That clause provided:

> "The provisions contained in the regulations (rules of land warfare) referred to in Article I as well as in the present convention do not apply except between contracting powers, and then only if all the belligerents are parties to the convention."

Several of the belligerents in the recent war were not parties to this convention.

In the opinion of the Tribunal it is not necessary to decide this question. The rules of land warfare expressed in the convention undoubtedly represented an advance over existing international law at the time of their adoption. But the convention expressly stated that it was an attempt "to revise the general laws and customs of war," which it thus recognized

to be then existing, but by 1939 these rules laid down in the convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war which are referred to in Article 6 (b) of the Charter.

A further submission was made 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 gave Germany authority to deal with the occupied countries as though they were part of Germany. In the view of the Tribunal it is unnecessary in this case to decide whether this doctrine of subjugation, dependent as it is upon military conquest, has any application where the subjugation is the result of the crime of aggressive war. The doctrine was never considered to be applicable so long as there was an army in the field attempting to restore the occupied countries to their true owners, and in this case, therefore, the doctrine could not apply to any territories occupied after the 1st September 1939. As to the war crimes committed in Bohemia and Moravia, it is a sufficient answer that these territories were never added to the Reich, bur a mere protectorate was established over them.

With regard to crimes against humanity, there is no doubt whatever that political opponents were murdered in Germany before the war, and that many of them were kept in concentration camps in circumstances of great horror and cruelty. The policy of terror was certainly carried out on a vast scale, and in many cases was organized and systematic. The policy of persecution, repression, and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out. The persecution of Jews

during the same period is established beyond all doubt. To constitute crimes against humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter, but from the beginning of the war in 1939 war crimes were committed on a vast scale, which were also crimes against humanity; and insofar as the inhumane acts charged in the indictment, and committed after the beginning of the war, did not constitute war crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted crimes against humanity.

The Accused Organizations

[After referring to Articles 9 and 10 of the Charter, the Tribunal continued:]

* * * The effect of the declaration of criminality by the Tribunal is well illustrated by law No. 10 of the Control Council of Germany passed on the 20th day of December 1945, which provides:

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

* * * * *

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

* * * * *

"(3) Any person found guilty of any of the crimes above mentioned may upon conviction be punished as shall be determined

by the Tribunal to be just. Such punishment may consist of one or more of the following:

(*a*) Death.

(*b*) Imprisonment for life or a term of years, with or without hard labor.

(*c*) Fine, and imprisonment with or without hard labor, in lieu thereof."

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

Article 9, it should be noted, uses the words "The Tribunal may declare," so that the Tribunal is vested with discretion as to whether it will declare any organization criminal. This discretion is a judicial one and does not permit arbitrary action, but should be exercised in accordance with well-settled legal principles, one of the most important of which is that criminal guilt is personal, and that mass punishments should be avoided. If satisfied of the criminal guilt of any organization or group, this Tribunal should not hesitate to declare it to be criminal because the theory of "group criminality" is new, or because it might be unjustly applied by some subsequent tribunals. On the other hand, the Tribunal should make such declaration of criminality so far as possible in a manner to insure that innocent persons will not be punished.

A criminal organization is analogous to a criminal conspiracy in that the essence of both is cooperation for criminal purposes. There must be a group

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

Since declarations of criminality which the Tribunal makes will be used by other courts in the trial of persons on account of their membership in the organizations found to be criminal, the Tribunal feels it appropriate to make the following recommendations:

1. That so far as possible throughout the four zones of occupation in Germany the classifications, sanctions, and penalties be standardized. Uniformity of treatment so far as practical should be a basic principle. This does not, of course, mean that discretion in sentencing should not be vested in the court; but the discretion should be within fixed limits appropriate to the nature of the crime.

2. Law No. 10, to which reference has already been made, leaves punishment entirely in the discretion of the trial court even to the extent of inflicting the death penalty.

The de-Nazification law of March 5, 1946, however, passed for Bavaria, Greater-Hesse, and Wuerttemberg-Baden, provides definite sentences for punishment in each type of offense. The Tribunal recommends that in no case should punishment im-

posed under law No. 10 upon any members of an organization or group declared by the Tribunal to be criminal exceed the punishment fixed by the de-Nazification law. No person should be punished under both laws.

3. The Tribunal recommends to the Control Council that law No. 10 be amended to prescribe limitations on the punishment which may be imposed for membership in a criminal group or organization so that such punishment shall not exceed the punishment prescribed by the de-Nazification law.

The indictment asks that the Tribunal declare to be criminal the following organizations: The Leadership Corps of the Nazi Party; the Gestapo; the SD; the SS; the SA; the Reich Cabinet, and the General Staff and High Command of the German Armed Forces. . . .

(A) THE LEADERSHIP CORPS OF THE NAZI PARTY

* * * *Conclusion.*—The Leadership Corps was used for purposes which were criminal under the Charter and involved the Germanization of incorporated territory, the persecution of the Jews, the administration of the slave labor program, and the mistreatment of prisoners of war. The defendants Bormann and Sauckel, who were members of this organization, were among those who used it for these purposes. The Gauleiters, the Kreisleiters, and the Ortsgruppenleiters participated, to one degree or another, in these criminal programs. The Reichsleitung as the staff organization of the party is also responsible for these criminal programs as well as the heads of the various staff organizations of the Gauleiters and Kreisleiters. The decision of the Tribunal on these staff organizations 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 organizations 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.

The Tribunal declares to be criminal within the meaning of the Charter the group composed of those members of the Leadership Corps holding the positions enumerated in the preceding paragraph who became or remained members of the organization with knowledge that it was being used for the commission of acts declared criminal by Article 6 of the Charter, or who were personally implicated as members of the organization in the commission of such crimes. The basis of this finding is the participation of the organization in war crimes and crimes against humanity connected with the war; the group declared criminal cannot include, therefore, persons who had ceased to hold the positions enumerated in the preceding paragraph prior to 1 September 1939.

(B) GESTAPO AND SD

* * * *Conclusion.*—The Gestapo and SD were used for purposes which were criminal under the Charter involving the persecution and extermination of the Jews, brutalities and killings in concentration camps, excesses in the administration of occupied territories, the administration of the slave labor program, and the mistreatment and murder of prisoners of war. The defendant Kaltenbrunner, who was a member of this organization, was among those who used it for these purposes. In dealing with the Gestapo the Tribunal includes all executive and administrative officials of Amt IV of the RSHA or concerned with Gestapo administration in other departments of the RSHA and all local Gestapo officials serving both inside and outside of Germany, including the members of the frontier police, but not

including the members of the border and customs protection or the secret field police, except such members as have been specified above. At the suggestion of the prosecution the Tribunal does not include persons employed by the Gestapo for purely clerical, stenographic, janitorial, or similar unofficial routine tasks. 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.

The tribunal declares to be criminal within the meaning of the charter the group composed of those members of the Gestapo and SD holding the positions enumerated in the preceding paragraph who became or remained members of the organization with knowledge that it was being used for the commission of acts declared criminal by Article 6 of the Charter, or who were personally implicated as members of the organization in the commission of such crimes. The basis for this finding is the participation of the organization in war crimes and crimes against humanity connected with the war; this group declared criminal cannot include, therefore, persons who had ceased to hold the positions enumerated in the preceding paragraph prior to 1 September 1939.

(C) THE SS

* * * *Conclusions.*—The SS was utilized for purposes which were criminal under the Charter involving the persecution and extermination of the Jews, brutalities and killings in concentration camps, excesses in the administration of occupied territories, the administration of the slave labor program and the

mistreatment and murder of prisoners of war. The defendant Kaltenbrunner was a member of the SS implicated in these activities. In dealing with the SS the Tribunal includes all persons who have 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. The Sicherheitsdienst des Reichsfuehrer SS (commonly known as the SD) is dealt with in the Tribunal's judgment on the Gestapo and SD.

The Tribunal declares to be criminal within the meaning of the Charter the group composed of those persons who had been officially accepted as members of the SS as enumerated in the preceding paragraph who became or remained members of the organization with knowledge that it was being used for the commission of acts declared criminal by Article 6 of the Charter, or who were personally implicated as members of the organization in the commission of such crimes, excluding, however, those who were drafted into membership by the State in such a way as to give them no choice in the matter, and who had committed no such crimes. The basis of this finding is the participation of the organization in war crimes and crimes against humanity connected with the war; this group declared criminal cannot include, therefore, persons who had ceased to belong to the organizations enumerated in the preceding paragraph prior to 1 September 1939.

(D) THE SA

* * * *Conclusion.*—Until the purge beginning on June 30, 1934, the SA was a group composed in large part of ruffians and bullies who participated in the

Nazi outrages of that period. It has not been shown, however, that these atrocities were part of a specific plan to wage aggressive war, and the Tribunal therefore cannot hold that these activities were criminal under the Charter. After the purge, the SA was reduced to the status of a group of unimportant Nazi hangers-on. Although in specific instances some units of the SA were used for the commission of war crimes and crimes against humanity, it cannot be said that its members generally participated in or even knew of the criminal acts. For these reasons, the Tribunal does not declare the SA to be a criminal organization within the meaning of Article 9 of the Charter.

(E) THE REICH CABINET

The prosecution has named as a criminal organization the Reich Cabinet (Die Reichsregierung) consisting of members of the ordinary cabinet after January 30, 1933, members of the council of ministers for the defense of the Reich and members of the secret cabinet council. The Tribunal is of opinion that no declaration of criminality should be made with respect to the Reich Cabinet for two reasons: (1) Because it is not shown that after 1937 it ever really acted as a group or organization; (2) because the group of persons here charged is so small that members could be conveniently tried in proper cases without resort to a declaration that the Cabinet of which they were members was criminal.

As to the first reason for our decision, it is to be observed that from the time that it can be said that a conspiracy to make aggressive war existed the Reich Cabinet did not constitute a governing body, but was merely an aggregation of administrative officers subject to the absolute control of Hitler. Not a single meeting of the Reich Cabinet was held after 1937, but laws were promulgated in the name of one

or more of the cabinet members. The Secret Cabinet Council never met at all. A number of the cabinet members were undoubtedly involved in the conspiracy to make aggressive war; but they were involved as individuals, and there is no evidence that the cabinet as a group or organization took any part in these crimes. It will be remembered that when Hitler disclosed his aims of criminal aggression at the Hossbach Conference, the disclosure was not made before the cabinet and that the cabinet was not consulted with regard to it, but, on the contrary, that it was made secretly to a small group upon whom Hitler would necessarily rely in carrying on the war. Likewise no cabinet order authorized the invasion of Poland. On the contrary, the defendant Schacht testifies that he sought to stop the invasion by a plea to the commander in chief of the army that Hitler's order was in violation of the constitution because not authorized by the cabinet.

It does appear, however, that various laws authorizing acts which were criminal under the Charter were circulated among the members of the Reich Cabinet and issued under its authority signed by the members whose departments were concerned. This does not, however, prove that the Reich Cabinet, after 1937, ever really acted as an organization.

As to the second reason, it is clear that those members of the Reich Cabinet who have been guilty of crimes should be brought to trial; and a number of them are now on trial before the Tribunal. It is estimated that there are 48 members of the group, that 8 of these are dead and 17 are now on trial, leaving only 23 at the most, as to whom the declaration could have any importance. Any others who are guilty should also be brought to trial; but nothing would be accomplished to expedite or facilitate their trials by declaring the Reich Cabinet to be a criminal

organization. Where an organization with a large membership is used for such purposes, a declaration obviates the necessity of inquiring as to its criminal character in the later trial of members who are accused of participating through membership in its criminal purposes and thus saves much time and trouble. There is no such advantage in the case of a small group like the Reich Cabinet.

(F) GENERAL STAFF AND HIGH COMMAND

The prosecution has also asked that the General Staff and High Command of the German armed forces be declared a criminal organization. The Tribunal believes that no declaration of criminality should be made with respect to the General Staff and High Command. The number of persons charged, while larger than that of the Reich Cabinet, is still so small that individual trials of these officers would accomplish the purpose here sought better than a declaration such as is requested. But a more compelling reason is that in the opinion of the Tribunal the General Staff and High Command is neither an "organization" nor a "group" within the meaning of those terms as used in Article 9 of the Charter.

Some comment on the nature of this alleged group is requisite. According to the indictment and evidence before the Tribunal, it consists of approximately 130 officers, living and dead, who at any time during the period from February 1938, when Hitler reorganized the armed forces, and May 1945, when Germany surrendered, held certain positions in the military hierarchy. These men were high-ranking officers in the three armed services: OKH—army, OKM—navy, and OKL—air force. Above them was the over-all armed forces authority, OKW—high command of the German armed forces with Hitler as the supreme commander. The officers

in the OKW, including defendant Keitel as chief of the high command, were in a sense Hitler's personal staff. In the larger sense they coordinated and directed the three services, with particular emphasis on the functions of planning and operations.

The individual officers in this alleged group were, at one time or another, in one of four categories: (1) Commanders in chief of one of the three services; (2) chief of staff of one of the three services; (3) "Oberbefehlshabers," the field commanders in chief of one of the three services, which of course comprised by far the largest number of these persons; or (4) an OKW officer, of which there were three, defendants Keitel and Jodl, and the latter's deputy chief, Warlimont. This is the meaning of the indictment in its use of the term "General Staff and High Command."

The prosecution has here drawn the line. The prosecution does not indict the next level of the military hierarchy consisting of commanders of army corps, and equivalent ranks in the navy and air force, nor the level below, the division commanders or their equivalent in the other branches. And the staff officers of the four staff commands of OKW, OKH, OKM, and OKL are not included, nor are the trained specialists who were customarily called General Staff officers.

In effect, then, those indicted as members are military leaders of the Reich of the highest rank. No serious effort was made to assert that they composed an "organization" in the sense of Article 9. The assertion is rather that they were a "group," which is a wider and more embracing term than "organization."

The Tribunal does not so find. According to the evidence, their planning at staff level, the constant conferences between staff officers and field commanders, their operational technique in the field and

at headquarters was much the same as that of the armies, navies, and air forces of all other countries. The over-all effort of OKW at coordination and direction could be matched by a similar, though not identical form of organization in other military forces, such as the Anglo-American Combined Chiefs of Staff.

To derive from this pattern of their activities the existence of an association or group does not, in the opinion of the Tribunal, logically follow. On such a theory the top commanders of every other nation are just such an association rather than what they actually are, an aggregation of military men, a number of individuals who happen at a given period of time to hold the high-ranking military positions.

Much of the evidence and the argument has centered around the question of whether membership in these organizations was or was not voluntary; in this case, it seems to the Tribunal to be quite beside the point. For this alleged criminal organization has one characteristic, a controlling one, which sharply distinguishes it from the other five indicted. When an individual became a member of the SS for instance, he did so, voluntarily or otherwise, but certainly with the knowledge that he was joining something. In the case of the General Staff and High Command, however, he could not know he was joining a group or organization for such organization did not exist except in the charge of the indictment. He knew only that he had achieved a certain high rank in one of the three services, and could not be conscious of the fact that he was becoming a member of anything so tangible as a "group," as that word is commonly used. His relations with his brother officers in his own branch of the service and his association with those of the other two branches were, in general, like those of other services all over the world.

The Tribunal therefore does not declare the General Staff and High Command to be a criminal organization.

Although the Tribunal is of the opinion that the term "group" in Article 9 must mean something more than this collection of military officers, it has heard much evidence as to the participation of these officers in planning and waging aggressive war, and in committing war crimes and crimes against humanity. This evidence is, as to many of them, clear and convincing.

They have been responsible in large measure for the miseries and suffering that have fallen on millions of men, women, and children. They have been a disgrace to the honorable profession of arms. Without their military guidance the aggressive ambitions of Hitler and his fellow Nazis would have been academic and sterile. Although they were not a group falling within the words of the Charter, they were certainly a ruthless military caste. The contemporary German militarism flourished briefly with its recent ally, National Socialism, as well as or better than it had in the generations of the past.

Many of these men have made a mockery of the soldier's oath of obedience to military orders. When it suits their defense they say they had to obey; when confronted with Hitler's brutal crimes, which are shown to have been within their general knowledge, they say they disobeyed. The truth is they actively participated in all these crimes, or sat silent and acquiescent, witnessing the commission of crimes on a scale larger and more shocking than the world has ever had the misfortune to know. This must be said.

Where the facts warrant it, these men should be brought to trial so that those among them who are guilty of these crimes should not escape punishment.

The Accused Individuals

Article 26 of the Charter provides that the judgment of theTribunal as to the guilt or innocence of any defendant shall give the reasons on which it is based.

The Tribunal will now state those reasons in declaring its judgment on such guilt or innocence. * * * [The Tribunal's discussion of the cases against the individual defendants, except those against Doenitz and Raeder, is omitted.]

Doenitz

Doenitz is indicted on counts one, two, and three. In 1935 he took command of the first U-boat flotilla commissioned since 1918, became in 1936 Commander of the submarine arm, was made Vice Admiral in 1940, Admiral in 1942, and on January 30, 1943 Commander in Chief of the German Navy. On 1 May 1945, he became the Head of State, succeeding Hitler.

Crimes against peace.—Although Doenitz built and trained the German U-boat arm, the evidence does not show he was privy to the conspiracy to wage aggressive wars or that he prepared and initiated such wars. He was a line officer performing strictly tactical duties. He was not present at the important conferences when plans for aggressive wars were announced, and there is no evidence he was informed about the decisions reached there. Doenitz did, however, wage aggressive war within the meaning of that word as used by the Charter. Submarine warfare which began immediately upon the outbreak of war, was fully coordinated with the other branches of the Wehrmacht. It is clear that his U-boats, few in number at the time, were fully prepared to wage war.

It is true that until his appointment in January 1943 as Commander in Chief he was not an "Oberbefehlshaber." But this statement under-estimates the importance of Doenitz' position. He was no mere army or division commander. The U-boat arm was the principal part of the German fleet and Doenitz was its leader. The High Seas Fleet made a few minor, if spectacular, raids during the early years of the war but the real damage to the enemy was done almost exclusively by his submarines as the millions of tons of allied and neutral shipping sunk will testify. Doenitz was solely in charge of this warfare. The naval war command reserved for itself only the decision as to the number of submarines in each area. In the invasion of Norway, for example, Doenitz made recommendations in October 1939 as to submarine bases, which he claims were no more than a staff study, and in March 1940 he made out the operational orders for the supporting U-boats as discussed elsewhere in this judgment.

That his importance to the German war effort was so regarded is eloquently proved by Raeder's recommendation of Doenitz as his successor and his appointment by Hitler on 30 January 1943, as Commander in Chief of the Navy. Hitler too knew that submarine warfare was the essential part of Germany's naval warfare.

From January 1943, Doenitz was consulted almost continuously by Hitler. The evidence was that they conferred on naval problems about 120 times during the course of the war.

As late as April 1945, when he admits he knew the struggle was hopeless, Doenitz as its Commander in Chief urged the Navy to continue its fight. On 1 May 1945, he became the Head of State and as such ordered the Wehrmacht to continue its war in the east, until capitulation on 9 May 1945. Doenitz

explained that his reason for these orders was to insure that the German civilian population might be evacuated and the army might make an orderly retreat from the east.

In the view of the Tribunal, the evidence shows that Doenitz was active in waging aggressive war.

War crimes.—Doenitz is charged with waging unrestricted submarine warfare contrary to the Naval Protocol of 1936, to which Germany acceded, and which reaffirmed the rules of submarine warfare laid down in the London Naval Agreement of 1930.

The prosecution has submitted that on 3 September 1939, the German U-boat arm began to wage unrestricted submarine warfare upon all merchant ships, whether enemy or neutral, cynically disregarding the Protocol; and that a calculated effort was made throughout the war to disguise this practice by making hypocritical references to international law and supposed violations by the Allies.

Doenitz insists that at all times the Navy remained within the confines of international law and of the Protocol. He testified that when the war began, the guide to submarine warfare was the German prize ordinance taken almost literally from the Protocol, that pursuant to the German view, he ordered submarines to attack all merchant ships in convoy, and all that refused to stop or used their radio upon sighting a submarine. When his reports indicated that British merchant ships were being used to give information by wireless, were being armed, and were attacking submarines on sight, he ordered his submarines on 17 October 1939, to attack all enemy merchant ships without warning on the ground that resistance was to be expected. Orders already had been issued on 21 September 1939, to attack all ships, including neutrals, sailing at night without lights in the English Channel.

On 24 November 1939, the German Government issued a warning to neutral shipping that, owing to the frequent engagements taking place in the waters around the British Isles and the French coast between U-boats and Allied merchant ships which were armed and had instructions to use those arms as well as to ram U-boats, the safety of neutral ships in those waters could no longer be taken for granted. On 1 January 1940, the German U-boat command, acting on the instructions of Hitler, ordered U-boats to attack all Greek merchant ships in the zone surrounding the British Isles which was banned by the United States to its own ships and also merchant ships of every nationality in the limited area of the Bristol Channel. Five days later, a further order was given to U-boats to "make immediately unrestricted use of weapons against all ships" in an area of the North Sea, the limits of which were defined. Finally on the 18th of January 1940, U-boats were authorized to sink, without warning, all ships "in those waters near the enemy coasts in which the use of mines can be pretended." Exceptions were to be made in the cases of United States, Italian, Japanese, and Soviet ships.

Shortly after the outbreak of war the British Admiralty, in accordance with its Handbook of Instructions of 1938 to the merchant navy, armed its merchant vessels, in many cases convoyed them with armed escort, gave orders to send position reports upon sighting submarines, thus integrating merchant vessels into the warning network of naval intelligence. On 1 October 1939, the British Admiralty announced that British merchant ships had been ordered to ram U-boats if possible.

In the actual circumstances of this case, the Tribunal is not prepared to hold Doenitz guilty for his

conduct of submarine warfare against British armed merchant ships.

However, the proclamation of operational zones and the sinking of neutral merchant vessels which enter those zones presents a different question. This practice was employed in the war of 1914–18 by Germany and adopted in retaliation by Great Britain. The Washington conference of 1922, the London Naval Agreement of 1930, and the protocol of 1936 were entered into with full knowledge that such zones had been employed in the First World War. Yet the protocol made no exception for operational zones. The order of Doenitz to sink neutral ships without warning when found within these zones was, therefore, in the opinion of the Tribunal, a violation of the protocol.

It is also asserted that the German U-boat arm not only did not carry out the warning and rescue provisions of the protocol but that Doenitz deliberately ordered the killing of survivors of shipwrecked vessels, whether enemy or neutral. The prosecution has introduced much evidence surrounding two orders of Doenitz, war order No. 154, issued in 1939, and the so-called "Laconia" order of 1942. The defense argues that these orders and the evidence supporting them do not show such a policy and introduced much evidence to the contrary. The Tribunal is of the opinion that the evidence does not establish with the certainty required that Doenitz deliberately ordered the killing of shipwrecked survivors. The orders were undoubtedly ambiguous, and deserve the strongest censure.

The evidence further shows that the rescue provisions were not carried out and that the defendant ordered that they should not be carried out. The argument of the defense is that the security of the submarine is, as the first rule of the sea, paramount

to rescue and that the development of aircraft made rescue impossible. This may be so, but the protocol is explicit. If the commander cannot rescue, then under its terms he cannot sink a merchant vessel and should allow it to pass harmless before his periscope. These orders, then, prove Doenitz is guilty of a violation of the protocol.

In view of all of the facts proved and in particular of an order of the British Admiralty announced on 8 May 1940, according to which all vessels should be sunk at night in the Skagerrak, and the answers to interrogatories by Admiral Nimitz stating that unrestricted submarine warfare was carried on in the Pacific Ocean by the United States from the first day that Nation entered the war, the sentence of Doenitz is not assessed on the ground of his breaches of the international law of submarine warfare.

Doenitz was also charged with responsibility for Hitler's commando order of 18 October 1942. Doenitz admitted he received and knew of the order when he was flag officer of U-boats, but disclaimed responsibility. He points out that the order by its express terms excluded men captured in naval warfare, that the navy had no territorial commands on land, and that submarine commanders would never encounter commandos.

In one instance, when he was Commander in Chief of the Navy, in 1943, the members of the crew of an Allied motor torpedo boat were captured by German naval forces. They were interrogated for intelligence purposes on behalf of the local Admiral, and then turned over by his order to the SD and shot. Doenitz said that if they were captured by the Navy their execution was a violation of the commando order, that the execution was not announced in the Wehrmacht communique, and that

he was never informed of the incident. He pointed out that the Admiral in question was not in his chain of command, but was subordinate to the Army general in command of the Norway occupation. But Doenitz permitted the order to remain in full force when he became Commander in Chief, and to that extent he is responsible.

Doenitz, in a conference of 11 December 1944, said, "12,000 concentration camp prisoners will be employed in the shipyards as additional labor." At this time Doenitz had no jurisdiction over shipyard construction, and claims that this was merely a suggestion at the meeting that the responsible officials do something about the production of ships, that he took no steps to get these workers since it was not a matter for his jurisdiction and that he does not know whether they ever were procured. He admits he knew of concentration camps. A man in his position must necessarily have known that citizens of occupied countries in large numbers were confined in the concentration camps.

In 1945, Hitler requested the opinion of Jodl and Doenitz whether the Geneva Convention should be denounced. The notes of the meeting between the two military leaders on 20 February 1945, show that Doenitz expressed his view that the disadvantages of such an action outweighed the advantages. The summary of Doenitz' attitude shown in the notes taken by an officer, included the following sentence:

"It would be better to carry out the measures considered necessary without warning, and at all costs to save face with the outer world."

The prosecution insisted that "the measures" referred to meant the Convention should not be denounced, but should be broken at will. The defense explanation is that Hitler wanted to break

the Convention for two reasons: to take away from German troops the protection of the Convention, thus preventing them from continuing to surrender in large groups to the British and Americans; and also to permit reprisals against Allied prisoners of war because of Allied bombing raids. Doenitz claims that what he meant by "measures" were disciplinary measures against German troops to prevent them from surrendering, and that his words had no reference to measures against the Allies; moreover, that this was merely a suggestion, and that in any event no such measures were ever taken, either against Allies or Germans. The Tribunal, however, does not believe this explanation. The Geneva Convention was not, however, denounced by Germany. The defense has introduced several affidavits to prove that British naval prisoners of war in camps under Doenitz' jurisdiction were treated strictly according to the Convention, and the Tribunal takes this fact into consideration, regarding it as a mitigating circumstance.

Conclusion.—The Tribunal finds Doenitz is not guilty on count one of the indictment, and is guilty on counts two and three.

RAEDER

Raeder is indicted on counts one, two, and three. In 1928 he became Chief of Naval Command and in 1935 Oberbefehlshaber der Kriegsmarine (OKM); in 1939 Hitler made him Gross Admiral. He was a member of the Reich Defense Council. On 30 January 1943, Doenitz replaced him at his own request, and he became Admiral Inspector of the Navy, a nominal title.

Crimes against peace.—In the 15 years he commanded it, Raeder built and directed the German Navy; he accepts full responsibility until retirement

in 1943. He admits the navy violated the Versailles Treaty, insisting it was "a matter of honor for every man" to do so, and alleges that the violations were for the most part minor, and Germany built less than her allowable strength. These violations, as well as those of the Anglo-German Naval Agreement of 1935, have already been discussed elsewhere in this judgment.

Raeder received the directive of 24 June 1937, from von Blomberg, requiring special preparations for war against Austria. He was one of the five leaders present at the Hossbach Conference of 5 November 1937. He claims Hitler merely wished by this conference to spur the army to faster rearmament, insists he believed the questions of Austria and Czechoslovakia would be settled peacefully, as they were, and points to the new Naval treaty with England which had just been signed. He received no orders to speed construction of U-boats, indicating that Hitler was not planning war.

Raeder received directives on "Fall Gruen" and the directives on "Fall Weiss" beginning with that of 3 April 1939; the latter directed the navy to support the army by intervention from the sea. He was also one of the few chief leaders present at the meeting of 23 May 1939. He attended the Obersalzburg briefing of 22 August 1939.

The conception of the invasion of Norway first arose in the mind of Raeder and not that of Hitler. Despite Hitler's desire, as shown by his directive of October 1939, to keep Scandinavia neutral, the Navy examined the advantages of naval bases there as early as October. Admiral Karls originally suggested to Raeder the desirable aspects of bases in Norway. A questionnaire, dated 3 October 1939, which sought comments on the desirability of such bases, was circulated within SKL. On 10 October,

Raeder discussed the matter with Hitler; his war diary entry for that day says Hitler intended to give the matter consideration. A few months later Hitler talked to Raeder, Quisling, Keitel, and Jodl; OKW began its planning and the Naval War Staff worked with OKW staff officers. Raeder received Keitel's directive for Norway on 27 January 1940, and the subsequent directive of 1 March, signed by Hitler.

Raeder defends his actions on the ground it was a move to forestall the British. It is not necessary again to discuss this defense, which has heretofore been treated in some detail, concluding that Germany's invasion of Norway and Denmark was aggressive war. In a letter to the Navy, Raeder said: "The operations of the Navy in the occupation of Norway will for all time remain the great contribution of the Navy to this war."

Raeder received the directives, including the innumerable postponements, for the attack in the west. In a meeting of 18 March 1941 with Hitler he urged the occupation of all Greece. He claims this was only after the British had landed and Hitler had ordered the attack, and points out the navy had no interest in Greece. He received Hitler's directive on Yugoslavia.

Raeder endeavored to dissuade Hitler from embarking upon the invasion of the USSR. In September 1940 he urged on Hitler an aggressive Mediterranean policy as an alternative to an attack on Russia. On 14 November 1940, he urged the war against England "as our main enemy" and that submarine and naval air force construction be continued. He voiced "serious objections against the Russian campaign before the defeat of England," according to notes of the German naval war staff. He claims his objections were based on the violation of the Non-Aggres-

sion Pact as well as strategy. But once the decision had been made, he gave permission 6 days before the invasion of the Soviet Union to attack Russian submarines in the Baltic Sea within a specified warning area and defends this action because these submarines were "snooping" on German activities.

It is clear from this evidence that Raeder participated in the planning and waging of aggressive war.

War crimes.—Raeder is charged with war crimes on the high seas. The *Athenia*, an unarmed British passenger liner, was sunk on 3 September 1939, while outward bound to America. The Germans 2 months later charged that Mr. Churchill deliberately sank the *Athenia* to encourage American hostility to Germany. In fact, it was sunk by the German U-boat 30. Raeder claims that an inexperienced U-boat commander sank it in mistake for an armed merchant cruiser, that this was not known until the U-30 returned several weeks after the German denial and that Hitler then directed the Navy and Foreign Office to continue denying it. Raeder denied knowledge of the propaganda campaign attacking Mr. Churchill. The most serious charge against Raeder is that he carried out unrestricted submarine warfare, including sinking of unarmed merchant ships, of neutrals, nonrescue and machine-gunning of survivors, contrary to the London Protocol of 1936. The Tribunal makes the same finding on Raeder on this charge as it did as to Doenitz, which has already been announced, up until 30 January 1943, when Raeder retired.

The commando order of 18 October 1942, which expressly did not apply to naval warfare, was transmitted by the Naval War Staff to the lower naval commanders with the direction it should be distrib-

uted orally by flotilla leaders and section commanders to their subordinates. Two commandos were put to death by the Navy, and not by the SD, at Bordeaux on 10 December 1942. The comment of the Naval War Staff was that this was "in accordance with the Fuehrer's special order, but is nevertheless something new in international law, since the soldiers were in uniform." Raeder admits he passed the order down through the chain of command, and he did not object to Hitler.

Conclusion.—The Tribunal finds that Raeder is guilty on counts one, two, and three. * * *

1 October 1946

/s/ Geoffrey Lawrence, *President*	/s/ Nikitchenko
/s/ Francis Biddle	/s/ Norman Birkett
/s/ H. Donnedieu De Vabres	/s/ John J. Parker
	/s/ R. Falco
	/s/ A. Volchkov

Dissenting Opinion

The Tribunal decided:

(*a*) To acquit the defendants Hjalmar Schacht, Franz von Papen, and Hans Fritzsche.

(*b*) To sentence the defendant Rudolf Hess to life imprisonment.

(*c*) Not to declare criminal the following organizations: the Reich Cabinet, General Staff and OKW.

In this respect I cannot agree with the decision adopted by the Tribunal as it does not correspond to the facts of the case and is based on incorrect conclusions. . . .

Soviet Member IMT, Major General Jurisprudence.

[signed] I. T. Nikitchenko.

1 October 1946.

(21) Tabulation of Nürnberg Sentences—Individual Defendants

	Count 1	Count 2	Count 3	Count 4	Sentence
Hermann Goering	C	C	C	C	Hanging.
Rudolf Hess	C	C	A	A	Life.
Joachim von Ribbentrop	C	C	C	C	Hanging.
Wilhelm Keitel	C	C	C	C	Hanging.
Ernst Kaltenbrunner	A	------	C	C	Hanging.
Alfred Rosenberg	C	C	C	C	Hanging.
Hans Frank	A	------	C	C	Hanging.
Wilhelm Frick	A	C	C	C	Hanging.
Julius Streicher	A	------	------	C	Hanging.
Walther Funk	A	C	C	C	Life.
Hjalmar Schacht	A	A	------	------	Acquitted.
Karl Doenitz	A	C	C	------	10 Years.
Erich Raeder	C	C	C	------	Life.
Baldur von Schirach	A	------	------	C	20 Years.
Fritz Sauckel	A	A	C	C	Hanging.
Alfred Jodl	C	C	C	C	Hanging.
Martin Bormann	A	------	C	C	Hanging.
Franz von Papen	A	A	------	------	Acquitted.
Arthur Seyss-Inquart	A	C	C	C	Hanging.
Albert Speer	A	A	C	C	20 Years.
Constantin von Neurath	C	C	C	C	15 Years.
Hans Fritzsche	A	------	A	A	Acquitted.

A=acquitted.
C=convicted.

Indicted Groups and Organizations

Reich Cabinet	Not criminal.
Leadership Corps of the Nazi Party	Criminal in part.
SS (*Schutzstaffeln*), including SD (*Sicherheitsdienst*)	Criminal.
SA (*Sturmabteilung*)	Not criminal.
Gestapo (*Geheime Staatspolizei*)	Criminal.
General Staff and High Command of the Armed Forces	Not criminal.

(22) Resolution of the General Assembly of the United Nations, 11 December 1946

(Journal of the United Nations, No. 58, Supplement A, p. 485)

The General Assembly,

Recognizes the obligation laid upon it by Article 13, paragraph 1, sub-paragraph *a* of the Charter, to