12-3-1947

Judgment

Military Tribunal No. III

Case IV - Justice

UNITED STATES MILITARY TRIBUNALS
SITTING IN THE PALACE OF JUSTICE, NUERNBERG, GERMANY
AT A SESSION OF MILITARY TRIBUNAL III

Judgment

THE UNITED STATES OF AMERICA, Plaintiff, vs. JOSEF ALTSTOETTER, WILHELM VON AMMON, PAUL BARNICKEL, HERMANN CUHORST, KARL ENGERT, GUENTHER JOEL, HERBERT KLEMM, ERNST LAUTZ, WOLFGANG METTGENBERG, GUENTHER NEBELUNG, RUDOLF OESCHEY, HANS PETERSEN, OSWALD ROTHAUG, CURT ROTHENBERGER, FRANZ SCHLEGELBERGER, and CARL WESTPHAL, Defendants.	Military Tribunal No.III Case No. 3.

J U D G M E N T.

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UNITED STATES MILITARY TRIBUNALS
SITTING IN THE PALACE OF JUSTICE, NUERNBERG, GERMANY
AT A SESSION OF MILITARY TRIBUNAL III
Held 3 and 4 December 1947 in Nuernberg, Germany

THE UNITED STATES OF AMERICA, Plaintiff, vs. JOSEF ALTSTOETTER, WILHELM VON AMMON, PAUL BARNICKEL, HERMANN CUHORST, KARL ENGERT, GUENTHER JOEL, HERBERT KLEMM, ERNST LAUTZ, WOLFGANG METTGENBERG, GUENTHER NEBELUNG, RUDOLF OESCHEY, HANS PETERSEN, OSWALD ROTHAUG, CURT ROTHENBERGER, FRANZ SCHLEGELBERGER, and CARL WESTPHAL, Defendants.	:	Military Tribunal No. III Case No. 3.

JUDGMENT

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

The presentation of evidence in support of the charges was commenced on 6 March 1947 and was followed by evidence for the defendants.

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

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

The defendant Carl Westphal died before the commencement of the trial. On 22 August 1947, the Tribunal entered an order declaring a mis-trial as to the defendant, Karl Engert, who has been able to attend court for only two days since 5 March 1947. The action was rendered necessary under the provisions of Article 4 (d) of Military Government Ordinance No. 7, and by reason of the serious and continuing illness of said defendant.

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

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

"Pursuant to Military Government Ordinance No. 7

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

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

"BY COMMAND OF GENERAL CLAY:

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

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

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

The indictment contains four counts, as follows:

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

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

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

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

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

"Count I of the indictment in this case charges that the defendants, acting pursuant to a common design, unlawfully, willfully and knowingly did conspire and agree together to commit war crimes and crimes against humanity as defined in Control Council Law No. 10, Article 2. It is charged that the alleged crime was committed between January 1933 and April 1945.

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

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

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

The Jurisdictional Enactments

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

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

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

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

"In order to give effect to the terms of the Moscow

Declaration of 30 October 1943 and the London Agreement of 8 August 1945, and the Charter issued pursuant thereto and in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, * * * the Control Council enacts as follows:".

Article I reads in part as follows:

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

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

Article 2 of C.C. Law 10 defines acts, each of which "is recognized as a crime", namely: (a) crimes against peace; (b) war crimes; (c) crimes against humanity; (d) membership in criminal organizations. We are concerned here with categories b, c, d, only, each of which will receive later consideration.

The Procedural Ordinance

C.C. Law 10 provides that:

"Each occupying authority, within its zone of occupation, (a) shall have the right to cause persons within such zone suspected of having committed a crime, including those charged with crime by one of the United Nations, to be arrested * * *", (Article III, paragraph 1 (a)), and "shall have the right to cause all persons so arrested and charged * * * to be brought to trial before an appropriate tribunal." (Article III, paragraph 1 (d)). "The tribunal by which persons charged with offenses hereunder shall be tried, and the rules and procedure thereof, shall be determined or designated by each zone commander for his respective zone * * *". (Article III, paragraph 2).

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

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

"Article II. Military Tribunal Constituted: (a) Pursuant to the powers of the Military Governor for the United States Zone of Occupation within Germany and further pursuant to the powers conferred upon the Zone Commander by Control Council Law No. 10 and Articles 10 and 11 of the Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945 certain tribunals to be known as 'Military Tribunals' shall be established hereunder."

The tribunals authorized by Ordinance 7 are dependent upon the substantive jurisdictional provisions of C.C. Law 10 and are thus based upon international authority and retain international characteristics. It is provided that the United States Military Governor may agree with other zone commanders for a joint trial, (Ordinance 7, Article 2 (c)). The Chief of Counsel for War Crimes, United States, may invite others of the United Nations to participate in the prosecution. (Ordinance 7, Article 3 (b)).

The Ordinance provides:

"The determinations of the International Military Tribunal in the judgments in Case No. 1 that invasions, aggressive acts, aggressive wars, crimes, atrocities, or inhumane acts were planned or occurred, shall be binding on the tribunals established hereunder and shall not be questioned except in so far as the participation therein or knowledge thereof by any particular person may be concerned. Statements of the International Military Tribunal in the judgment in Case No. 1 constitute proof of the facts stated, in the absence of substantial new evidence to the contrary." (Ordinance No. 7, Article X).

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

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

fined in C.C. Law 10.

Source of Authority of C.C. Law 10

Having identified the instruments which purport to establish the jurisdiction of this Tribunal, we next consider the legal basis of those instruments. The unconditional surrender of Germany took place on 8 May 1945. (Department of State publication No. 2423, page 24). The surrender was preceded by the complete disintegration of the central government and was followed by the complete occupation of all of Germany. There were no opposing German forces in the field; the officials who during the war had exercised the powers of the Reich Government were either dead, in prison, or in hiding. On 5 June 1945 the Allied Powers announced that they "hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the high command, and any State, municipal or local government or authority", and declared that "there is no central government or authority in Germany capable of accepting responsibility for the maintenance of order, the administration of the country, and compliance with the requirements of the victorious powers". The Four Powers further declared that they "will hereafter determine the boundaries of Germany or any part thereof and the status of Germany or of any area at present being a part of German territory". (Berlin Declaration of 5 June 1945, Department of State publication No. 2423, pages 62, 63).

On 2 August 1945 at Berlin, President Truman, Generalissimo Stalin, and Prime Minister Atlee, as heads of the Allied Powers, entered into a written agreement setting forth the principles which were to govern Germany during the initial control period. Reference to that document will disclose the wide scope of authority and control which was assumed and exercised by the Allied Powers. They assumed "supreme authority" and declared that it was their purpose to accomplish complete demilitarization of

Germany; to destroy the National Socialist Party, to prevent Nazi propaganda; to abolish all Nazi laws which "established discrimination on grounds of race, creed, or political opinion" * * * "whether legal, administrative, or otherwise"; to control education; to reorganize the judicial system in accordance with the principles of democracy and of equal rights; to accomplish the decentralization of the political structure. The agreement provided that "for the time being no central German government shall be established". In the economic field they assumed control of "German industry and all economic and financial international transactions". Finally, the Allies re-affirmed their intention to bring the Nazi war criminals to swift and sure justice. (Department of State publication No. 2423, page 10, et seq.).

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

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

> "On the other hand, a distinction is clearly warranted between measures taken by the Allies prior to destruction of the German government and those taken thereafter. Only the former need be tested by the Hague Regulations, which are inapplicable to the situation now prevailing in Germany. Disappearance of the German State as a belligerent entity, necessarily implied in the Declaration of Berlin of 5 June 1945, signifies that a true state of war--and hence belligerent occupation--no longer exists within the meaning of international law."
>
> --Freeman, in The American Journal of International Law, July 1947, page 605.

> "Through the subjugation of Germany the outcome of the war has been decided in the most definite manner possible. One of the prerogatives of the Allies resulting from the subjugation is the right to occupy German territory at their discretion. This occupation is, both legally and factually, fundamentally different from the belligerent occupation contemplated in the Hague Regulations, as can be seen from the following observations.
>
> "The provisions of the Hague Regulations restricting the rights of an occupant refer to a belligerent who, favored by the changing fortunes of war, actually exercises military authority over enemy territory and thereby prevents the legitimate sovereign--who remains the legitimate sovereign--from exercising his full authority. The regulations draw important legal conclusions from the fact that the legitimate sovereign may at any moment himself be favored by the changing fortunes of war, reconquer the territory, and put an end to the occupation. 'The occupation applies only to territory where such authority (i.e., the military authority of the hostile State) is established and can be exercised' (Art. 42, 2). In other words, the Hague Regulations think of an occupation which is a phase of an as yet undecided war. Until 7 May 1945, the Allies were belligerent occupants in the then-occupied parts of Germany, and their rights and duties were circumscribed by the respective provisions of the Hague Regulations. As a result of the subjugation of Germany the legal character of the occupation of German territory was drastically changed."
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> --Fried, The American Journal of International Law, Vol. 40, No. 2, April 1946, page 327.

The view expressed by the two authorities cited appears to have the support of the International Military Tribunal judgment in the case against Goering, et al. In that case the defendants contended that Germany was not bound by the rules of land warfare in occupied territory because Germany had completely

subjugated those countries and incorporated them into the German Reich. The Tribunal refers to the "doctrine of subjugation, dependent as it is upon military conquest", and holds that it is unnecessary to decide whether the doctrine has any application where the subjugation is the result of the crime of aggressive war. The reason given is significant. The Tribunal said:

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

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

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

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

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

"The Influence of the Legal Position of Germany upon the War Crimes Trials", Dr. Hermann Mosler, Assistant Professor of the University of Bonn, published in Sueddeutsche Juristen-

Zeitung, Volume 2, No. 7, July 1947.

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

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

Both of the authorities first cited directly assert that the situation at the time of the unconditional surrender resulted in the transfer of sovereignty to the Allies. In this they are supported by the weighty opinion of Lord Wright, eminent jurist of the British House of Lords and head of the United Nations War Crimes Commission. For our purposes, however, it is unnecessary to determine the present situs of "residual sovereignty". It is sufficient to hold that, by virtue of the situation at the time of unconditional surrender, the Allied Powers were provisionally in the exercise of supreme authority, valid and effective until such time as, by treaty or otherwise, Germany shall be permitted to exercise the full powers of sovereignty. We hold that the legal right of the Four Powers to enact C.C. Law 10 is established and that the jurisdiction of this Tribunal to try persons charged as major war criminals by the European Axis must be conceded.

We have considered it proper to set forth our views concerning the nature and source of the authority of C.C. Law 10 in its aspect as substantive legislation. It would have been possible to treat that law as a binding rule regardless of the righteousness of its provisions, but its justification must ultimately

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

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

In declaring that the expressed determination of the victors to punish German officials who slaughtered their own nationals is in harmony with international principles of justice, we usurp no power; we only take judicial notice of the declarations already made by the chief executives of the United States and her former Allies. The fact that C.C. Law 10 on its face is limited to the punishment of German criminals does not transform this Tribunal into a German court. The fact that the

Four Powers are exercising supreme legislative authority in governing Germany and for the punishment of German criminals does not mean that the jurisdiction of this Tribunal rests in the slightest degree upon any German law, prerogative, or sovereignty. We sit as a Tribunal drawing its sole power and jurisdiction from the will and command of the four occupying powers.

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

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

> "The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world. * * * These provisions are binding upon the Tribunal as the law to be applied to the case." (Trial of the major war criminals (Official Text--Nuernberg, 1947), Volume 1, pages 218 and 174).

Since the Charter and C.C. Law 10 are the product of legislative action by an international authority, it follows of necessity that there is no national constitution of any one State which could be invoked to invalidate the substantive provisions of such international legislation. It can scarcely be argued that a court which owes its existence and jurisdiction solely to the provisions of a given statute could assume to exercise that jurisdiction and then, in the exercise thereof, declare invalid the act to which it owes its existence. Except as an aid to construction, we cannot and need not go behind the statute. This was discussed authoritatively by the first International Military Tribunal in connection with the contention of defendants that the Charter was invalid because it partook of the nature of ex-post facto legislation. That Tribunal said, "The Charter makes the planning or waging of a war of aggression or a war in violation of international treaties a crime; and it is, therefore, not strictly necessary to consider whether and to what extent aggressive war was a crime before the execution of the London Agreement." (Trial of major war criminals, Volume 1, page 219).

As recently said by an American authority:

> "The Charter was, of course, binding upon the Tribunal in the same way that a constitutional statute would bind a

domestic court". (Issues of the Nuernberg Trials, by Herbert Wechsler, Political Science Quarterly, March 1947, page 14).

In its aspect as a statute defining crime and providing punishment the limited purpose of C.C. Law 10 is clearly set forth. It is an exercise of supreme legislative power in and for Germany. It does not purport to establish by legislative act any new crimes of international applicability. The London Agreement refers to the trial of "those German officers and men and members of the Nazi Party who have been responsible for * * * atrocities". C.C. Law 10 recites that it was enacted to establish a "uniform legal basis in Germany" for the prosecution of war criminals.

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

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

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

It must be conceded that the circumstance which gives to principles of international conduct the dignity and authority of law is their general acceptance as such by civilized nations, which acceptance is manifested by international treaties, conventions, authoritative textbooks, practice and judicial decisions. (Hackworth, Digest of International Law, Volume 1, pages 1-4).

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

> "The basis of the law, that is to say, what has given to some principles of general applicability the quality or character of law has been the acquiescence of the several independent States which were to be governed thereby." (Hyde, International Law, (2d rev. ed.), Vol. 1, page 4).

> "The requisite acquiescence on the part of individual States has not been reflected in formal or specific approval of every restriction which the acknowledged requirements of international justice have appeared, under the circumstances of the particular case, to dictate or imply. It has been rather a yielding to principle, and by implication, to logical applications thereof which have begotten deep-rooted and approved practices." (Hyde, supra, page 5).

> "It should be observed, however, that acquiescence in a proposal may be inferred from the failure of interested States to make appropriate objection to practical applications of

it. Thus it is that changes in the law may be wrought gradually and imperceptibly, like those which by process of accretion alter the course of a river and change an old boundary. Without conventional arrangement, and by practices manifesting a common and sharp deviation from rules once accepted as the law, the community of States may in fact modify that which governs its members." (Hyde, supra, page 9).

"States may through the medium of an international organization such as the League of Nations, itself the product of agreement, find it expedient to create and accept fresh restraints that ultimately win widest approval and acceptance as a part of the law of nations. The acts of the organization may thus in fact become sources of international law at least in case the members thereof have by their general agreement clothed it with power to create and put into force fresh rules of restraint." (Hyde, supra, page 11).

"But international law is progressive. The period of growth generally coincides with the period of world upheavals. The pressure of necessity stimulates the impact of natural law and of moral ideas and converts them into rules deliberately and overtly recognized by the consensus of civilized mankind. The experience of two great world wars within a quarter of a century cannot fail to have deep repercussions on the senses of the peoples and their demand for an international law which reflects international justice. I am convinced that international law has progressed, as it is bound to progress if it is to be a living and operative force in these days of widening sense of humanity." (Lord Wright, "War Crimes under International Law", The Law Quarterly Review, Vol. 62, January 1946, page 51).

For the reasons stated by Lord Wright, this growth by accretion has been greatly accelerated since the First World War, (Hyde, International Law, (2d rev. ed.), Volume 1, page 8). The Charter, the I.M.T. Judgment, and C.C. Law 10 are merely "great new cases in the book of international law". They constitute authoritative recognition of principles of individual penal responsibility in international affairs which, as we shall show, had been developing for many years. Surely C.C. Law 10, which was enacted by the authorized representatives of the four greatest powers on earth, is entitled to judicial respect when it states, "Each of the following acts is <u>recognized</u> as a crime". Surely the requisite international approval and acquiescence is established when twenty-three States, including all of the great powers, have approved the London Agreement and the I.M.T. Charter without dissent from any State. Surely the Charter must be deemed declaratory

of the principles of international law in view of its recognition as such by the General Assembly of the United Nations. We quote:

> "The General Assembly recognizes the obligation laid upon it by Article 13, paragraph 1, subparagraph (a) of the Charter, to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification;
>
> "Takes note of the agreement for the establishment of an International Military Tribunal for the prosecution and punishment of the major war criminals of the European Axis, signed in London on 8 August 1945, and of the Charter annexed thereto, and of the fact that similar principles have been adopted in the Charter of the International Military Tribunal for the trial of the major war criminals in the Far East, proclaimed at Tokyo on 19 January 1946;
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> "Therefore,
>
> "Affirms the principles of international law recognized by the Charter of the Nuernberg Tribunal and the judgment of the Tribunal;
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> "Directs the Committee on codification of international law established by the resolution of the General Assembly of . . . . . December 1946, to treat as a matter of primary importance plans for the formulation, in the text of a general codification of offenses against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nuernberg Tribunal and in the judgment of the Tribunal."
>
> (Journal of the United Nations, No. 58, Supp. A - A/P. V./55, p. 485; "The Crime of Aggression and the Future of International Law", by Philip C. Jessup, Political Science Quarterly, Vol. LXII, March 1947, Number 1, page 2).

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

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

to the Court but are intended to define and do, in my opinion, accurately define what is the existing international law on these matters." (Lord Wright, "War Crimes under International Law", The Law Quarterly Review, Vol. 62, January 1946, page 41).

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

"The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law." (I.M.T. Judgment, page 218).

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

"If there exists a body of international law which States, from a sense of legal obligation do in fact observe in their relations with each other, and which they are unable individually to alter or destroy, that law must necessarily be regarded as the law of each political entity deemed to be a State, and as prevailing throughout places under its control. This is true although there be no local affirmative action indicating the adoption by the individual State of international law. * * * International law, as the local law of each State, is necessarily superior to any administrative regulation or statute or public act at variance with it. There can be no conflict on an equal plane." (Hyde, International Law, (2d rev. ed.), Vol. 1, pages 16, 17).

This universality and superiority of international law does not necessarily imply universality of its enforcement. As to the punishment of persons guilty of violating the laws and customs of war (war crimes in the narrow sense), it has always been recognized that tribunals may be established and punishment imposed by the State into whose hands the perpetrators fall. These rules of international law were recognized as paramount, and jurisdiction

to enforce them by the injured belligerent government, whether within the territorial boundaries of the State or in occupied territory, has been unquestioned. (Ex parte Quirin, supra; In re: Yamashita, 90 L. ed. 343). However, enforcement of international law has been traditionally subject to practical limitations. Within the territorial boundaries of a State having a recognized, functioning government presently in the exercise of sovereign power throughout its territory, a violator of the rules of international law could be punished only by the authority of the officials of that State. The law is universal, but such a State reserves unto itself the exclusive power within its boundaries to apply or withhold sanctions. Thus, notwithstanding the paramount authority of the substantive rules of common international law the doctrines of national sovereignty have been preserved through control of enforcement machinery. It must be admitted that Germans were not the only ones who were guilty of committing war crimes; other violators of international law could, no doubt, be tried and punished by the State of which they were nationals, by the offended State if it can secure jurisdiction of the person, or by an International Tribunal if of competent authorized jurisdiction.

Applying these principles, it appears that the power to punish violators of international law in Germany is not solely dependent on the enactment of rules of substantive penal law applicable only in Germany. Nor is the apparent immunity from prosecution of criminals in other States based on the absence there of the rules of international law which we enforce here. Only by giving consideration to the extraordinary and temporary situation in Germany can the procedure here be harmonized with established principles of national sovereignty. In Germany an international body (the Control Council) has assumed and exercised the power to establish judicial machinery for the punishment of those who have

violated the rules of the common international law, a power which no international authority without consent could assume or exercise within a State having a national government presently in the exercise of its sovereign powers.

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

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

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

> "Article II, 1.—Each of the following acts is recognized as a crime: * * * (b) War crimes. Atrocities or offenses against persons or property constituting violations of the laws or customs of war, including but not limited to, murder, ill treatment or deportation to slave labor or for any other purpose, of civilian population from occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity."

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

The scope of inquiry as to war crimes is, of course, limited by the provisions, properly construed, of the Charter and C.C. Law 10. In this particular, the two enactments are in substantial harmony. Both indicate by inclusion and exclusion the intent that the term "war crime" shall be employed to cover acts in violation of the laws and customs of war directed against non-Germans, and shall not include atrocities committed by Germans against their own nationals.

It will be observed that Article VI of the Charter enumerates as war crimes acts against prisoners of war, persons on the seas, hostages, wanton destruction of cities and the like, devastation not justified by military necessity, plunder of public or private property (obviously not property of Germany or Germans), and "ill treatment or deportation to slave labor, or for any other purpose, of civilian population of, or in, occupied territory". C.C. Law 10, supra, employs similar language. It reads:

> " * * * ill treatment or deportation to slave labor or for any other purpose of civilian population from occupied territory".

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

> " * * * murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."

C.C. Law 10 defines as criminal:

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

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

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

As recently asserted by General Telford Taylor before Tribunal No. IV, in the case of the United States vs. Flick, et al.:

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

Our jurisdiction to try persons charged with crimes against humanity is limited in scope, both by definition and illustration, as appears from C.C. Law 10. It is not the isolated crime by a private German individual which is condemned, nor is it the isolated crime perpetrated by the German Reich through its officers

against a private individual. It is significant that the enactment employs the words "against any civilian population" instead of "against any civilian individual". The provision is directed against offenses and inhumane acts and persecutions on political, racial, or religious grounds systematically organized and conducted by or with the approval of government.

The opinion of the first International Military Tribunal in the case against Goering, et al., lends apport to our conclusion. That opinion recognized the distinction between war crimes and crimes against humanity, and said:

> " * * * in so far as the inhumane acts charged in the indictment and committed after the beginning of the war did not constitute war crimes, they were all committed in execution of, or in connection with, aggressive war and, therefore, constituted crimes against humanity." (Trial of major war criminals, Vol. I, pp. 254-255).

The evidence to be later reviewed establishes that certain inhumane acts charged in Count 3 of the indictment were committed in execution of, and in connection with, aggressive war and were, therefore, crimes against humanity even under the provisions of the I.M.T. Charter, but it must be noted that C.C. Law 10 differs materially from the Charter. The latter defines crimes against humanity as inhumane acts, etc., committed " * * * in execution of, or in connection with, any crime within the jurisdiction of the tribunal * * *", whereas in C.C. Law 10 the words last quoted are deliberately omitted from the definition.

The Ex Post Facto Principle

The defendants claim protection under the principle nullum crimen sine lege, though they withheld from others the benefit of that rule during the Hitler regime. Obviously the principle in question constitutes no limitation upon the power or right of the Tribunal to punish acts which can properly be held to have been violations of international law when committed. By way of illustration, we observe that C.C. Law 10, Article II, 1 (b), "War Crimes",

has by reference incorporated the rules by which war crimes are to be identified. In all such cases it remains only for the Tribunal, after the manner of the common law, to determine the content of those rules under the impact of changing conditions.

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

Under written constitutions the ex post facto rule condemns statutes which define as criminal, acts committed before the law was passed, but the ex post facto rule cannot apply in the international field as it does under constitutional mandate in the domestic field. Even in the domestic field the prohibition of the rule does not apply to the decisions of common law courts, though the question at issue be novel. International law is not the product of statute for the simple reason that there is as yet no world authority empowered to enact statutes of universal application. International law is the product of multipartite treaties, conventions, judicial decisions and customs which have received international acceptance or acquiescence. It would be sheer absurdity to suggest that the ex post facto rule, as known to constitutional states, could be applied to a treaty, a custom, or a common law decision of an international tribunal, or to the international acquiescence which follows the event. To have attempted to apply the ex post facto principle to judicial decisions of common international law would have been to strangle that law at birth. As applied in the field of international law, the principle nullum crimen sine lege received its true interpretation in the opinion of the I.M.T. in the case versus Goering, et al. The question arose with reference to crimes against the peace, but the opinion expressed is equally applicable to war crimes and crimes against humanity. The Tribunal said:

"In the first place, it is to be observed that the maxim

nullum crimen sine lege is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring States without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished." (I.M.T. Judgment, page 219).

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

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

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

(The Nuernberg Trial, Landmark and Law; Foreign Affairs, January 1947).

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

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

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

"With regard to 'crimes against humanity', this at any rate

is clear: the Nazis, when they persecuted and murdered countless Jews and political opponents in Germany, knew that what they were doing was wrong and that their actions were crimes which had been condemned by the criminal law of every civilized State. When these crimes were mixed with the preparation for aggressive war and later with the commission of war crimes in occupied territories, it cannot be a matter of complaint that a procedure is established for their punishment." (Fyfe, Foreword to "The Nuernberg Trial", by R. W. Cooper).

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

"These are, indeed, the issues that are currently mooted. But there are elements in the debate that should lead us to be suspicious of the issues as they are drawn in these terms. For, most of those who mount the attack on one or another of these contentions hasten to assure us that their plea is not one of immunity for the defendants; they argue only that they should have been disposed of politically, that is, dispatched out of hand. This is a curious position indeed. A punitive enterprise launched on the basis of general rules, administered in an adversary proceeding under a separation of prosecutive and adjudicative powers is, in the name of law and justice, asserted to be less desirable than an ex parte execution list or a drumhead court-martial constituted in the immediate aftermath of war. I state my view reservedly when I say that history will accept no conception of law, politics or justice that supports a submission in these terms."

Again, he says:

"There is, indeed, too large a disposition among the defenders of Nuernberg to look for stray tags of international pronouncements and reason therefrom that the law of Nuernberg was previously fully laid down. If the Kellogg-Briand Pact or a general conception of international obligation sufficed to authorize England, and would have authorized us, to declare war on Germany in defense of Poland—and in this enterprise to kill countless thousands of German soldiers and civilians—can it be possible that it failed to authorize punitive action against individual Germans judicially determined to be responsible for the Polish attack? To be sure, we would demand a more explicit authorization for punishment in domestic law, for we have adopted for the protection of individuals a prophylactic principle absolutely forbidding retroactivity that we can afford to carry to that extreme. International society, being less stable, can afford less luxury. We admit that in other respects. Why should we deny it here?" (Wechsler, "Issues of Nuernberg Trial", Political Science Quarterly, Vol. LXII, No. 1, March 1947, pages 23-25).

Many of the laws of the Weimar era which were enacted for the protection of human rights have never been repealed. Many acts constituting war crimes or crimes against humanity as defined in C.C. Law 10 were committed or permitted in direct violation also of the

provisions of the German criminal law. It is true that this Tribunal can try no defendant merely because of a violation of the German penal code, but it is equally true that the rule against retrospective legislation, as a rule of justice and fair play, should be no defense if the act which he committed in violation of C.C. Law 10 was also known to him to be a punishable crime under his own domestic law.

As a principle of justice and fair play, the rule in question will be given full effect. As applied in the field of international law that principle requires proof before conviction that the accused knew or should have known that in matters of international concern he was guilty of participation in a nationally organized system of injustice and persecution shocking to the moral sense of mankind, and that he knew or should have known that he would be subject to punishment if caught. Whether it be considered codification or substantive legislation, no person who knowingly committed the acts made punishable by C.C. Law 10 can assert that he did not know that he would be brought to account for his acts. Notice of intent to punish was repeatedly given by the only means available in international affairs, namely, the solemn warning of the governments of the States at war with Germany. Not only were the defendants warned of swift retribution by the express declaration of the Allies at Moscow of 30 October 1943. Long prior to the Second World War the principle of personal responsibility had been recognized.

> "The Council of the Conference of Paris of 1919 undertook, with the aid of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, to incorporate in the treaty of peace arrangements for the punishment of individuals charged with responsibility for certain offenses." (Hyde, International Law, (2d rev. ed.), Vol. III, page 2409).

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

> "The war was carried on by the Central Empires, together with their Allies, Turkey and Bulgaria, by barbarous or illegi-

timate methods in violation of the established laws and customs of war and the elementary laws of humanity." (Hyde, International Law, (2d rev. ed.), Vol. III, pages 2409-2410).

As its conclusion the Commission solemnly delcared:

"All persons belonging to enemy countries, however high their position may have been, without distinction of rank, including chiefs of States, who have been guilty of offenses against the laws and customs of war or the laws of humanity, are liable to criminal prosecution." (American Journal of International Law, Volume 14, (1920), page 117).

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

"Every belligerent has, according to international law, the power and authority to try the individuals alleged to be guilty of the crimes of which an enumeration has been given in Chapter II on Violations of the Laws and Customs of War, if such persons have been taken prisoners or have otherwise fallen into its power. Each belligerent has, or has power to set up, pursuant to its own legislation, an appropriate tribunal, military or civil, for the trial of cases." (Hyde, International Law, (2d rev. ed), Vol. III, page 2412).

According to the Treaty of Versailles, Article 228, the German government itself "recognized the right of the Allied and associated powers to bring before military tribunals persons accused of offenses against the laws and customs of war. Such persons who might be found guilty were to be sentenced to punishments 'laid down by law'," Some Germans were, in fact, tried for the commission of such crimes. (See: Hyde, International Law, (2d rev. ed.), Vol. III, page 2414.

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

Crimes Against Humanity as Violative of International Law

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

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

> "Inasmuch as changing estimates are to be anticipated, and as the evolution of thought in this regard appears to be constant and is perhaps now more obvious than at any time since the United States came into being, the circumstance that at any given period the solution of a particular question is by international law deemed to be solely within the control or jurisdiction of one State, gives frail assurance that it will always be so regarded." (Hyde, International Law, (2d rev. ed.), Vol. 1, pages 7, 8).

> "The family of nations is not unconcerned with the life and experience of the private individual in his relationships with the State of which he is a national. Evidence of concern has become increasingly abundant since World War I, and is reflected in treaties through which that conflict was brought to a close, particularly in provisions designed to safeguard the racial, linguistic and religious minorities inhabiting the territories of certain States, and in the terms of Part XIII of the Treaty of Versailles, of 28 June 1919, in respect to Labor, as well as in Article XXIII of that treaty embraced in the Covenant of the League of Nations." (Hyde, International Law, (2d rev. ed.), Vol. I, page 38).

> "The nature and extent of the latitude accorded a State in the treatment of its own nationals has been observed elsewhere. It has been seen that certain forms or degrees of harsh treatment of such individuals may be deemed to attain

an international significance because of their direct and adverse effect upon the rights and interests of the outside world. For that reason it would be unscientific to declare at this day that tyrannical conduct, or massacres, or religious persecutions are wholly unrelated to the foreign relations of the territorial sovereign which is guilty of them. If it can be shown that such acts are immediately and necessarily injurious to the nationals of a particular foreign State, grounds for interference by it may be acknowledged. Again, the society of nations, acting collectively, may not unreasonably maintain that a State yielding to such excesses renders itself unfit to perform its international obligations, especially in so far as they pertain to the protection of foreign life and property within its domain.[3] The propriety of interference obviously demands in every case a convincing showing that there is in fact a causal connection between the harsh treatment complained of, and the outside State that essays to thwart it.

"Note 3.--Since the World War of 1914-1918, there has developed in many quarters evidence of what might be called an international interest and concern in relation to what was previously regarded as belonging exclusively to the domestic affairs of the individual State; and with that interest there has been manifest also an increasing readiness to seek and find a connection between domestic abuses and the maintenance of the general peace. See Art. XI of the Covenant of the League of Nations, U.S. Treaty Vol. III, 3339." (Hyde, International Law, (2d rev. ed.), Vol. I, pages 249-250).

The international concern over the commission of crimes against humanity has been greatly intensified in recent years. The fact of such concern is not a recent phenomenon, however. England, France, and Russia intervened to end the atrocities in the Greco-Turkish warfare in 1827. (Oppenheim, International Law, Vol. I, (3d ed.) (1920), page 229).

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

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

Various nations directed protests to the governments of Russia and Roumania with respect to pogroms and atrocities against Jews. Similar protests were made to the government of Turkey on behalf of

the persecuted Christian minorities. In 1872 the United States, Germany, and five other powers protested to Roumania; and, in 1915, the German government joined in a remonstrance to Turkey on account of similar persecutions. (Bentwich, op. cited, supra).

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

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

> "Nevertheless, there are occasional crimes committed on so vast a scale and of such peculiar horror as to make us doubt whether it is not our manifest duty to endeavor at least to show our disapproval of the deed and our sympathy with those who have suffered by it. The case must be extreme in which such a course is justifiable. . . . . The case in which we could interfere by force of arms, as we interfered to put a stop to the intolerable conditions in Cuba, are necessarily very few." (President's Message to Congress, 1904).

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

> "First. In the cause of humanity and to put an end to the barbarities, bloodshed, starvation, and horrible miseries now existing there, and which the parties to the conflict are either unable or unwilling to stop or mitigate. It is no answer to say this is all in another country, belonging to another nation, and therefore none of our business. It is specially our duty, for it is right at our door." (President's Special Message of 11 April 1898, Hyde, International Law, Vol. 1, (2d ed.), page 259 (1945)).

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

> "States are allowed to interfere in the name of international law if 'humanity rights' are violated to the detriment of any single race." (J. K. Bluntschel, Professor of Law, Heidelberg University, in "Das Moderne Volkerrecht der Civilisierten Staaten", (3d ed.), page 270 (1878)).

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

> "The right of humanitarian intervention on behalf of the rights of man trampled upon by a State in a manner shocking the sense of mankind has long been considered to form part of the law of nations. Here, too, the Charter merely develops a pre-existing principle." (Transcript, page 813).

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

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

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

"Genocide is a denial of the right of existence of entire human groups, as homicide is a denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations.

"Many instances of such crimes of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part.

"The punishment of the crime of genocide is a matter of international concern.

"The General Assembly therefore

"Affirms that genocide is a crime under international law which the civilized world condemns, and for the comission of which principals and accomplices---whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds---are punishable; * * *."

(Journal of the United Nations, No. 58, Supp. A-C/P. V./55, page 485; Political Science Quarterly (March 1947), Vol. LXII, No. 1, page 3).

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

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

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

Frank recognition of the following facts is essential. The jurisdictional enactments of the Control Council, the form of the indictment, and the judicial procedure prescribed for this Tribunal are not governed by the familiar rules of American criminal law and

procedure. This Tribunal, although composed of American judges schooled in the system and rules of the common law, is sitting by virtue of international authority and can carry with it only the broad principles of justice and fair play which underlie all civilized concepts of law and procedure.

No defendant is specifically charged in the indictment with the murder or abuse of any particular person. If he were, the indictment would, no doubt, name the alleged victim. Simple murder and isolated instances of atrocities do not constitute the gravamen of the charge. Defendants are charged with crimes of such immensity that mere specific instances of criminality appear insignificant by comparison. The charge, in brief, is that of conscious participation in a nation-wide governmentally-organized system of cruelty and injustice, in violation of the laws of war and of humanity, and perpetrated in the name of law by the authority of the Ministry of Justice, and through the instrumentality of the courts. The dagger of the assassin was concealed beneath the robe of the jurist. The record is replete with evidence of specific criminal acts, but they are not the crimes charged in the indictment. They constitute evidence of the intentional participation of the defendants and serve as illustrations of the nature and effect of the greater crimes charged in the indictment. Thus it is that the apparent generality of the indictment was not only necessary but proper. No indictment couched in specific terms and in the manner of the common law could have encompassed within practicable limits the generality of the offense with which these defendants stand charged.

The prosecution has introduced evidence concerning acts which occurred before the outbreak of the war in 1939. Some such acts are relevant upon the charges contained in Counts 2, 3, and 4, but as stated by the prosecution, 'None of these acts is charged as an independent offense in this particular indictment". We direct our consideration to the issue of guilt or innocence after the outbreak of the war in accordance with the specific limitations of time set forth in Counts 2, 3, and 4 of the indictment. In measuring the conduct of the individual defendants by the standards of C.C. Law 10, we are also to be guided by Article 2, paragraph 2 of that law, which provides that a person is deemed to have committed a crime as defined in paragraph I of Article 2, if he was "(a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission or (e) was a member of any organization or group connected with the commission of any such crime * * *."

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

> "The acceptance of bribes or inducements by a judge, offered for the purpose of influencing his decision.—Section 334.
>
> "Action by an official, who, in the conduct or decision of a case, deliberately makes himself guilty of diverting the law to the disadvantage of one of the parties.—Section 336.
>
> "The securing of a confession by duress.—Section 343.
>
> "The act of an official who, in the exercise of his duty in a criminal proceeding, knowingly causes any person to escape penalty provided by law.--Section 346.

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

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

The Constitution also guaranteed to all Germans:

Equality before the law. (Article 109);

Citizenship, the right of travel and emigration. (Articles 110, 111, 112);

Freedom of person. (Article 114);

Freedom of speech, assembly, and association. (Articles 118, 123, and 124);

Right of just compensation for property expropriated. (Article 155);

Right of inheritance. (Article 154);

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

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

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

The first step in the march toward absolutism was of necessity the assumption and consolidation of power. It was deemed essential that the government be authorized to make laws by decree, unhampered by the limitations of the Weimar Republic, by the Reichstag, or by the independent action of the several German States (lands). To accomplish this end and on 28 February 1933, a decree was promul-

gated over the signature of President von Hindenburg, Chancellor Hitler, Reich Minister of the Interior Frick, and Reich Minister of Justice Guertner. Briefly stated, this decree expressly suspended the provisions of the Weimar Constitution guaranteeing personal liberty, free speech, press, assembly, association, privacy of communication, freedom from search, and inviolability of property rights. The decree further provided that the Reich government might, to restore public security, temporarily take over the powers of the highest State authority. It was declared in the preamble that the decree was passed "in virtue of Section 48 (2) of the Weimar Constitution". This is the section to which we previously referred and which authorized the Reichspraesident to suspend the very provisions which were in fact stricken down by the Hitler decree of 28 February. The decree was reinforced on 24 March 1933 by the act of an intimidated Reichstag. The enactment was subtley drawn to accomplish a double purpose. It provided that "laws decreed by the Government may deviate from the Constitution", but the act did not stop there; it also provided that "laws of the Reich can be decreed by the Government apart from the procedure provided by the Constitution". We quote in part:

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

Though the enabling act expressly repealed only a small portion of the Constitution, nevertheless that portion which was repealed cleared the procedural way for the nullification of the rest if and when decrees should be promulgated by "the Government". On 14

July 1933 a law was passed declaring the Nationalsozialistische Deutsche Arbeiterpartei (NSDAP) to be the only political party and making it a crime to maintain or form any other political party. (IMT Judgment, page 178). Thus it was made doubly sure that any legislation thereafter enacted by the Reichstag would be in harmony with the will of the Government.

Although the process by which the Hitler regime came into power was tainted with illegality and duress, nevertheless the power thus seized was later consolidated and the regime thereafter did receive the organized support of the German people and recognition by foreign powers. On 30 January 1934, more than ten months after the enactment of the enabling act, and subsequent to the Reichstag election of 12 November 1933, the Reichstag passed an act by unanimous vote providing that "the sovereign powers of the Laender are transferred to the Reich", and further providing that "the Reich Government may issue new Constitutional laws". The act was regularly signed by Reich President von Hindenburg, and by Reich Chancellor Hitler, and Minister Frick. (See: 1934 RGBl I, page 75). The provisions of the enabling act were renewed by acts of the Reichstag on 30 January 1937 and again on 30 January 1939.

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

The conduct of the defendants must be seen in a context of preparation for aggressive war, and must be interpreted as within the framework of the criminal law and judicial system of the Third Reich. We shall, therefore, next consider the legal and judicial process by which the entire judicial system was transformed into a tool for the propagation of the National Socialist ideology, the extermination of opposition thereto, and the advancement of plans for aggressive war and world conquest. Though the overt acts with which defendants are charged occurred after September 1939, the evidence

now to be considered will make clear the conditions under which the defendants acted and will show knowledge, intent, and motive on their part, for in the period of preparation some of the defendants played a leading part in molding the judicial system which they later employed.

Beginning in 1933, there developed side by side two processes by which the Ministry of Justice and the courts were equipped for terroristic functions in support of the Nazi regime. By the first, the power of life and death was ever more broadly vested in the courts. By the second, the penal laws were extended in such inclusive and indefinite terms as to vest in the judges the widest discretion in the choice of law to be applied, and in the construction of the chosen law in any given case. In 1933, by the law for the "Protection against Violent Political Acts", the death sentence was authorized, though not required, as to a number of crimes "whenever milder penalty has been prescribed hitherto", (Law of 4 April 1933 (1933 RGBl I, page 162).

On 24 April 1934, the definition of high treason was greatly expanded and the death sentence was authorized, though not required, in numerous instances. The manner in which this law was applied renders it all important. The following provisions, among others, illustrate the scope of the amended law and the discretionary power of the judge:

> "83. Whoever publicly incites to or solicits an undertaking of high treason shall be punished by confinement in a penitentiary not to exceed ten years.
>
> "Whoever prepares an undertaking of high treason in any other way shall be punished in like manner.
>
> "The death penalty, or confinement in a penitentiary for life, or for not less than two years, shall be inflicted:
>
> "(1) if the act was directed toward establishing or maintaining an organized combination for the preparation of high treason or
>
> * * * * * * * * *
>
> "(3) if the act was directed toward influencing the masses by making or distributing writings, recordings,

or pictures or by the installation of wireless telegraph or telephone, or

"(4) if the act was committed abroad or was committed in such a manner that the offender undertook to import writings, recordings or pictures from abroad or for the purpose of distribution within the country." (Law of 24 April 1934; 1934 RGBl I, page 341).

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

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

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

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

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

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

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

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

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

The act was amended on 20 September 1944 as follows:

"In especially serious cases a German may be punished by death." (1944 RGBl. I, page 225).

By the act of 28 June 1935 it was provided:

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

"The offense shall be prosecuted only upon order of the Reichsminister of Justice who shall issue such order in agreement with the Fuehrer's deputy." (1935 RGBl. I, page 839).

By the law of 28 June 1935 it was provided:

"If the main proceedings show that the defendant committed an act which deserves punishment according to the common sense of the people but which is not declared punishable by the law, then the court must investigate whether the underlying principle of a penal law applies to this act and whether justice can be helped to triumph by the proper application of this penal law." (1935, RGBl. I, page 844, Article 267a (Article 2 of the Penal Code.)

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

"Section 1. (1) A German citizen who consciously and unscrupulously, for his own gain or for other low motives, contrary to legal provisions smuggles property abroad or leaves property abroad and thus inflicts serious damage to German economy is to be punished by death. His property will be confiscated. The perpetrator is also punishable, if he commits the misdeed abroad." (1936 RGBl, I, page 999).

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

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

"1. Whoever openly solicits or incites others to evade the fulfillment of compulsory military service in the German or an allied armed force, or otherwise openly seeks to paralyze or undermine the will of the German people or an allied nation to self-

assertion by bearing arms;". (1939 RGBl. I, page 1455).

Under this law the death sentence was mandatory.

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

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

"Section 2.—Whoever deliberately spreads news from foreign radio stations which is designed to undermine German defensive strength will be punished by hard labor and in particularly severe cases by death." (1939 RGBl. I, page 1683).

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

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

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

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

"Section 4.—Whoever commits a criminal act exploiting the extraordinary conditions caused by war is punishable beyond the regular punishment limits with hard labor of up to fifteen years or for life, or is punishable by death if the sound common sense of the people requires it on account of the crime being particularly despicable." (1939 RGBl. I, page 1679).

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

enterprise essential to the defense of the Reich or to the supply of the population. (1939 RGBl. I, page 2319).

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

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

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

> "With regard to all offenders who are guilty of causing serious prejudice or seriously endangering the conduct of war, or the security of the Reich, through an intentional criminal act, a penalty may be imposed in excess of the regular penal limits up to the statutory maximum for a given type of punishment, or hard labor for a term or for life, or death, if the regular statutory maximum limits are insufficient for expiation of the act according to the sentiment of the people. The same shall also apply to all offenses committed by negligence by which one made himself guilty of a particularly grave prejudice or a particularly serious danger to the conduct of war, or to the security of the Reich." (1944 RGBl. I, page 115).

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

> "A strong administration of justice is necessary for the fulfillment of the tasks of the great German Reich. Therefore, I commission and empower the Reich Minister of Justice to establish a National Socialist Administration of Justice and to take all necessary measures in accordance with my directives and instructions made in agreement with the Reich Minister and Chief of the Reich Chancellory and the Leader of the Party Chancellory. He can hereby deviate from any existing law." (1942 RGBl. I, page 535).

The statutes which we have reviewed were merely steps in the process of increased severity of the criminal law and in the development of a loose concept concerning the definition of crime. The

latter concept was especially evident in the statutes concerning the "sound sentiment of the people", crime by analogy, and undermining the defensive strength of the nation. In place of the control of law there was substituted the control of National Socialist ideology as a guide to judicial action.

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

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

> "Article 2. -- Persons who, according to the Law for the Restoration of the Professional Civil Service of 7 April 1933 (RGBl. I, 172), are of non-Aryan descent, may be refused permission to practice law, even if there exists none of the reasons enumerated in the Regulations for Lawyers. The same rule applies in cases, as where a lawyer described in Section 1, clause 2, wishes to be admitted to another court.
>
> "Article 3. -- Persons who are active in the Communistic sense are excluded from the admission to the bar. Admissions already given have to be revoked." (1933, RGBl. I, page 188).

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

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

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

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

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

By other laws, as amended from time to time, non-Aryans were almost completely expelled from public service. The number of non-Aryans in schools and higher institutions of learning was restrcited. (1933 RGBl. I, page 225). Jews were excluded from the homestead law concerning peasantry. (1933 RGBl. I, page 683). Jewish religious communities were regulated. (1938 RGBl. I, page 338). Jews were excluded from certain industrial enterprises and their rights as tenants were restricted. (1939 RGBl. I, page 864, 30 April 1939).

By the act of 2 November 1941 it was provided:

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

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

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

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

And by act of 25 November 1941 it was provided:

"3.—The property of the Jew who is losing his nationality under this amendment shall be forfeited for the benefit of the Reich at the moment he loses his nationality. The Reich further confiscates the property of Jews who are stateless at the moment this amendment becomes effective, and who were last of German nationality, if they have or take up their regular residence abroad. The property thus forfeited shall serve to furthering of all purposes in connection with the solution of the Jewish question.

* * * * * * * * *

"8.—It is for the Chief of the Security Police and the SD (of Reichsfuehrer SS) to decide whether the conditions for confiscation of property are given. The administration and liquidation of the forfeited property is up to the Chief of the County Finance Office, Berlin." (1942 RGBl. I, page 627).

The Decree of 4 December 1941 "Concerning the Organization and

Criminal Jurisdiction against Poles and Jews in the Incorporated Eastern Territories", marks perhaps the extreme limit to which the Nazi Government carried its statutory and decretal persecution of racial and religious minorities, but it also introduces another element of great importance. We refer to the extension of German laws to occupied territory, to purportedly annexed territory, and to territory of the so-called protectorates. The Decree provides:

> "(1) Poles and Jews in the incorporated Eastern territories are to conduct themselves in conformity with the German laws and with the regulations introduced for them by the German authorities. They are to abstain from any conduct liable to prejudice the sovereignty of the German Reich or the prestige of the German people.
>
> "(2) The death penalty shall be imposed on any Pole or Jew if he commits an act of violence against a German on account of his being of German blood.
>
> "(3) A Pole or Jew shall be sentenced to death, or in less serious cases to imprisonment, if he manifests anti-German sentiments by malicious activities or incitement, particularly by making anti-German utterances, or by removing or defacing official notices of German authorities or offices, or if he, by his conduct, lowers or prejudices the prestige or the wellbeing of the German Reich or the German people.
>
> "(4) The death penalty, or in less serious cases imprisonment, shall be imposed on any Jew or Pole:
>
> * * * * * * * * *
>
> "3.—If he urges or incites to disobedience to any decree or regulation issued by the German authorities;
>
> "4.—If he conspires to commit an act punishable under subsections (2), (3), and (4), paragraphs 1 to 3, or if he seriously contemplates the carrying out of such an act, or if he offers himself to commit such an act, or accepts such an offer, or if he obtains credible information of such act, or of the intention of committing it, and fails to notify the authorities or any person threatened thereby at a time when danger can still be averted.
>
> "II.--Punishment shall also be imposed on Poles or Jews if they act contrary to German criminal law or commit any act for which they deserve punishment in accordance with the fundamental principles of German criminal law and in view of the interests of the State in the incorporated Eastern territories.
>
> "III. * * * (2) The death sentence shall be imposed in all cases where it is prescribed by the law. Moreover, in these cases where the law does not provide for the death sentence, it may and shall be imposed if the offense points to parti-

cularly grave for other reasons; the death sentence may also be passed upon juvenile offenders.

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

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

There was promulgated a thirteenth regulation under the Reich Citizenship Law which illustrates the increasing severity by means of which the government was attempting to reach a "solution of the Jewish problem" under the impulsion of the progressively adverse military situation. This regulation, under date of 1 July 1943, provides:

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

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

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

* * * * * * * * *

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

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

Not only did the Nazis enact special discriminatory laws against Poles and Jews and political minorities; they also enacted

discriminatory laws in favor of members of the Party. By the Decree of 17 October 1939, it was provided that "for the area of the Greater German Reich, special jurisdiction in penal matters will be established for:

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

"2. Professional members of the staffs of those higher SS and police chiefs who possess the authority of issuing orders in those units which have been specially designated under numbers 3 to 6 below;

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

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

"5. Members of the SS Junker schools;

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

On 12 March 1938, the German army invaded Austria. The methods employed "were those of an aggressor". (IMT Judgment, page 194). On the next day Austria was incorporated in the German Reich. As a result of the Munich pact of 29 September 1938, and of threatened invasion, Czechoslovakia was compelled to cede the Sudetenland to Germany (IMT Judgment, page 197), and on 16 March 1939, Bohemia and Moravia were incorporated in the Reich as a protectorate. On 1 September 1939, Poland was invaded and thereafter occupied and, later on, Germany, by military force, occupied all or portions of Denmark, Norway, Belgium, The Netherlands, Luxembourg, Yugoslavia, Greece and Russia. These occupations and annexations furnished the motive for an extension into many areas outside the old Reich of the Draconic and discriminatory German laws which had been put in force within the old Reich. By the Act of 14 April 1939, it was provided:

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

"(a) to which German criminal law applies,

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

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

the Protectorate unless otherwise provides."

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

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

> "Section 2.--Whoever disturbs or imperils the ordinary function of an enterprise essential to the defense of the Reich or to the supply of the population in that he made a thing serving the enterprise completely or partially unusable or put it out of commission, shall be punished by hard labor or in especially serious cases by death.
>
> "Section 6.--In the Protectorate of Bohemia and Moravia the provisions of Section 1, 2, * * * and 5 of this Decree are valid also for persons who are not nationals of the German State."

The "Decree on the Extension of the Application of Criminal Law of 6 May 1940" provided in part:

> "German criminal law will be applied to the following crimes committed by a foreigner abroad, independently of a. the laws of the place of commitment:
>
> > "1. Crimes committed while holding a German governmental office, as a German soldier or as member of the Reich Labor Service (Reichsarbeitsdienst) or committed against a holder of a German office of the State or the Party, against a German soldier or a member of the Reich Labor Service, while on duty or relating to his duty;
> >
> > "2. Actions constituting treason or high treason against Germany;* * *".
>
> "Paragraph 153a.--A crime committed by a foreigner abroad will be prosecuted by the public prosecutor only if so demanded by the Reich Ministry of Justice. The public prosecutor may abstain from the prosecution of a crime if the same crime has already been punished abroad and if the punishment has been carried out and the sentence to be expected in Germany would, after deducting the time served abroad, not be heavy."

The Act of 25 November 1941, supra, concerning the confiscation of Jewish propertywas made applicable in the Protectorate of Bohemia and Moravia and in the incorporated Eastern territories. (1941 RGBl. I, page 722). Of greatest significance in this category was the law against Poles and Jews already cited in another connection. The thirteenth regulation under the Reich Citizenship

Law of 1 July 1943, supra, was also made applicable within the Protectorate of Bohemia and Moravia "where German administration and German courts have jurisdiction". It is also made applicable to Jews "who are citizens of the Protectorate". (Article IV).

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

By Decree of 21 March 1933 special courts were established within the district of every court of appeal. Their jurisdiction was rapidly extended. It included the trial of cases arising under the Decree relating to the defense against insidious attacks against the government of the national revolution. (1933 RGBl. I, page 136).

The Decree of 21 March 1933 provided in part:

"Section 3. (1) The special courts shall also be competent if a crime within their jurisdiction represents also another punishable deed.

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

* * * * * * * * *

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

* * * * * * * * *

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

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

"Section 12. * * * (4) The term of the summons (Section 217 of the Code of Criminal Procedure) is three days. It can be

shortened to 24 hours. (1933 RGBl. I, page 136).

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

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

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

"(2) Applications for a reopening of the trial are to be decided upon by the Criminal Chamber of the District Court. The reopening of the trial in favor of the defendant will also take place if there are circumstances which point to the necessity of re-examining the case in the ordinary procedure. The stipulation of Section 363 of the Code of Criminal Procedure remains unaffected. If the application for the reopening of the trial is justified, the trial will be ordered to take place before the competent ordinary court." (1933 RGBl. I, page 136).

Special courts were also vested with jurisdiction under the Law for the Protection against Violent Political Acts of 4 April 1933 under which the death penalty was authorized. (1933 RGBl. I, page 162).

On 1 September 1939 the special courts were given jurisdiction under the Law concerning Listeners to Foreign Radio Broadcasts, and the death sentence was authorized in certain cases. (1939 RGBl. I, page 1683). On 5 September 1939 jurisdiction of the special court was extended to cases of looting, and the death sentence was authorized. Jurisdiction was also extended to cases of criminal acts exploiting the extraordinary conditions caused by the war. That act further provided:

"In all trials by special courts the verdict must be pronounced at once without observation of time limitations if the perpetrator is caught red-handed or if guilt is otherwise obvious." (RGBl. I, page 1679).

On 21 February 1940 the special courts were expressly given jurisdiction concerning:

"1. Crime and offenses committed under the Law of 20 December 1934 concerning treacherous attacks against State

and Party, and concerning protection of Party uniforms;

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

"3. Crimes under the decree concerning extraordinary measures in regard to radio;

"4. Crimes and offenses under the War Economy Decree of 4 September 1939;

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

"6. Crimes under Sections 1 and 2 of the decree of 5 December 1939 against violent criminals." (1940 RGBl. I, page 405).

The decree further provided:

"1. The special court also has jurisdiction over other crimes and offenses, if the prosecution is of the opinion that immediate sentencing by the special court is indicated by the gravity or the outrageousness of the act, on account of the thereby-aroused public sentiment or in consideration of serious threat to public order or security." (Article 14, supra).

"1. In all proceedings before a special court the sentence must be passed immediately without observation of any reprieves, if the delinquent was caught in the very act or if his guilt is self-evident otherwise.

"2. In all other cases the term of summons shall be 24 hours. (Articles 217, 218 of the Reich Code of Criminal Procedure (Reichsstrafprozessordnung))". (Article 23, paragraphs 1, 2, supra).

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

"1. There is no legal appeal against a decision of the special court." (Article 26, paragraph 1, supra).

"The Chief Public Prosecutor may lodge a petition for nullification with the Supreme Court (Reichsgericht) against a final judgment of a judge of the criminal court of the special court, within one year from the date of its becoming final, if the judgment is not justified because of an erroneous application of law on the established facts. (Article 34, supra).

"1. The petition for nullification must be submitted in writing to the Supreme Court. This court will decide thereon by judgment based on a trial. With the consent of the Chief Public Prosecutor it can also reach a decision without trial.

"2. The Supreme Court may order a postponement or an interruption of the execution. It may order arrest or internment even prior to the decision on the petition for nullification. The Criminal Senate (Strafsenat) composed of three members including the president, will decide thereon without a trial, with reservations as to the regulations of Article 124, Section 3 of the Reich Code of Criminal Procedure." (Article 35, paragraphs 1, 2, supra), (1940 RGBl. I, page 405).

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

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

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

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

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

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

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

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

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

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

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

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

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

"XV. Within the meaning of this Decree, the term 'Poles' includes 'Schutzangehoerige' or those who are stateless." (1941 RGBl. I, page 759).

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

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

"When the Supreme Court acquitted three of the four defendants charged with complicity in the Reichstag fire, its jurisdiction in cases of treason was thereafter taken away and given to a newly-established People's Court consisting of two judges and five officials of the Party." (IMT Judgment, page 179).

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

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

"(2) Decisions of the People's Court are made by five members during the trial, by three members outside the trial. This includes the president. The president and one further member must be qualified judges. Several senates may be established." (1934 RGBl. I, page 341).

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

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

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

* * * * * * * * *

"Section 5. (2) Against the decisions of the People's Court no appeal is permitted."

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

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

"2. Furthermore, the Supreme Reich Court and the People's Court will carry out jurisdiction for the Protectorate Bohemia and Moravia." (1939 RGBl. I, page 752).

The extent of jurisdiction was defined as follows:

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

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

"1. to which German criminal law applies,

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

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

"Section 8. The German courts in the Protectorate of Bohemia and Moravia administer justice in the name of the German people." (1939 RGBl. I, page 752).

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

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

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

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

* * * * * * * * *

"Section 5. (1) The Special Senate of the People's Court consists of the president and of four members." (1939 RGBl. I, page 1841).

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

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

"German criminal law will be applied to the crime of a German national, no matter whether it is committed in Germany or abroad. For a crime committed abroad, which according to the laws of the place of commitment is not punishable, German criminal law will not be applied, unless such action would constitute a crime according to the sound sentiment for justice of the German people on account of the particular conditions prevailing at the place of commitment." (1940 RGBl. I, page 754, Article 1, paragraph 3).

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

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

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

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

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

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

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

"2. Actions constituting treason or high treason against Germany",

and in other special cases.

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

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

"Section 11. A preliminary court investigation will not take place. ***", (1933 RGBl. I, page 136).

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

"Article I, paragraph 12. Limited admittance of defense counsel. (1) In any one criminal case, several lawyers or professional representatives may not act side by side as chosen counsel for one defendant.

"(2) The rules about obligatory representation by defense counsel do not apply. The presiding judge appoints a defense counsel for the whole or part of the proceedings if the difficulty of the material or legal problems require assistance by a defense counsel, or if the defendant, in due consideration of his personality, is unable to defend himself personally." (1944 RGBl, I, page 339)

On 16 February 1934 it was provided that:

"Article 2. The President of the Reich has the prerogatives for nulla prosequi and clemency formerly held by the States. Amnesties can be promulgated only by Reich law." (1934 RGBl, I, page 91)

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

"Even if the judgment has been contested only by

the defendant or his legal representative, or by the prosecution in his favor, it can be changed against the interests of the defendant. (Article 358, Law of 28 June 1935; 1935 RGBl, I, page 844)

"In penal matters for which the People's Court, the Superior District Court, or the Court of Assizes are competent, pre-examination is conducted upon application of the prosecution, if, after due consideration, the prosecution thinks it necessary.

"In other penal matters as well, pre-examination takes place on application of the prosecution. The prosecution should make such an application only of unusual circumstances make it necessary to have a judge conduct such pre-examination." (Law of 28 June 1935; 1935 RGBl, I, page 844)

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

"A criminal case on which verdict has been passed must not again become the subject of another criminal proceeding. This exclusive effect pertains to the subject of the case both as regards the crime and the criminal *** According to the findings of the German Supreme Court and to the prevailing theory in accord with these findings, the effect of ne bis in idem includes the history of the case submitted to the court for verdict. *** This theory, however, leads to unbearable consequences. In order to avoid these unbearable consequences some courts, recently, have permitted the breach of the principle against double jeopardy in exceptional cases where jeopardy of a second trial is necessitated by the sound sense of justice." * * * - German Criminal Procedure, by Heinrich Henkel, (Hamburg 1943)

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

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

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

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

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

On 31 August 1942 a decree was issued by the defendant Schlegelberger as Reich Minister of Justice in charge of the Ministry:

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

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

the main proceeding.

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

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

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

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

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

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

"II. 1. The court martial consists of a judge of a criminal court as president and of a member of

the political leader corps, or of a leader of another structural division of the NSDAP and an officer of the Wehrmacht, the Waffen SS, or the police, as associate judges. * * *

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

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

(1945 RGBl. I, page 30)

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

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

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

"Section 2. If the offense directly injures the

interests of the armed forces, the Reich Leader of the SS and Chief of the German Police in the Reich Ministry of the Interior, and the Chief of the Supreme Command of the Armed Forces shall reach an agreement as to whether the case shall be prosecuted by an SS and Police Court or by a military court." (1942 RGBl, I, page 475)

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

"When a decision is made about a legal question, the Reich Court can deviate from a decision laid down before this law went into effect." (Law of 28 June 1935; 1935 RGBl. I, page 844)

The Law in Action

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

defendants. Concerning the first principle, Dr. Jahrreiss said:

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

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

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

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

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

international law to the Germans."

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

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

> "I do expect one thing: That the nation gives me the right to intervene immediately and to take action myself wherever a person has failed to render unqualified obedience. * * * "
>
> "I therefore ask the German Reichstag to confirm expressly that I have the legal right to keep everybody to his duty

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

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

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

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

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

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

The conception of Hitler as the Supreme Judge was supported by the defendant Rothenberger. We quote:

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

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

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

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

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

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

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

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

The defendant Schlegelberger, on 10 March 1936, said:

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

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

"So also with us the conviction has grown in these ten years in which the Fuehrer has led the German people that the Fuehrer is the Chief Justice and the Supreme Judge of the German people."

On 17 February 1943 the defendant Under-Secretary Dr. Rothenberger summed up his legal philosophy with the words:

"The judge is on principle bound by the law. The laws

are the orders of the Fuehrer."

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

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

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

The Ministry of Justice was actually conscious of the interference by Hitler in the administration of criminal law. On 10 March 1941 Schlegelberger wrote to Reich Minister Lammers in part as follows:

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

On the same date Schlegelberger wrote to Hitler in part as follows:

> "In the course of the verdicts pronounced daily there are still judgments which do not entirely comply with the necessary requirements. In such cases I will take the necessary steps. * * *
>
> "Apart from this it is desirable to educate the judges more and more to a correct way of thinking, conscious of the national destiny. For this purpose it would be invaluable, if you, my Fuehrer, could let me know if a

verdict does not meet with your approval. The judges are responsible to you, my Fuehrer; they are conscious of this responsibilities and are firmly resolved to discharge their duties accordingly. Heil, my Fuehrer!"

Hitler now only complied with the foregoing request, but proceeded beyond it. Upon his personal orders persons who had been sentenced to prison terms were turned over to the Gestapo for execution. We quote briefly from the testimony of Dr. Hans Gramm, who for many years was personal referent to the defendant Schlegelberger, and who testified in his behalf.

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

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

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

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

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

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

By reference to case histories we will illustrate three different methods by which Hitler, through the Ministry of Justice, imposed his will in disregard of judicial proceedings. On Schlitt had been sentenced to a prison term, as a result of which Schlegelberger received a telephone call from Hitler protesting the sentence. In response the defendant Schlegelberger on 24 March 1942 wrote in part as follows:

> "I entirely agree with your demand, my Fuehrer, for very severe punishment for crime, and I assure you that the judges honestly wish to comply with your demand, Constant instructions in order to strengthen them in this intention, and the increase of threats of legal punishment, have resulted in a considerable decrease of the number of sentences to which objections have been made from this point of view, out of a total annual number of more than 300,000.
>
> "I shall continue to try to reduce this number still more, and if necessary, I shall not shrink from personal measures, as before.
>
> "In the criminal case against the buildings technical Ewald Schlitt from Wilhelmhaven, I have applied through the Public Prosecutor for an extraordinary plea for nullification against the sentence, at the Special Senate of the Reich Court. I will inform you of the verdict of the Special Senate immediately it has been given."

On 6 May, 1942, Schlegelberger informed Hitler that the ten-year sentence against Schlitt was "quashed within ten days and that Schlitt was sentenced to death and executed at once".

In the case against Anton Scharff, the sentence of ten years penal servitude had been imposed. Thereupon, on 26 May 1941, Bormann wrote to Dr, Lammers: "The Fuehrer believes this sentence entirely incomprehensible * * * . The Fuehrer requests that you inform State Secretary Schlegelberger again of his point of view."

On 26 June 1941, defendant Schlegelberger wrote Dr. Lammers:

> "I am very obliged to the Fuehrer for informing me, on my request, of his conception of atonements of blackout crimes in reference to the sentence of the Munich Special Court against Anton Scharff. I shall re-instruct the presidents of the courts of appeal and the Chief Public Prosecutors of this conception of the Fuehrer as soon as possible."

As a final illustration of a general practice, we refer to the case of the Jew Luftgas, who had been sentenced to two nad one-half years imprisonment for hoarding eggs. On 25 October 1941 Lammers notified Schlegelberger: "The Fuehrer wishes that Luftgas be sentenced to death". On 29 October 1941 Schlegelberger wrote Lammers: " * * * I have handed over to the Gestapo for the purpose of execution the Jew Luftgas who had been sentenced to two and one-half years of imprisonment * * * ".

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

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

In September 1942 Thierack commenced the systematic distribution to the German judges of Richterbriefe. The first letter to the judges under date of 1 October 1942 called their attention to the fact that Hitler was the Supreme Judge and that "leadership and judgeship have related characters".

We quote:

> "A corps of judges like this will not slavishly use the crutches of law. It will not anxiously search for support by the law, with a satisfaction in its

> responsibility, it will find within the limits of the law the decision which is the most satisfactory for the life of the community."

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

A letter to the judges of 1 October 1942 discussed a case decided in a district court on 24 November 1941. A special coffee ration had been distributed to the population of a certain town.

A number of Jews applied for the coffee ration, but did not receive it, being "excluded from the distribution per se". The food authorities imposed fines upon the Jews for making the unsuccessful application. In 500 cases the Jews appealed to the court and the judge informed the food authorities that the imposition of a fine could not be upheld for legal reasons, one of which was the statute of limitations. In deciding favorably to the Jews, the court wrote a lengthy opinion stating that the interpretation on the part of the food authorities was absolutely incompatible with the established facts. We quote, without comment, the discussion of the Reich Minister of Justice concerning the manner in which the case was decided:

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

A Richterbrief also discusses the case of a Jew who, after the "Aryanization of his firm", attempted to get funds transferred to Holland without a permit. He also attempted to conceal some of his assets. Concerning this case the judges of Germany received the following "guidance":

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

Space does not permit the citation of other instances of this form of perverted political guidance of the courts. Notwithstanding solemn protestations on the part of the Minister that the independence of the judge was not to be affected, the evidence satisfies us beyond a reasonable

doubt that the purpose of the judicial guidance was siniter and was known to be such by the Ministry of Justice and by the judges who received the directions. If the letters, the Judges' letter, had been written in good faith with the honest purpose of aiding independent judges in the performance of their duties, there would have been no occasion for the carefully guarded secrecy with which the letters were distributed. A letter of 17 November 1942 instructs the judges that the letters are to be "carefully locked up to avoid that they get into the hands of unauthorized persons. The receivers are subject to official secrecy as far as the contents of the judges' letters are concerned."

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

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

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

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

He continues:

"I will try to illustrate this with individual cases:

"1. If a Jew -- and a leading Jew at that -- is charged with high treason -- even if he is only an accomplice therein22, he has behind him the hate and the will of Jewry to exterminate the German people. As a rule this will therefore be high treason and must be punished by the death penalty."

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

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

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

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

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

The threat alone of the removal was sufficient to impair the independence of the judges, but the evidence discloses that measures were actually carried out for the removal or transfer of judges who proved unsatisfactory from the Party standpoint. On 29 March 1941 Schlegelberger received a letter from the Chief of the Reich Chancellery protesting against the sentence which had been imposed against the Polish farmhand Wojciesk. The Court at

Lueneburg had recognized some extenuating circumstances in the case, Schlegelberger was advised as follows:

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

On 1 April 1941 Schlegelberger wrote to the Chief of the Reich Chancellery informing him that "by means of a circular with the order for immediate transmittal to all judges and public prosecutors, I brought the mistake in the viewpoint as it is shown in this passage of the court's statement to the knowledge of the penal justice without delay. I consider it impossible that such an incident will occur again."

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

> "* * * I beg to inform you that the Presiding Judge of the Criminal Division which passed the sentence in the case of the Polish farmhand Wolay Wojciesk, is no longer chairman, and the two associate judges have been replaced by other associate judges."

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

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

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

In connection with the discussion of removals, we find a list of proposed staff reductions in which seventy-five judges and prosecutors are named. Among the reasons stated for reduction we find the following: Persons of Jewish ancestry, persons having Jewish wife, lack of cooperation

with Party, religious grounds, not a Party member, pro-Jewish or pro-Pole.

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

On 22 July 1942 Reich Minister Dr. Goebbels addressed the members of the People's Court. The speech was reported in part as follows:

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

On 14 September 1934 Hans Frank, Reichsleiter of the Nazi Party and President of the Academy of German law, said:

"by means of the law of 18 June 1935, the liberalist foundation of the old Penal Code: 'no penalty without a law' was definitly abandoned and replaced by the postulate: 'no crime without punishment', which corresponds to our conception of the law."

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

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

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

On 10 March 1936 the defendant Schlegelberger said:

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

Reich Minister Thierack on 5 January 1943 said:

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

In the words of the defendant Rothenberger the project was "to organize Europe new and to create a new world philosophy". Again, he said, we quote:

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

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

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

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

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

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

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

The defendant Schlegelberger spoke with more caution:

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

The defendant Lautz testified concerning attempted interference

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

A reliable witness, Dr. Hanns Anschuetz, testified:

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

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

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

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

In view of the conclusive proof of the sinister influences which were in constant interplay between Hitler, his Ministers, the Ministry

of Justice, the Party, the Gestapo, and the Courts, we see no merit in the suggestion that Nazi judges are entitled to the benefit of the Anglo-American doctrine of judicial immunity. The doctrine that judges are not personally liable for their judicial actions is based on the concept of an independent judiciary administering impartial justice. Furthermore, it has never prevented the prosecution of a judge for malfeasance in office. If the evidence cited supra does not demonstrate the utter destruction of judicial independence and impartiality , then we "never writ nor no man ever proved." The function of the Nazi Courts was judicial only in a limited sense. They more closely resembled administrative tribunals acting under directives from above in a quasi-judicial manner.

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

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

1. Cases against proven habitual criminals;
2. Cases of looting in the devastated areas of Germany; committed after air raids and under cover of blackout;

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

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

5. Crimes of treason and high treason;

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

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

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

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

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

It is persuasively urged that the fact that Germany was waging a criminal war of aggression colors all of these acts with the dye of criminality. To those who planned the war of aggression and who were charged with and were guilty of the crime against the peace as defined in the Charter, this argument is conclusive, but these defendants are not charged with crimes against the peace nor has it been proven here that they knew that the war which they were supporting on the home front was based upon a criminal conspiracy or was per se a violation of international law. The lying propaganda of Hitler and Goebbels concealed even from many public officials the criminal plans of the inner circle of aggressors. If we should adopt the view that by reason of the fact that the war was a criminal war of aggression every act which would have been legal in a defensive war was illegal in this one, we would be forced to the conclusion that every soldier who marched under orders into occupied territory or who fought in the homeland was a criminal and a murderer. The rules of land warfare upon which the prosecution has relied would not be the measure of conduct and the pronouncement of guilt in any case would become a mere formality. In the opinion of the Tribunal the territory occupied and annexed by Germany after September 1939 never became a part of Germany, but for that conclusion

we need not rest upon the doctrine that the invasion was a crime against the peace. Such purported annexations in the course of hostilities while armies are in the field are provisional only, and dependent upon the final successful outcome of the war. If the war succeeds, no one questions the validity of the annexation. If it fails, the attempt to annex becomes abortive. In view of our clear duty to move with caution in the recently charted field of international affairs, we conclude that the domestic laws and judgments of Germany which limited free speech in the emergency of war cannot be condemned as crimes against humanity merely by invoking the doctrine of aggressive war. All of the laws to which we have referred could be and were applied in a discriminatory manner and in the case of many, the Ministry of Justice and the courts enforced them by arbitrary and brutal means, shocking to the conscience of mankind and punishable here. We merely hold that under the particular facts of this case we cannot convict any defendant merely because of the fact, without more, that laws of the first four types were passed or enforced.

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

We have expressed the o ini n that the purported annexation of territory in the East which occurred in the course of war and while opposing armies were still in the field was invalid and that in point of law such territory never became a part of the Reich, but merely remained in German military control under belligerent occupancy. On 27 October 1939 the Polish Ambassador at Washington informed the Secretary of State that the German Reich had decreed the annexation of part of the territory of the Polish Republic. In acknowledging the receipt of this information, Secretary Hull stated that he had "taken note of the Polish Government's declaration that it considers this act as illegal and therefore null and void" (Department of State Bulletin, 4 November 1939, page 458; Hyde International Law, Vol. 1 (2d ed.), page 391). The foregoing fact alone demonstrates that the Polish Government was still in existence and was recognized by the Government of the United States. Sir Arnold D. McNair expressed a principle which we believe to be incontestable in the following words:

> "A purported incorporation of occupied territory by a military occupant into his own kingdom during the war is illegal and ought not to recieve any recognition, ***" (Legal Facts of War (2d ed.), (Cambridge, 1944), page 320, Note).

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

These considerations, however, do not justify the action of the Reich prosecutors who in numerous cases charged Poles with high treason under the following circumstances: Poles were charged with attempting to escape from the Reich. The indictments in these cases alleged that

the defendants were guilty of attempting, by violence or threat of violence, to detach from the Reich territory belonging to the Reich, contrary to the express provisions of Section 80 of the law of 24 April 1934. The territory which defendants were charged with attempting to detach from the Reich consisted of portions of Poland, which the Reich had illegally attempted to annex. If the theory of the German prosecutors in these cases were carried to its logical conclusion it would mean that every Polish soldier from the occupied territories fighting for the restoration to Poland of territory belonging to it would be guilty of high treason against the Reich and on capture, could be shot. The theory of the Reich prosecutors carries with it its own refutation.

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

Membership in Criminal Organizations

C.C. Law 10 provides:

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

* * * * * * * * * * * * *

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

Article 9 of the Charter provides:

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

Article 10 is as follows:

"In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military, or occupation courts. In any such case the criminal nature of the group or organization is considered proved

and shall not be questioned." (IMT Charter, Articles 9 and 10).

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

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

We quote further from the opinion in that case:

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

"A criminal organization is analogous to a criminal conspiracy in that the essence of both is cooperation for criminal 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." (IMT Judgment, Volume I, pages 255,256.)

The Tribunal in that case recommended uniformity of treatment so far as practicable in the administration of this law, recognizing,

however, that discretion in sentencing is vested in the courts. Certain groups of the Leadership Corps, the SS, the Gestapo, the SD, were declared to be criminal organizations by the Judgment of the first International Military Tribunal. The test to be applied in determing the guilt of individual members of a criminal organization is repeatedly stated in the opinion of the first International Military Tribunal. The test is as follows: those members of an organization which has been declared criminal "who became or remained members of the organization with knowledge that it was being used for the commission of acts declared criminal by Article 6 of the Charter, ro who were personally implicated as members of the organization in the commission of such crimes" are declared punishable.

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

> "The 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 or 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."
>
> (Trial of the Major War Criminals, Volume I, page 261.)

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

> "In dealing with the SD the Tribunal includes Amter III, VI, and VII of the RSHA, and all other members of the SD, including all local representatives and

agents, honorary or otherwise, whether they were technically members of the SS or not, but not including honorary informers who were not members of the SS, and members of the Abwehr who were transferred to the SD." (Trial of the Major War Criminals, Volume I, pages 267-268).

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

"In dealing with the SS the Tribunal includes all persons who had been officially accepted as members of the SS including the members of the Allgemwine SS, members of the Waffen SS, members of the SS Totenkopf V rbaende, and the members of any of the different police forces who were members of the SS. The Tribunal does not include the so-called SS riding units." (Trial of the Major War Criminals, Volume I, page 273).

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

Crimes Under the Night and Fog Decree

Paragraph 13 of Count II of the indictment charges in substance that the Ministry of Justice participated with the OKW and the Gestapo in the execution of the Hitler decree of "Night and Fog" (Nacht und Nebel) whereby civilians of occupied countries accused of alleged crimes in resistance activities against German occupying forces were spirited away for secret trial by special courts of the Ministry of Justice within the Reich; that the victim's whereabouts, trials, and subsequent disposition were kept completely secret, thus serving the dual purpose of terrorizing the victim's relatives and associates and barring recourse to evidence, witnesses, or counsel for defense. If the accused was acquitted, or if convicted, after serving his sentence, he was handed over to the Gestapo for "protective custody" for the duration of the war. These proceedings resulted in the torture, ill treatment, and murder of thousands of persons. These crimes and offenses are alleged to be war crimes in violation of certain established international rules and customs of warfare and as recognized in Control Council Law No. 10.

Paragraph 25 of Count III of the indictment incorporates by reference paragraph 13 of Count II of the indictment and alleges that the same acts, offenses, and crimes are crimes against humanity as defined by Allied Control Council Law No. 10. The same facts were introduced to prove both the war crimes and crimes against humanity and the evidence will be so considered by us.

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

Paragraph 8 of the Count II of the indictment dharges all of the defendants with having committed the war crimes set forth in paragraphs 9 to 18 inclusive of Count II, in that they were principals in, acces-

sories to, ordered, abetted, took a consenting part in, and were connected with plans and enterprises involving the commission of actocities and offenses against persons, including but not limited to murder, illegal imprisonment, brutalities, atrocities, transportation of civilians and other inhumane acts which were set out in paragraphs 9 to 18 inclusive of the indictment as war crimes against the civilian population in occupied territories.

Paragraph 29 of Count III of the indictment charges all of the defendants with having committed the same acts as contained in paragraph 8 of Count II as being crimes against humanity. Paragraphs 21 to 30 inclusive of Count III refer to and adopt the facts alleged in paragraphs 9 to 18 inclusive of Count II, and thus all defendants are charged with having committed crimes against humanity upon the same allegations of facts as are contained in paragraphs 9 to 18 inclusive of Count II.

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

The Night and Fog Decree (Nacht und Nebel Erlass) arose as the plan or scheme of Hitler to combat so-called resistance movements in occupied territories. Its enforcement brought about a systematic rule of violence, brutality, outrage, and terror against the civilian populations of territories overrun and occupied by the Nazi armed forces. The IMT treated the crimes committed under the Night and Fog decree as war crimes and found as follows:

> "The territories occupied by Germany were administered in violation of the laws of war. The evidence is quite over-

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

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

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

The Tribunal also found that:

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

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

the appalling cruelties and horrors found to have been committed therein. Such concentration camps were used extensively for the NN prisoners in the execution of the Night and Fog decree as will be later shown.

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

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

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

The evidence herein adduced sustains the foregoing findings and conclusions of the IMT. In fact the same documents, or copies thereof, referred to and quoted from in the IMT Judgment were introduced in evidence in this case. In addition, a large number of captured documents and oral testimony were introduced showing the origin and purpose

of the Night and Fog plan or scheme, and showing without dispute that certain of the defendants with full knowledge of the illegality of the plan or scheme under international law of war and with full knowledge of the intended terrorism, cruelty, and other inhumane principles of the plan or scheme became either a principal, or aided and abetted, or took a consenting part in, or were connected with the execution of the illegal, cruel, and inhumane plan or scheme.

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

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

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

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

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

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

In addition to the Hitler decree there were also enclosed in Keitel's letter of 12 December 1941 the "First Decree" of directives concerning the prosecution of crimes against the Reich or occupation power in occupied territories under the Hitler decree. This First Decree was signed by Keitel and was marked "Secret."

It contains seven sections relating to the crimes intended to be prosecuted under the Hitler decree and the manner and place of trials and execution of sentences. Section I of the First Decree declares that the directive will be as a rule applicable in cases of:

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

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

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

Section III of the First Directive declares that the judge in agreement with the Intelligence Office of the Wehrmacht decides whether or not the condition for a trial in occupied territories exists.

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

Section V declares that "the judicial proceedings in Germany will be carried out under strictest exclusion of the public because of the danger for the Stat's security. Foreign witnesses may be questions at

the main proqeedings only with the permission of the Wehrmacht."

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

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

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

On 16 December 1941, officials of the Ministry of Justice (Schaeffer and Grau, associates of defendant Mettgenberg in his Department III) drafted a proposed order for the execution of the Hitler NN decree by the Ministry of Justice, the courts, and the Reich prosecution. This was forwarded to General Lehmann, head of the OKW legal department for his approval.

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

"Circular Decree:

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

"1. Competent for the handling of the cases transferred to ordinary courts including their eventual re-trial are: the Special Court and the Chief Prosecutor in Cologne as far as they originate from the occupied Belgian and Netherland territories, the Special Court and the Chief Prosecutor in Dortmund; as far as they originate from the occupied Norwegian territories, the Special Court and the Chief Prosecutor in Kiel; for the rest, the Special Court and the Attorney General at the County Court, Berlin. In special cases I reserve for myself the decision of competence for each individual case.

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

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

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

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

This supplementary decree was signed for Dr. Freisler by Chief Secretary of the Ministerial Office.

The latter of Under-Secretary of State Freisler to Minister of Justice Thierack, dated 14 October 1942, shows that in accordance with his promise to Thierack he had conducted preliminary proceedings through Reich departmental officials and with Lehmann, Chief of the Legal

Division of the OKW, concerning the matter of the Ministry of Justice taking over the Night and Fog proceedings under the Hitler decree. Such top secret negotiations had lasted for several months. The last conference was held on 7 February 1942. On that day the final decree was drafted, approved, and was "the Decree of 7 February 1942, signed by Schlegelberger" as Acting Minister of Justice. Defendant Schlegelberger testified that he signed the decree. He thereby brought about the enforcement by the Ministry of Justice, the courts, and the prosecutors of a systematic rule of violence, brutality, outrage, and terror against the civilian populations of territories overrun by the Nazi armed forces resulting in the ill-treatment, death, or imprisonment of thousands of civilians of occupied territories.

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

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

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

He further testified that Hitler had:

"used the expression that the military justice indeed sabotaged his conduct of war. These reproaches first emanated from the Polish campaign. There the Military Justice - the Justice Administration of the Armed Forces - were reprimanded that they had not acted sufficiently severe against members of bands. The next reprimands of that kind occurred during the French campaign."

Lehmann further testified that Keitel had passed on to him a directive which he had received from Hitler in October of 1941. This directive was quite long in which Hitler referred to the resistance movement in France, which he stated was a tremendous danger for the German troops and that new means would have to be found to combat this danger. There was therefore a discussion of the resistance movement. The army was opposed to the plan because it involved them in violation of international law of war. It was then suggested in the discussion that the Gestapo should be given that power. But even in this Hitler's ideas were overruled. It was at this point that he, Lehmann, suggested that the matters:

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

Lehmann further testified that Hitler

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

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

"I discussed with him the proposition that the cases which the military courts in France would not keep should be taken over and dealt with by and tried by the civilian justice administration. I can only say that Freisler told me that first he had to think it over; and secondly, he had to discuss it with Under-Secretary Schlegelberger who was at that time in charge of the Ministry. *** Freisler told me that he had to ask the man who was in charge of the Ministry, the Acting Minister *** for permission and authority on behalf of the Ministry of Justice to try the Nacht und Nebel cases. *** As I was informed about the routine in the Ministry, Schlegelberger, who was then Acting Minister of Justice, was in my opinion the only person who could consent to take over these Nacht und Nebel cases by the Ministry of Justice."

Lehmann further testified:

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

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

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

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

"Whenever Mr. von Ammon had doubts concerning the handling of individual cases, we talked these questions over together, and when they had major importance, referred them to higher officials for decision. When he had no doubts, he could decide all matters himself. We got these cases originally from the Wehrmacht and later from the Gestapo. The distribution of these cases to the competent Special Courts or to the People's Court, von Ammon decided independently. Von Ammon also had to review the indictments and sentences and to obtain the Minister's decision concerning the execution of death sentences. The question posed by the exclusion of foreign means of evidence was a legal problem of the first order. Since it had been prescribed from above, the Ministry of Justice had no freedom of disposition in this matter. This is another one of the

reasons why we should not have taken over these things."

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

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

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

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

"I must admit that, in dealing with these matters, I did not particularly feel at ease. It was my intention to get the best out of this thing and to emphasize humanitarian considerations as much as possible in these hard measures. I have seen from the first Nuernberg trials that the court has declared the 'Night and Fog' Decree as being against international

law and that Keitel, too, declared that he had been aware of the illegal nature of this decree. Freisler, though, represented it to us in such a manner as to create the impression that the decree was very hard but altogether admissible."

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

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

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

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

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

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

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

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

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

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

Freisler further states:

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

By his supplemental directive of 28 October 1942, Thierack made note of the fact that the

"jurisdiction of the People's Court (No. 1, 1 and 2 of the additional circular directives of the 14th of October 1942)" had been extended to NN cases. Thierack's letter, dated 25 October 1942 to defendant Lautz,

copy to von Ammon, established and expanded jurisdiction of the People's Court over NN cases.

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

Later NN cases were sent to the Special Court at Hamm, to German Special Courts at Breslau and Kattowice, Poland, and to Silesia and other places as will be later shown herein.

Concentration Camps

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

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

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

"This crowding had been caused by numerous NN prisoners from France and Belgium. Among them was the French General Vaillant who died in the prison of old age and of a heart disease. Owing to the overcrowding of the penitentiary, it was impossible to avoid the

frequent outbreak of diseases, such as pulmonary tuberculosis, consumption and, of course many cases of undernourisment. The very poor medical care was a serious disadvantage; the doctor showed up only two or three times a week. Sixty-two inmates died during the last months of the war. Many of them, of course, came in already sick. During the last months, a criminal convict was employed as physician. He was a morphinomaniac and a man of very low character.

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

The affidavit of Joseph Prey, head guard at the Amberg prison, confirmed by his oral testimony, states that foreigners, Jews, and NN prisoners at Amberg prison, which had a capacity of 900 to 1,100 were incarcerated there. Yet shortly before the collapse there were 2,000 prisoners, of whom 800 to 900 prisoners were Polish, and NN prisoners who included Frenchmen, Dutchmen, and Belgians. From time to time by secret decree prisoners were transferred to the concentration camp at Mauthausen. Defendant Engert, the official representative of the Department of Justice, visited and officially and inspected the prison and knew of these conditions.

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

and that he was in charge of the task of transferring prisoners and knew their nationality and the character of crime charged against them.

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

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

"As to the prisoners who were with me at Ravensbruck, as far as I can remember there was only an Italian woman of Belgian descent who was treated well, better than we were. However, in the penitentiary of Cottbus, as well as in the prison of Moabit, I met many foreegners. In the penitentiary of Cottbus, there alone were 300 French women who were sentenced to death, and five Dutch women sentenced to death who, after a week or twoo were pardoned to penitentiary terms and who I saw in the courtyard. The 200 French women sentenced to death were sent to Ravensbruck at the end of November 1944. The night before they were transported they had to sleep on a bare stone floor. One of the auxilliary wardens, who was also an interpreter for them and who had a great deal of courage and a kind heart, came to me in order to ask us political prisoners to give them our blankets, which we certainly did."

She further testified:

"I know and have seen for myself that, for instance, in Moabit, some of the brutal wardens kicked them and shouted at them for reasons

which seemed very, very unjust because these women did not understand what they were supposed to do."

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

Trials Under NN Decree

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

The trials of the accused NN persons did not approach even a semblande of fair trial or justice. The accussed NN persons were arrested and secretly transported to Germany and other countries for trial. They were held incommunicado. In many instances they were denied the right to introduce evidence, to be confronted by witnesses against them, or to present witnesses in their own behalf. They were tried secretly and denied the right of counsel of their own choice, and usually denied the aid of any counsel. No indictment was served in many instances and the accused learned only a few moments before the trial of the nature of the alleged crime for which he was to be tried. The entire proceedings from beginning to end were secret and no record was allowed to be made of them. These facts are proved by captured documents and evidence adduced on the trial; to some of which we now advert.

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

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

These sentences were later pronounced.

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

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

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

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

A letter dated 9 February 1943, Berlin, to the President of the People's Court, Chief Public Prosecutor at Kiel and Cologne and Chief Public Prosecutor at Hamm, states that for the purpose of carrying out the Night and Fog decree or directive:

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

In connection with the foregoing matter, a secret note to defendant von Ammon, dated 18 January 1941, suggests that a regulation concerning counsel for NN prisoners should be drafted. A litter dated 4 Jan. 1943 states that in accordance with the power granted under the Fuehrer's order of 7 December 1941:

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

A letter dated 21 April 1943, Berlin, by Thierack Minister of Justice states that

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

A letter by Thierack to the President of the People's Court, Berlin, dated 13 May 1943, states that:

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

A Draft of an extensive secret order or directives of the Reich Minister of Justice, dated 6 March 1943, covering secret NN procedure was sent to and initialed by or for heads of Ministry Divisions III and IV (the defendants Mettgenberg and von Ammon), Division V (headed by defendant Engert), and Division VI (headed by defendant Altstoetter). The directives instructed all so concerned to take further measures "in order not to endanger necessary top secrecy of NN procedure". Separate copues of this order, dated 8 March 1943, were sent to the aforementioned Ministry Divisions, including Division VI, headed by defendant Altstoetter, who admits having seen and executed the directives, to defendant von Ammon and to, among others, the Chief Reich Prosecutor at the People's Court)defendant Lautz), the Attorneys General in Celle, Duesseldorf, Frankfurt on Main, Hamburg, Hamm, Kiel, and Cologne and the Attorney General at the Prussina Court of Appeal and for the attention of Presidents of the People's Court, district of Appeal of Hamm, Kiel, and Cologne, and the Russian Court of Appeals at Berlin. Among the measures of secrecy included in the order or directives were the

following:

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

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

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

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

"Farewell letters by NN prisoners as well as other letters must be mailed. They have to be forwarded to the prosecution who will keep them until further notice.

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

"The relatives will not be informed of the death and especially of the execution of an NN prisoner. The press will not be informed of the execution of a death sentence, nor must the execution of a death sentence be publicly announced by posters.

"The bodies of executed NN prisoners or prisoners who died from other causes have to be turned over to the State Police for burial.

Reference must be made to the existing regulations on secrecy. It must be pointed out especially that the graves of NN prisoners must not be marked with the names of the deceased.

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

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

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

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

A note signed by the defendant von Ammon, dated 2 October 1947, states that NN prisoners were often ignorant of charges against them until a few moments before the trial. He further states that Reich Public Prosecutor Lautz asked him whether there were any objections to the

The defendant von Ammon attended conference with Public Prosecutors in Breslau and Kattowice (Poland) on 18 and 19 February 1944, concerning housing of NN prisoners and possibility of transferring NN cases from the Netherlands, Belgium, and Northern France to special courts in Poland for trial; von Ammon reported the results of these conferences in detail to, among others, the defendant Klemm (Under-Secretary) and personally wrote on his report that he had secured appropriate Gauleiter's concurrence to the proposal transfer. Shortly thereafter the Ministry of Justice issued a decree endorsed to the defendant Mettgenberg for signature, and submitted twice to von Ammon, for information and co-signature, whereby these Dutch, Belgian, and Northern French NN cases were to be transferred to Silesia for trial. In response to this decree, von Ammon was personally notified that the defendant Joel (then General Public Prosecutor at Hamm) feared objections from the Wehrmacht because of the longer transportation involved in the transfer.

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

> "If in the main trial of an NN proceeding it appears that the accused is innocent or if his guilt has not been sufficiently established, then he is to be handed over to the Secret State Police; the Public Prosecutor informs the Secret State Police about his opinion whether the accused can be released and return into the occupied territories, or whether he is kept under detention. The secret State Police decide which further actions are to be taken.

"Accused who were acquitted or whose proceedings were closed in the main trial, or who served a sentence during the war, are to be handed to the Secret State Police for detention for the duration of the war."

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

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

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

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

> "The Chief of Public Prosecutor submits record to the Chief Reich Prosecutor only if, according to previous experience or according to directives laid down by the Chief Reich Prosecutor, it is to be expected that he will take over, or partly take over the case.
>
> "As a rule, even now when the draft of the indictment is submitted for approval to the Reich Minister of Justice, the records are not enclosed. The decision rests with me, to whom the documents are brought by courier."

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

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

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

Disposition of NN cases.

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

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

2. Charges filed by Senior Public Prosecutors as follows: At Kiel, nine cases with 175 defendants; at Essen, 254 cases with 860 defendants; at Cologne, 173 cases with 257 defendants; by Chief Public Prosecutor at the People's Court (Lautz), 111 cases with 494 defendants.

3. Sentences passed by Special Courts at Keil, eight on 168 defendants; at Essen, 221 cases with 475 defendants; at Cologne, 128 cases with 183 defendants; at People's Court, 84 cases with 304 defendants.

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

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

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

Use of NN Prisoners in Armament Industry

In file of reports for the years 1943 and 1944 of NN cases still pending in the Ministry of Justice, the Attorney General at Kattowice (Poland) stated to the Ministry of Justice the following:

"NN — (Nacht und Nebel) prisoners held within the jurisdiction of the Court of Appeal of Kattowice are already employed to a large extent in the armament industry, regardless of whether they are being held for questioning or punishment. They are quartered there inspecial camps at or near the place of the respective industrial enterprise. In this way it is intended, if possible, to place all NN prisoners at the disposal of the armament industry.

"It has been disclosed that the NN prisoners already employed in the armament industry, as for instance the 400-odd prisoners working in Laband, have done a very good job and excel in particular as skilled workers. The armament industry therefore, wants to retain the employed NN prisoners also after their acquittal or after they have served their sentence.

"I ask for a decision on whether and, if so how that demand can be complied with. Considerable doubts arise from the fact that there is no legal right to confine them further and that the judicial authorities would thus take preventive police measures. There is the question, however, whether the situation of the Reich does not justify even such extraordinary measures."

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

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

CLEMENCY IN THE NN CASES

As Under-Secretary, defendant Klemm was required to pass upon

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

As Under-Secretary, defendant Rothenberger also passed upon clemency matters in NN cases along with other clemency pleas. Defendant Mettgenberg testified that the Minister of Justice instructed him with special clemency proceedings in 1941 because of the escape of prisoners under death sentence during air raids.

He states:

"He called up Under-State Secretary Rothenberger by telephone and ordered him to receive reports concerning persons under death sentence in the ordinary manner, and to make the decisions concerning their execution. This was done. Individual cases were presented in reports lasting hours, to Under-State Secretary Rothenberger who then made the decisions."

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

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

The foregoing documents and the undisputed facts show that Hitler and the high-ranking officials of the armed forces and of the Nazi Party,

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

The foregoing documents and facts show without dispute that several of the defendants participated to one degree or another either as a principal, or ordered or abetted, took a consenting part in, or were connected with the execution or carrying out of the Hitler NN scheme or plan. The defendants so participating will be later discussed in the summation of the evidence.

The Night and Fog decree originated with Hitler as a plan or scheme to combat alleged resistance movements against the German occupation forces but it was early extended by the Ministry of Justice to include offenses against the German Reich. Often the offenses had nothing to do with the security of the armed forces in the occupied territories. May of them occurred after military operations. The first secret decree of the Ministry of Justice for the execution or carrying out of the NN decree provided for:

"1) the prosecution of criminal offenses against the Reich or

"2) the occupation troops in occupied areas."

"It declared that the directive will be as a rule applicable to the seven above listed general types of offenses or crimes, including "Communist activity". The term "Communist activity" is general and political in nature. The evidence shows that political prisoners in occupied territories were tried and sentenced to death under the NN proceedings. Pertinent here with respect to the so-called resistance activities is the finding of the IMT that

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

Defendant Schlegelberger explained the fundamental purpose of the NN decree to be a deterrent "through cutting off of the prisoners from every contact with the outside world". He further explained "That the NN prisoners were expected, and were, to be tried materially according to the same regulations which would have been applied to them by the courts martial in the occupied territories" and that accordingly, "the rules of procedure had been curtailed to the utmost extent."

The enforcement of the directives under the Hitler NN plan or scheme became a means of instrumentality by which the most complete control and coercion of a lot of the people of occupied territories were affected and under which thousands of the civilian population of

occupied areas were imprisoned, terrorized, and murdered. The enforcement and administration of the NN directives resulted in the commission of war crimes and crimes against humanity in violation of the international law of war and international common law relating to recognized human rights, and of Article II, ib and c of Control Council Law No. 10.

During the war, in addition to deporting millions of inhabitants of occupied territories for slave labor and other purposes, Hitler's Night and Fog program was instituted for the deportation to Germany of many thousands of inhabitants of occupied territories for the purpose of making them disappear without trace and so that their subsequent fate remain secret. This practice created an atmosphere of constant fear and anxiety amongst their relatives, friends, and the population of the occupied territories.

The report of the Paris Conference of 1919, above referred to, listed 32 crimes as constituting "the most striking list of crimes as has ever been drawn up, to the eternal shame of those who committed them." This list of crimes was considered and recognized by the Versailles Treaty and was later recognized as international law in the manner hereinabove indicated. Among the crimes so listed was the "deportation of civilians" from enemy-occupied territories.

Control Council Law No. 10 in illustrating acts constituting violations of laws or customs of war, recognizes as war crimes the "deportation to slave labor or for any other purpose of civilian population from occupied territory". (Article II, 1b). Law 10 (1c) also recognizes as crimes against humanity the "enslavement, deportation, imprisonment of any civilian population."

The IMT held that the deportation of inhabitants from occupied territories for the purpose of "efficient and enduring intimidation" constituted a violation of the laws and customs of war. The deportation for the purpose of "efficient and enduring intimidation" is likewise condemned by Control Council Law No. 10, under the provision inhibiting

"deportation *** for any other purpose, of civilian population from occupied territory".

Also among the list of 32 crimes contained in the Conference Report of 1919 are "murder and massacre, and systematic terrorism". Control Council Law No. 10 makes deportation of civilian population "for any purpose" a crime recognized as coming within the jurisdiction of the law. The admitted purpose of the Night and Fog decree was to provide an "efficient and enduring intimidation" of the population of occupied territories. The IMT held that the Hitler NN decree was "a systematic rule of violence, brutality, and terror", and was therefore in violation of the laws of war as a terroristic measure.

The evidence shows that many of the Night and Fog prisoners who were deported to Germany were not charged with serious offenses and were given comparatively light sentences or acquitted. This shows that they were not a menace to the occupying forces and were not dangerous in the eyes of the German justices who tried them. But they were kept secretly and not permitted to communicate in any manner with their friends and relatives. This is inhumane treatment. It was meted out not only to the prisoners themselves but to their friends and relatives back home who were in constant distress of mind as to their whereabouts and fate. The families were deprived of the support of the husband, thus causing suffering and hunger. The purpose of the spiriting away of persons under the Night and Fog decree was to deliberately create constant fear and anxiety amongst the families, friends, and relatives as to the fate of the deportees. Thus, cruel punishment was meted out to the families and friends without any charge or claim that they actually did anything in violation of any occupation rule of the army or of any crime against the Reich.

It is clear that mental cruelty may be inflicted as well as physical cruelty. Such was the express purpose of the NN decree, and thousands of innocent persons were so penalized by its enforcement.

The foregoing documents show without dispute that the NN victim

was held incommunicado and the rest of the population only knew that a relative or citizen had disappeared in the night and fog; hence, the name of the decree. If relatives or friends inquired, they were given no information. If diplomats or lawyers inquired concerning the fate of an NN prisoner, they were told that the state of the record did not admit of any further inquiry or information. The population, relatives, or friends were not informed for what character of offense the victim had been arrested. Thus they had no guide or standard by which to avoid committing the same offense as the unfortunate victims had committed, which necessarily created in their minds terror and dread that a like fate awaited them.

Throughout the whole Night and Fog program ran this element of utter secrecy. This secrecy of the proceedings was a particularly obnoxious form of terroristic measure and was without parallel in the annals of history. It could have been promulgated only by the cruel Nazi regime which sought to control and terrorize the civilian population of the countries overrun by its aggressive war. There was no proof that the deportation of the civilian population from the occupied territories was necessary to protect the security of the occupant forces. The NN plan or scheme fit perfectly into the larger plan or scheme of transportation of millions of persons from occupied territories to Germany.

Control Council Law No. 10 makes deportation of the civilian population for any purpose an offense. The international law of war has for a long period of time protected the civilian population of any territory or country occupied by an enemy war force. This law finds its source in the unwritten international law as established by the customs and usages of the civilized nations of the world. Under international law the inhabitants of an occupied area or territory are entitled to certain rights which must be respected by the invader occupant.

This law of military occupation has been in existence for a long

period of time. It was officially interpreted and applied nearly a half century ago by the President of the United States of America during the war with Spain in 1898. By general Order No. 101, 18 July 1898 (Foreign relations of the United States, page 783), the President declared that the inhabitants of the occupied territory "are entitled to the security of their person and property and in all their private rights and religions". He further declared that it was the duty of the Commander of the Army of Occupation "to protect them in their homes, in their employment, and in their personal and religious rights", and that "the municipal laws of the conquered territories, such as affect private rights of persons and property and provide for punishment of crime are continued in force" and "are to be administered by the ordinary tribunals substantially as they were before the occupation". The President referred to the fact that these humane standards of warfare had previously been established by the laws and customs of war, which were later codified by the Hague Convention of 1899 and 1907, and which constituted the effort of the civilized participating n ations to diminish the evils of war by the limitation of the power of the invading occupant over the people and by placing the inhabitants of the occupied area or territory "under the protection and rules of principles of law of nations as they result from usage established among the civilized peoples from the laws of humanity and the dictates of public conscience."

A similar order was issued during the first war with Germany by the President of the United States of America when the American Expeditionary Forces entered the Rhienland in November 1918. (General Order 218, 28 November 1918). At the conclusion of this occupancy, the German Government expressed its appreciation of the conduct of the American occupying forces.

But Germany soon forgot these humane standards of warfare, as is shown by the undisputed evidence. The general policy of the Nazi regime was to terrorize and in some instances to exterminate the

civilian populations of occupied territories.

Pertinent here is the finding of the IMT that:

> "In an order issued by the Defendant Keitel on 23 July 1941, and drafted by the defendant Jodl, it was stated that:
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> 'In view of the vast size of the occupied areas in the East, the forces available for establishing security in these areas will be sufficient only if all resistance is punished not by legal prosecution of the guilty, but by the spreading of such terror by the armed forces as is alone appropriate to eradicate every inclination to resist among the population ***. Commanders must find the means of keeping order by applying suitable Draconian measures'".

Both Keitel and Jodl were sentenced to death by the IMT and later executed. It was the same Keitel who later issued, over his own signature the Hitler NN decree which provided that:

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

Beyond dispute the foregoing decrees were inspired by the same thought and purpose and represent the general policy of the Nazi regime in the prosecution of its aggressive war. This general policy was to terrorize, torture, and in some occupied areas to exterminate the civilian population. The undisputed evidence in this case shows that Germany violated during the recent war every principle of the law of military occupation. Not only under NN proceedings but in all occupations she immediately, upon occupation of invaded areas and territories, set aside the laws and courts of the occupied territories. She abolished the courts of the occupied lands and set up courts manned by members of the Nazi totalitarian regime and system. These laws of occupation were cruel and extreme beyond belief, and were enforced by the Nazi courts in a cruel and ruthless manner against the inhabitants of the occupied territories, resulting in grave outrages against humanity, against human rights and morality and religion, and against international law, and against the law as declared by Control Council Law No. 10, by authority of which this Court exercises its jurisdiction in the instant case. The evidence adduced herein provides undeniable and positive proof of the ill-treatment of the subjugated people by the Nazi Ministry of Justice and prosecutors to such an extent that jurists as well as civilians of civilized nations who respect human rights and human personality and dignity, can hardly believe that the Nazi judicial system could possibly have been so cruel and ruthless in their treatment of the population of occupied areas and territories.

The foregoing procedure under the NN decree was clearly in violation of the following provisions sanctioned by the Hague Regulations:

"Article 5.--Prisoners of war *** cannot be confined except as an indispensable measure of safety, and only while the circumstances which necessitate the measure continue to exist.

"Article 23 (h).— *** It is expressly forbidden to declare abolished, suspended, or inadmissible in a court of law the rights and actions of the hostile party.

"Article 43.--The authority of the legitimate power having, in fact, passed into the hands of the occupant, the latter shall take all the measures in his power to restore and insure, as far as possible, public order and safety while respecting, unless absolutely prevented, the law enforced in the country.

"Article 45.--Family honor and rights, the lives of persons and private property as well as religious convictions and practice must be respected. Private property cannot be confiscated."

Both the international rules of war and Control Council Law No. 10 inhibit the torture of civilians by the occupying forces. Under the Night and Fog decree civilians were secretly transported to concentration camps and were imprisoned under the most inhumane conditions as was shown by the above statements from captured documents. They were starved and ill treated while in concentration camps and prisons. Thus the Night and Fog decree violated these express inhibitions of international law of war as well as the express provisions of Control Council Law No. 10.

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

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

The extent of activity and the criminality of the defendants who participated in the execution and carrying out of the Night and Fog decree will be discussed under the summation of the evidence relating to each such defendant. Each defendant has pleaded in effect as a defense the act of State as well as superior orders in

justification or mitigation of any crime he may have committed in the execution of the Night and Fog decree. The basis for individual liability for crimes committed and the law relating thereto was clearly and ably declared by the IMT Judgment which reads as follows:

> "It was submitted that international law is concerned with the actions of sovereign States, and provides no punishment for individuals; and further, that where the act in question is an act of Senate, 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.'
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> "He went on to give a list of cases tried by the Courts, where individual offenders were charged with offenses against the laws of nations, and particularly the laws of war. Many other authorities could be cited, but enough has been said to show that individuals can be punished for violations of international law. Crimes against international law are committed by me, not by

abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." (IMT Judgment Vol. I, pages 222, 223).

The record contains innumerable acts of persecution of individual Poles and Jews, but to consider these cases as isolated and unrelated instances of perversion of justice would be to overlook the very essence of the offense charged in the indictment. The defendants are not now charged with conspiracy as a separate and substantive offense, but it is alleged that they participated in carrying out a governmental plan and program for the persecution and extermination of Jews and Poles, a plan which transcended territorial boundaries as well as the bounds of human decency. Some of the defendants took part in the enactment of laws and decrees the purposes of which was the extermination of Poles and Jews in Germany and throughout Europe. Others, in executive positions, actively participated in the enforcement of those laws and in atrocities, illegal even under German law, in furtherance of the declared national purpose. Others, as judges, distorted and then applied the laws and decrees against Poles and Jews as such in disregard of every principle of judicial behavior. The overt acts of the several defendants must be seen and understood as deliberate contributions toward the effectuation of the policy of the Party and State. The discriminatory laws themselves formed the subject matter of war crimes and crimes against humanity with which the defendants are charged. The material facts which must be proved in any case are: (1) the fact of the great pattern or plan of racial persecution and extermination; and (2) specific conduct of the individual defendant in furtherance of the plan. This is but an application of general concepts of criminal law. The person who persuades another to commit murder, the person who furnishes the lethal weapon for the purpose of its commission, and the person who pulls the trigger are all principals or accessories to the crime.

We turn to the national pattern or plan for racial extermination.