

5. As to the victims who belonged to the fighting units, in their case it appears that we are confronted with "war crimes" of the normal type.

This derives from the legal status of the fighting men in question, which gives them the right to be treated in accordance with Art. 1 of the Hague Regulations.

In this respect I am able to make the following authoritative statement:

1) From the occupation of Yugoslavia in April 1941, until the Spring of 1943, Yugoslav guerrillas in Yugoslavia and in Istria and the Julian March were organised into regular Partisan Units known as "POJ" (PARTIZANSKI ODREDI JUGOSLAVIJE), which entirely complied with the provisions of Art. 1, Hague Regulations.

2) From the Autumn of 1942 the Yugoslav General Headquarters was able to gradually build up a regular army and form military units of the same type as in other Allied armed forces. These forces also entirely complied with the provisions of Art. II Hague Regulations.

3) Early in 1943 two separate army Corps were formed in Istria and the Julian March: the XI Corps, which operated in Istria, and the IX Corps which operated in the Julian March. These forces were mainly composed of Yugoslavs by birth and race of Italian citizenship with whom pure Italians fought together against the Fascist Italian armed forces and the German Wehrmacht.

4) As soon as these two Corps were formed, British and American liaison officers were officially attached to them by the combined Anglo-American forces operating in Italy.

A list is attached containing names and particulars of a number of such liaison officers.

5) The military operations of the two Corps were in many instances conducted as an integral part of the Anglo-American operational tasks, and they were regularly combined with them.

6. The above facts show clearly that members of these units were recognised as Allied forces, and that they are consequently entitled to be treated as Allies in respect of the crimes committed against them and their relatives on account of their struggle in the ranks of the Allied forces, quite irrespective of their citizenship.

Submitted by the Yugoslav Representative on the United Nations War Crimes Commission on the 25th September, 1946.

ANNEX

LIST OF A NUMBER OF ALLIED LIAISON OFFICERS

ATTACHED TO THE YUGOSLAV IX. and XI. CORPS IN

THE JULIAN MARCH AND ISTRIA FROM 1943 - 1945

In 1943, two additional units of the Yugoslav Army of Liberation were formed in the Italian provinces known as Julian March and Istria.

One was the IX. Corps which operated in the Julian March, that is to say in the area north of the Istrian peninsula, and the second was the XI. Corps which operated in Istria itself. The ranks of these two Yugoslav units were filled by Yugoslavs from these two provinces who were technically Italian citizens.

Very soon after their formation the Allied Commander in the Mediterranean despatched special liaison officers with the two corps and thereby indicated that these two corps were recognised as Allied Military units. Ever since the first contact was established this liaison was maintained constantly until the end of the military operations in the Julian March and Istria.

Here are the names and particulars concerning a number of such Allied liaison officers:

1. Neville DAREWSKI, Major. Head of the British Military Mission to the IX. Corps. Arrived August 1943 and left February 1944.
2. David DAVIES, Captain. Head of the Anglo-American Military Mission with the IX. Corps. Arrived October 1943 and left 19th July, 1944.
3. Peter ALEXANDER, Lieut. -Colonel. Head of special mission known as "Clouder" with the IX. Corps. Arrived 21st January, 1944 and left 4th March 1944.
4. Alfgar CAHUSAC, Squadron-Leader, R. A. F. Assistant to the head of the British Special Mission with the IX. Corps known as "Clouder". Arrived 21st January, 1944 and left 28th May, 1945. Before that, from 3rd December, 1943, was attached to the Yugoslav general headquarters in Bosnia. After his mission with the IX. corps was completed on 28th May, 1945, went to Corinthia as liaison officer with the there operating Yugoslav units.
5. Nigel WATSON, Major. Head of the British Intelligence Service with the IX. Corps. Arrived May 1944. On 5th December, 1944, went to the Yugoslav general headquarters from where he returned to his base in Italy on 7th December 1944.
6. P. WOOD, Major. Head of the British Military Mission with the IX. Corps from 9th June 1944, until September 1944.
7. P. N. M. MOORE, Lieutenant Colonel. Member of the British Military Mission at the Yugoslav general headquarters from October 1943. On 25th May 1944, went on a tour of inspection of the Anglo-American missions in Slovenia and the Julian March, deputising for Brigadier MacLean. On 29th June 1944, arrived at the headquarters of the IX. Corps. On 15th July, 1944, return to the Yugoslav headquarters. From 16th October, 1944, appointed head of all the British missions in Slovenia and the Julian March.
8. George CRIG, Captain. Head of the British Intelligence Service with the IX. Corps from 26th August 1944 - 2nd April, 1945. In November 1944, was acting head of the British Mission with the IX. Corps instead of Major Watson.
9. Joseph SLATTERY, Captain. Liaison officer with the IX. Corps from 31st August 1944 to 31st March 1945.
10. Hugh GIBB, Captain. Assistant to the head of the Anglo-American Mission with the IX. Corps from 31st August 1944 to 16th February 1945.

11. Owen REED, Major. Head of the British Intelligence Service at the Yugoslav general headquarters. Was attached to the 11th Corps from 12th October 1944 to 18th February, 1945.

12. Peter HARRISON, Captain. Member of the British Mission with the 11th Corps from 7th July, 1944. On the 9th November, 1944, was attached to units operating on the western shores of Istria. On 22nd February 1945, went to the Yugoslav general headquarters from where he returned to his base in Italy on 25th February, 1945.

13. LYLE-SMYTHE, Major. Head of the British Intelligence Service of the IX. Corps from 8th March 1945 to 2nd May 1945.

14. Dereck VINSON, Wing-Commander, R. A. F. Head of the British Mission with the IX. Corps from 24th April 1945 to 2nd May, 1945. On this date the British Mission was closed down as a result of the liberation of Trieste.

RESTRICTED

III/58

26th September, 1946.

UNITED NATIONS WAR CRIMES COMMISSION

COMMITTEE III

re: LAW REPORTING

Note on the Report on the French Wagner Case
and on the Glossary of French Law

By the Secretary to Committee III

The French representative on the United Nations War Crimes Commission, Professor Gros, has kindly informed the Secretariat of a communication from le Directeur du Service de Recherche des Crimes de Guerre in the French Ministry of Justice, containing some minor observations on the Draft Glossary, Document III/53. From the communication it appears, however, that the French authorities would prefer to have the Glossary drafted on different lines, in order to provide a complete survey of the organisation of Military Jurisdiction and of the prosecution of war criminals in France. This work would, as is stated in the letter, necessarily take some time to complete.

This Secretary is of the opinion that it would not be proper to insert into the first volume of the publication a Glossary on French Law which would not fully meet the requirements of the French authorities. However reluctantly, he feels therefore compelled to suggest that the report on the Wagner trial and the corresponding Glossary on French Law should not be inserted in the first volume, which is already being printed, and should be held over for the second volume.

This decision, if approved by Committee III, will make it possible for the French authorities to re-draft the Glossary and to give it the shape they want it to have, and simultaneously to re-draft the report on the Wagner case as well. The files regarding the Wagner trial which this Secretariat has received, consist of the indictment on the one hand and of the judgment on the other. No information about what happened between can be gathered from these files, nor can the evidence and the attitude of the defence be described on the basis of these files. The Secretariat will therefore try to get additional information about the proceedings in order to give as complete a picture of the Wagner trial (and of other French trials to be inserted in the series) as it attempts to give of the British and American ones.

Agreement by Committee III is therefore sought:.

- (a) for postponing the publication of the Wagner trial and of the French Glossary to the second volume,
- (b) for inserting in the first volume the report on the poison gas case of Tesch and others (Trial and Law Report Series No. 24), which has already been approved by Committee III in principle. Some observations on this report have been received from the United Kingdom Judge Advocate General's Office, and will be given effect to in the final text of the report on this case.

Secret

III/59

3rd October, 1946.

UNITED NATIONS WAR CRIMES COMMISSION

COMMITTEE III

ITALIAN CRIMES AGAINST HUMANITY

SECOND MEMORANDUM

WITH REGARD TO CRIMES PERPETRATED AGAINST YUGOSLAVS
OF ITALIAN CITIZENSHIP IN THE JULIAN MARCH

Presented in the Meeting of Committee III
on 2nd October, 1946,
By Dr. R. Zivkovic.

In addition to the facts presented in the previous memorandum (Doc. III/57), and in order to have a better understanding of the crimes committed by the Italians and, from 1943 onwards by them and the Germans in the Julian March, it is necessary to set forth as briefly as possible what took place in this region in the period between the Two World Wars. This will show that the size and grave nature of the crimes perpetrated in the Julian March both before and during the war were no results of accidental outbreak of temperament of this or that man or unit, but the continuation of a systematically prepared and premeditated persecution of the population for twenty years. We have to deal with a criminal system planned long before the war, a system which, as regards the Yugoslav community, was inherent in Fascism.

The Land and the Population

The name Julian March or Venezia Giulia was given by the Italians to those parts of the Austro-Hungarian Empire which, after the World War I were allotted to Italy by the peace treaty against the wishes of the inhabitants. This new province included the former County of Gorizia, Trieste, parts of Carniola and the whole of Istria with Fiume. At the time of the annexation the population of the Julian March was approximately 900,000, two-thirds of which were Yugoslavs. The rest were Italians living in Trieste town and a few small places on Istria's western coast. The Yugoslavs (Slovenes and Croats) have been living in these parts for some thirteen centuries.

Persecutions between the two wars.

Having occupied the Julian March in 1918, and later annexed it on the basis of the Treaty of Rapallo of November 12, 1920, Italy solemnly declared through her official representatives (King Victor Emmanuel III, Count Sforza, Titoni, Giolitti and others) that the Slovenes and Croats of the Julian March would enjoy all legal rights, liberty and democracy, and that every idea of denationalisation was foreign to her. Italy had therefore recognised even in that way the Yugoslav character of the Julian March.

Meanwhile, the historical facts are quite different. Not only did these solemn Italian declarations remain a dead letter, but even pre-fascist Italy committed the unparalleled crime of forcibly Italianizing the Yugoslav population in the Julian March, using every possible means

for this purpose, paying no heed to the mass resistance of the people, to its Yugoslav character, national feeling and cultural achievements.

Light has been thrown upon these historical facts by the documents found after the liberation of the Julian March in the offices of former Italian institutions.

A series of these documents is enclosed herewith (Documents concerning the denationalization of Yugoslavs in the Julian March, Belgrade, 1946, edition of the Yugoslav Institute of International Studies) which irrefutably prove the following:-

1. That Italy, aware of the fact that the great majority of the population of the Julian March consisted of Slovenes and Croats, endeavoured by all means to change its ethnical structure. She used every possible means to carry out these criminal plans, from the persecution of the politically and nationally most conscious elements down to the forcible displacement of the Yugoslav population, the economic ruin of the population and, finally, physical extermination.
2. That Italy launched this policy immediately after the Julian March was allotted to her, that is to say even before the advent of the fascist regime, which only continued the work already begun.
3. That this criminal policy, which during the second World War assumed the character of mass extermination, met with a united resistance on the part of the conscious and patriotic people of the Julian March, who finally rose in arms against their fascist oppressor.

In other words, these documents give evidence of the fact that the Yugoslavs in the Julian March were subjected to a systematic persecution on racial and/or political grounds.

For the purposes of reference attention is drawn to the following numbers of the Documents or extracts contained in the appendix.

No.1 proves that the policy of assimilating the Slav minority by forcible denationalization was directed from Rome, i.e. from the Italian Ministry of the Interior.

Documents Nos. 3 to 11 inclusive demonstrate that the numerous Yugoslav schools in Venezia Giulia were closed as early as the first years of fascist regime, while Slav teachers were dismissed.

Documents Nos.12 to 18 inclusive illustrate the persecutions suffered by the Yugoslav priests in the Julian March.

The annihilation of the Yugoslav Press in Italy (newspapers, books, printing offices) is apparent in Documents Nos.20, 22 and 26.

Document No.28 is clear evidence that with one stroke of the pen the Minister of the Interior in 1927 suppressed all cultural associations.

It is obvious that military circles followed the same policy. They conceived a plan which would contribute to denationalizing the region.

In pursuance of this policy of racial persecution Italy resorted to acts which no civilised or uncivilised country in the world had ever committed; through legislative acts Italy forcibly changed or Italianised the names and surnames of the entire Yugoslav population of the Julian March. The documents quoted in Section 8 in the series which is enclosed represent only a small part of the ample documentary material discovered and are quoted as an illustration of Italian methods. Document No.50 reveals that the chauvinism of the Italian fanatics was such that they ordered the executive to remove all Slav names and surnames even from

the gravestones in cemeteries and to replace them with Italian ones. This would indeed sound strange to the ears of the deceased, especially to those who had been dead for ages and had never in their lives experienced Italian rule over their native land.

Documents Nos. 52, 57 and 58 serve as evidence of the Italian plan for depriving, through an elaborate system of administrative machinations, the ancient Slav population of their land and property and to replace the rightful owners by Italian settlers to be brought from the interior of Italy.

This special task was allotted to Dr. Italo Sauro, who was an important factor in the Fascist Party, was the "Duce's Counsellor for Slav problems" (A disposizione del Duce per gli Slavi). His correspondence reveals all the unbelievable measures which the Fascists had in store for the Slovenes and Croats of the Julian March long before the outbreak of World War II. Some of the documents to this effect are available in another series under the title "Italian Crimes in Yugoslavia", published by the Yugoslav Information Office, London, 1945, which is also enclosed. (see pp. 19-27 and Fig. 2-10).

As a consequence of this official attitude of the Italian Government towards the entire Slav population of the Julian March, at least twenty per cent of the Slav inhabitants of the Julian March, i.e. more than 100,000 people, were forced during the two decades of Italian rule over the Julian March to emigrate to Yugoslavia or overseas. A good many Slavs had to emigrate in order to escape with their lives.

Those who remained had to undergo ordeals one after the other. Such was the case especially during the Italian campaign in Abyssinia during which practically every able-bodied Yugoslav was thrown into the African campaign to perish in the fight for the glory of Mussolini's Empire.

Persecutions during 1941-1945

Policy

This is the background of the developments which took place after the invasion of Yugoslavia in April 1941, some cases of which have been submitted to the United Nations War Crimes Commission in the charges now under examination by Committee III.

The avowed aim pursued by Fascist Italy in invading Yugoslavia was to annex a very large portion of Yugoslav territory and this actually did take place. The annexation was to be carried out with the ultimate aim of definitely Italianising territories inhabited by Yugoslavs both in the Julian March and in Yugoslavia proper. To this end, after the invasion of Yugoslavia in April, 1941, the Italian Government instructed their officials and officers to undertake appropriate measures within the frame of such a policy.

Practically speaking this resulted in an ever increasing persecution of the Yugoslavs in the Julian March on account of their "alien" race, and in the introduction of systematic terrorism in Yugoslavia. Yugoslavs from both sides were thus, in the eyes of the Italians, doomed either to be "assimilated" and "converted" into Italians, or to perish as an obstacle in the way of Fascist-Italian imperialism. To the fascists there were no "loyal" or "innocent" Yugoslavs. They were all guilty of not being Italians.

As is understandable, the supreme instructions for the carrying out of such racial and political persecutions came from Mussolini himself. At a time when the Yugoslav partisan units in the Julian March were

operating only on a small scale and when these units were formed in self-defence against Fascist terror, in July 1942, Mussolini took advantage of their activities to put the weight of his personal authority in order to have them subdued to his imperialism.

On July 31, 1942, he came to Gorizia, the chief town of a purely Yugoslav area, and delivered a speech in which he openly displayed his policy.

Addressing the Yugoslavs in the Julian March he first said:-

"It is impossible to return to your town without feeling profound emotion. The blood of many generations has been spilt on the banks of the Isonzo and in the valleys of the Carso in order to unite this town with the mother country for all times. This soil is sacred to Italy and will remain such throughout the centuries."

Referring after that to the resistance of the population to his persecutions, he uttered the following significant words:-

"I have given the order to change the method, and you will have noted that for some weeks the methods have been radically changed.

The population should remember that the Roman Law is inflexible. I ordered the application of this law. Those who refuse to lay down their arms and give up their mad dreams should know that they will be completely annihilated and that their property will literally be razed to the ground.

This was always the Law of Rome, be it in the period of the Republic or during the period of the Empire.

Also Caesar whose most generous heart passed into history as the "heart of Caesar" knew how to be inflexible, and after one barbaric tribe had tried to attack the Romans three times, he gave the order to annihilate all the males of that population.

I think and I am sure that these words of mine will reach the ears of those who had the illusion of creating here a kind of second front.

The second front will not be made here nor probably in any other part of the world.

The Axis and Tri-partite have means, men and the will to achieve victory."

These words, though hardly concealing the grim reality, nevertheless need to be translated into their true meaning.

"The change of method" ordered by Mussolini and "the application of the inflexible Roman Law" meant literally what Mussolini himself mentioned on the same occasion as the "annihilation" of Yugoslavs and the "literal razing to the ground" of their homes. His example of Caesar being "inflexible" and giving the order to "annihilate all the males" of a "barbaric tribe", means exactly what was done to the Yugoslavs in the Julian March by Mussolini and his Fascists. The Yugoslavs were actually treated as if they were "a barbaric tribe", and their "Male" inhabitants were persecuted as if they were wild beasts and not human beings.

Mussolini's speech provides in itself the best evidence that all the offences and crimes perpetrated against the Yugoslavs in the Julian March were committed primarily on racial and political grounds, and that they were carried out systematically against the Yugoslav community as a whole.

It also clearly indicates that the crimes perpetrated during the war were merely a more acute form of the same persecution for racial and political reasons to which Yugoslavs from the Julian March had been subjected between the two wars.

Finally, it proves beyond doubt, that all these crimes were the direct result of a highly elaborate Government scheme aiming at uprooting a whole national community by whatever means possible in the various stages of its long-term accomplishment, from the forcible denationalization of names to the killing of inhabitants.

Here are some additional instances, apart from those already presented to the UNWCC (Committee III).

The Crimes

The Fascist Government being conscious that with such treatment they would not expect loyalty on the part of the Yugoslavs, mobilised the maximum in the Julian March and sent them deep into the interior of Italy as soon as the aggression against Yugoslavia was launched. The Yugoslavs, on the other hand, were well aware that their liberation could only be brought about by an Allied victory. Such was their determination that not even the sudden collapse of the old Yugoslavia could make them yield to the Fascist rule. Therefore they were among the first to organise and contribute to the new force of armed resistance in the common struggle against the Fascist aggressors. Their participation was comparatively enormous. Details of their activities are available in the book "The War Effort of the People of the Julian March and Union to Yugoslavia" published by the Yugoslav Ministry of National Defence, Belgrade, 1945, which is enclosed.

During the initial Italian successes in the war, there was comparative tranquility in the Julian March, but when the Italian armed forces in the Balkans found themselves in an ever increasing struggle with the resisting Yugoslav population in Yugoslavia proper, the conflict began to have its repercussions in the Julian March.

Fascist Italy who, by forcibly changing the names and surnames of a whole racial community within her frontiers, gave the world an example of an unique crime, soon afterwards undertook another, equally unprecedented and criminal action against her Slav population. A new regulation for a system of recruitment, applying only to the Yugoslav population, was introduced by the Commandant of the XXIII Corpo d'Armata (at Trieste) on March 3, 1943. According to this regulation (No.01/16923) all men born in 1924, 1925 and 1926 were called up before they were normally due (eligible). This regulation was carried out in an unusual manner known as the "precettazione a domicilio", which consisted of the following : during the night, Slav boys whom the recruiting regulation affected, were suddenly awakened, presented with their calling-up papers and, on the spot, proclaimed soldiers on duty and were immediately taken away in lorries to be driven deep into the interior of Italy where they were drafted into the "Battaglioni speciali" which were actually forced labour units.

This new means of persecution reached its peak with the capitulation of Italy and a direct result thereof was that all the Julian March took part in a general resistance movement against the Italo-Fascist terrorism.

At the same time the number of war crimes increased rapidly continuing until the end, i.e. May 1945, and being perpetrated by those Italians who remained loyal to Mussolini and who operated partly in independent units and partly in connection with different German formations brought to the south in order to retain the newly formed region "Operationszone Adriatisches Kuestenland."

In accordance with methods previously used in Slovenia, Croatia, Dalmatia and Montenegro, i.e. on Yugoslav territory proper, Italian troops and Fascist militia now terrorised "their" region, feeling in all probability, that it was lost to them for ever. As in Yugoslavia earlier, so these troops burned down villages, killed innocent persons without a trial, carried out frequent "restrellamenti" and sent people to concentration camps and forced labour, no longer in Italy, but in Germany where they were handed over to the Germans to be transported to different notorious German camps whence many never returned.

It is worth mentioning that after Badoglio's capitulation, the so-called Fascist Republic of Italy no longer represented the legal authority and cannot be recognised as having had a legal status in International Law. This should be taken into account when considering measures taken by this illegal authority against the people of the Julian March regardless of the fact that the civilian population may or may not have been members of the National Liberation Army. There was no legal basis for any such measures, the Neo-Fascists being rebels to the Italian Government in Rome, and possessing therefore only a de facto and not a lawful authority in Northern Italy.

III/60.
3rd October, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

Suggestions regarding the publication of
enactments dealing with war crimes.

By the Secretary to Committee III.

- I. In Document Misc. No.49, a preliminary report has been given on the collection of international and municipal provisions regarding war crimes.

It is the purpose of this paper to submit to Committee III for consideration, and eventually for making appropriate proposals to the Commission, the suggestion to publish a volume containing the texts of international, conventional, municipal and occupational provisions dealing with war crimes. The volume would be a necessary and useful corollary to the Law Reports published by the Commission. It would be a mine of information for the international and for the criminal lawyer, and for the student of international affairs in general.

- II. It is proposed that the publication should be in the English language, and that a French edition should be envisaged for a later date, in the same way as it has been decided, on principle, that the Law Reports should also be eventually produced in French.

- III. The publication should generally be restricted to a reproduction, in English, of the actual texts of the enactments and, where necessary, of the text of other provisions of municipal law which are referred to in the special enactments dealing with war crimes. In cases where, as in the United States of America, the actual executive orders can only be understood in connection with their common law background, a short reference to the latter will probably be unavoidable.

- IV. It is not suggested that the publication should take place in the very near future, but it appears to be necessary to commence the preparatory work without delay.

It will be seen from Doc.Misc.49, that the collection at present available to the Commission is far from complete. In addition to the conventions and enactments enumerated in Doc.Misc.49, there exist to-day similar enactments in other countries, both allied and former enemy.

I am indebted to Commander Mouton for the information that there are in existence similar provisions in the Netherlands East Indies and to Monsieur Stavropoulos for the information that laws have also been enacted in Greece in addition to the law concerning enemy collaborators, which is mentioned in Misc.No.49, Part III, point 8. There are in existence special provisions regarding war criminals in the Soviet Union, in Yugoslavia, in Bulgaria, in Hungary, in Finland and probably also in other countries.

Enactments by the German authorities in the different zones and Länder of Germany fall also within the scope of the proposed publication.

- V. If the suggestion is accepted, on principle, by Committee III, and eventually by the Commission, it will be the task of the Legal Secretariat to try to get the material not yet available, both from Member Governments and from other sources.

III/61.
8th October, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

Draft Glossary or General Introduction
into
United States Law
concerning
Trials of War Criminals.

Re: Observations from the War Department, Civil Affairs Division,
Washington, on the Draft Glossary III/54.

Observations from the War Department, Civil Affairs Division, Washington, on the Draft Glossary III/54 have now been received by this Secretariat. Doc. III/54 has been reviewed in the War Crimes Branch of the War Department. The consensus of opinion is that on the whole it is an admirable piece of work and will be of permanent value. Certain specific additions and corrections are proposed, however, the bulk of which is based on new material which has now been made available to this Secretariat, namely:

The Regulations Governing the Trials of Accused War Criminals in the Pacific Theater, 5th December 1945, (the so-called SCAP Rules);

The Regulations Governing the Trial of War Criminals in the China Theater of War, of 21st January, 1946, and

A Directive regarding the Trial of War Crimes Cases in the European Theater, dated 26th June 1946.

A revised and supplemented text of Doc. III/54 will therefore be prepared by the Legal Secretariat with the least possible delay.

100-100000-100000

REPORT OF THE COMMISSIONER OF THE GENERAL LAND OFFICE

IN RESPONSE TO A RESOLUTION OF THE HOUSE OF REPRESENTATIVES

ADOPTED FEBRUARY 1, 1890

AND PASSED BY THE SENATE FEBRUARY 1, 1890

FOR THE PURPOSE OF DETERMINING THE STATUS OF THE PUBLIC LANDS

The Commission has the honor to acknowledge the receipt of the resolution of the House of Representatives, adopted February 1, 1890, and to report the results of its investigation. The Commission has the honor to report that the public lands of the United States are now under the control of the General Land Office, and that the same are being managed in accordance with the provisions of the Act of March 3, 1879, and the Act of August 9, 1890.

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III/60.
3rd October, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

Suggestions regarding the publication of
enactments dealing with war crimes.

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Enactments by the German authorities in the different zones and Länder of Germany fall also within the scope of the proposed publication.

- V. If the suggestion is accepted, on principle, by Committee III, and eventually by the Commission, it will be the task of the Legal Secretariat to try to get the material not yet available, both from Member Governments and from other sources.

III/62.
26th October, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

REPORT
on the

Bearing of the Nuremberg Judgment on the Interpretation of the term
"Crimes against Humanity",
the work of Committee III connected with this type of crime and its
application in other courts. (Control Council Law No. 10.)

By Egon Schwelb, Legal Officer.

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III	General attitude of the Tribunal to the Law of the Charter.
IV	The Crime against peace as the supreme war crime.
V	Rejection of the charges for conspiracy to commit war crimes and crimes against humanity.
VI	Killing of "useless eaters" as a crime against humanity.
VII	The persecution of Jews as a crime against humanity.
VIII	War Crimes and Crimes against Humanity in "subjugated territories".
IX	General statement by the Court on the law as to crimes against humanity.
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XII	Application of the general statement to the S.A.
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I. Introductory.

In the meeting of Committee III held on 2nd October 1946, (Minutes No.21/46), Committee III charged this writer with preparing a paper analysing the Nuremberg judgment as far as it dealt with crimes against humanity, and to try to set out what bearing the judgment had on the interpretation of the notion of "crimes against humanity", and, consequently, on the charges involving crimes against humanity with which Committee III was dealing.

The present paper is based on the original transcript of pages 16794-17077 of the transcript which was made available to this writer by the British War Crimes Executive. At the time of writing, the part dealing with the sentences on the individual defendants is not yet available.

The numbers in this paper refer to the pages of the official Nuremberg transcript.

II. Earlier discussion of the term "Crimes against Humanity" by Committee III.

The general questions connected with the notion of "crimes against humanity" were discussed by this writer in the paper III/33 of 22nd March 1946. Its conclusions were, with certain amendments, adopted by Committee III in its report Doc.C.201.

As will be seen, the interpretation, by the Nuremberg Tribunal, of the term "crime against humanity", does not fully coincide with the interpretation contained in the papers III/33 and C.201. It will be seen particularly that the International Military Tribunal has interpreted the term in a narrower sense than in the documents quoted. It will also be seen that the International Military Tribunal appears to have attributed more relevance to the Berlin Protocol of 6th October 1945 than this writer did in his note on the Berlin Protocol contained in Doc.C.193.

III. General Attitude of the Tribunal to the Law of the Charter.

The Tribunal has said, (p.16799) that the provisions of Art.6. of the Charter of the International Military Tribunal "are binding upon the Tribunal as the law to be applied to the case".

The Court declared: "The law of the Charter is decisive and binding upon the Tribunal.

The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognised by the civilised world. The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law. " (p.16871.)

On p.16925, the Tribunal says: "The Tribunal is, of course, bound by the Charter in the definition which it gives both of "war crimes" and "crimes against humanity". "

The Tribunal conceived its task to be the interpretation and application of the law as laid down in the Charter. It did not consider itself to be called upon to make new law (judge-made law) on the one hand, or to examine the legality or otherwise of its constituting Charter on the other, although it did express the opinion that the law as laid down by the Charter was in accordance with the existing international law and in conformity with the law of all nations, (e.g. on p.16880).

IV. The crime against peace as the supreme war crime.

In dealing with Count 1 of the Indictment, (Common Plan or Conspiracy), and Count 2, (Aggressive War; Crimes against Peace), the Tribunal stated (p.16819): "To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.

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

The Tribunal further stated with regard to aggression against Austria that: "the facts plainly prove that the methods employed to achieve the object were those of an aggressor" (p.16831). The Tribunal also accepted the proposition of the prosecution as to the aggressive character of the seizure of Czechoslovakia (pp.16832-16837). And it stated, on p.16847: "The Tribunal is fully satisfied by the evidence that the war initiated by Germany against Poland on 1st September 1939 was most plainly an aggressive war, which was to develop in due course into a war which embraced almost the whole world, and resulted in the commission of countless crimes, both against the laws and customs of war, and against humanity."

V. Rejection of the charges for conspiracy to commit war crimes and crimes against humanity.

In the statement of the law as to the common plan or conspiracy, the Tribunal said: "Count One, however, charges not only the conspiracy to commit aggressive war, but also to commit war crimes and crimes against humanity. But the Charter does not define as a separate crime any conspiracy except the one to commit acts of aggressive war. Art.6. of the Charter provides:

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

In the opinion of the Tribunal these words do not add a new and separate crime to those already listed. The words are designed to establish the responsibility of persons participating in a common plan. The Tribunal will therefore disregard the charges in Count One that the defendants conspired to commit war crimes and crimes against humanity, and will consider only the common plan to prepare, initiate and wage aggressive war." (p. 16884).

The Tribunal, therefore, dismissed the accusation as far as it charged the defendants with having conspired to commit war crimes and crimes against humanity.

VI. Killing of "useless eaters" as a crime against humanity.

In the part of the Judgment which deals with war crimes and crimes against humanity generally, the Tribunal, after having dealt with the war crime of ordering slave labour, referred to the killing of insane and incurable people as follows: "Reference should also be made to the policy which was in existence in Germany by the summer of 1940, under which all aged, insane, and incurable people, "useless eaters", were transferred to special institutions where they were killed, and their relatives informed that they had died from natural causes. The victims were not confined to German citizens, but included foreign labourers, who were no longer able to work, and were therefore useless to the German war machine. It has been estimated that at least some 275,000 people were killed in this manner in nursing homes, hospital and asylums, which were under the jurisdiction of the defendant Frick, in his capacity as Minister of the Interior. How many foreign workers were included in this total it has been quite impossible to determine." (p.16916/7).

It will be noted that the Tribunal is careful to point out that the victims were not confined to German citizens, but included foreign labourers and that it was quite impossible to determine how many foreign workers were included in the estimated total of people killed.

VII. The persecution of Jews as a crime against humanity.

With respect to the persecution of the Jews, the Tribunal stated that the persecution of the Jews at the hands of the Nazi Government was proved in the greatest detail before the Tribunal. It was a record of consistent and systematic inhumanity on the greatest scale. (p.16917). The Tribunal recalled the anti-Jewish policy as formulated in Point 4 in the Programme of the Nazi Party of 24th February 1920 (p.16918 in connection with p.16801), and continued:

" The Nazi Party preached these doctrines throughout its history. "Der Stuermer" and other publications were allowed to disseminate hatred of the Jews, and in the speeches and public declarations of the Nazi leaders, the Jews were held up to public ridicule and contempt.

With the seizure of power, the persecution of the Jews was intensified. A series of discriminatory laws were passed, which limited the offices and professions permitted to Jews; and restrictions were placed on their family life and their rights of citizenship. By the autumn of 1938, the Nazi policy towards the Jews had reached the stage where it was directed towards the complete exclusion of Jews from German life. Pogroms were organised, which included the burning and demolishing of synagogues, the looting of Jewish businesses, and the arrest of prominent Jewish business men. A collective fine of one billion marks was imposed on the Jews, the seizure of Jewish assets was authorized, and the movement of Jews was restricted by regulations to certain specified districts and hours. The creation of ghettos was carried out on an extensive scale, and by an order of the Security Police, Jews were compelled to wear a yellow star to be worn on the breast and back.

It was contended for the Prosecution that certain aspects of this anti-Semitic policy was connected with the plans for aggressive war. The violent measures taken against the Jews in November 1938 was nominally in retaliation for the killing of an official of the German Embassy in Paris. But the decision to seize Austria and Czechoslovakia had been made a year before. The imposition of a fine of one billion marks was made, and the confiscation of the financial holdings of the Jews was decreed, at a time when German armament expenditure had put the German treasury in difficulties, and when the reduction of expenditure on armaments was being considered. These steps were taken,

moreover, with the approval of the defendant Goering, who had been given responsibility for economic matters of this kind, and who was the strongest advocate of an extensive rearmament programme notwithstanding the financial difficulties.

It was further said that the connection of the anti-Semitic policy with aggressive war was not limited to economic matters. "

The court then referred to a German Foreign Office circular of 25th January 1939, entitled: "The Jewish Question as a factor in the German Foreign Policy in the year 1938," and then stated:

" The Nazi persecution of Jews in Germany before the war, severe and repressive as it was, cannot compare, however, with the policy pursued during the war in the occupied territories. Originally the policy was similar to that which had been in force inside Germany. Jews were required to register, were forced to live in ghettos, to wear the yellow star, and were used as slave labourers. In the summer of 1941, however, plans were made for the "final solution" of the Jewish question in all of Europe. This "final solution" meant the extermination of the Jews, which early in 1939 Hitler had threatened would be one of the consequences of an outbreak of war, and a special section in the Gestapo under Adolf Eichmann, as head of Section B.4. of the Gestapo, was formed to carry out the policy. "

After describing the atrocities against Jews committed in occupied territories the Court stated on p.16924, the following: "Special groups travelled through Europe to find Jews and subject them to the "final solution". German missions were sent to such satellite countries as Hungary and Bulgaria, to arrange for the shipment of Jews to extermination camps and it is known that by the end of 1944, 400,000 Jews from Hungary had been murdered at Auschwitz. Evidence has also been given of the evacuation of 110,000 Jews from part of Roumania for 'liquidation'. "

VIII. War Crimes and Crimes against Humanity in "subjugated" territories.

In the chapter dealing with the law relating to war crimes and crimes against humanity, the Tribunal quoted the wording of Article 6(b) and (c) of its Charter, (p.16925) and repeated that the Charter does not define as a separate crime any conspiracy except the one set out in Article 6(a) dealing with crimes against peace. (*)

On pp.26926/7, the Tribunal deals with the plea based on the alleged complete subjugation of some of the occupied countries in the following way: "A further submission was made that Germany was no longer bound by the rules of land warfare in many of the territories occupied during the war, because Germany had completely subjugated those countries and incorporated them into the German Reich, a fact which gave Germany authority to deal with the occupied countries as though they were part of Germany. In the view of the Tribunal it is unnecessary in this case to decide whether this doctrine of subjugation, dependent as it is upon military conquest, has any application where the subjugation is the result of the crime of aggressive war. The doctrine was never considered to be applicable so long as there was an army in the field attempting to restore the occupied countries to their true owners, and in this case, therefore, the doctrine could not apply to any territories occupied after the 1st September 1939. As to the war crimes committed in Bohemia and Moravia, it is a sufficient answer that these territories were never added to the Reich, but a mere protectorate was established over them. "

(*) It may be added that the transcript available to this Secretariat quotes Art.6(c) on page 16925 with the semi-colon between "the war" and "or persecutions" although this semi-colon has, in the English and French texts, been replaced by a comma by the Berlin Protocol of 5th Oct., 1945. On p.16799, on the other hand, the amended text is quoted.

IX. General statement by the Court on the law as to crimes against humanity.

As to crimes against humanity in general, the opinion of the Court was summed up as follows (p.16927): "With regard to crimes against humanity, there is no doubt whatever that political opponents were murdered in Germany before the war, and that many of them were kept in concentration camps in circumstances of great horror and cruelty. The policy of terror was certainly carried out on a vast scale, and in many cases was organised and systematic. The policy of persecution, repression and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out. The persecution of Jews during the same period is established beyond all doubt. To constitute crimes against humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with any such crime. The Tribunal cannot, therefore, make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter, but from the beginning of the war in 1939 war crimes were committed on a vast scale, which were also crimes against humanity; and insofar as the inhumane acts charged in the Indictment, and committed after the beginning of the war did not constitute war crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted crimes against humanity.

X. The general statement analyzed.

From the statement quoted verbatim in the preceeding paragraph, the following can be seen:

(1) It is clear that the International Military Tribunal does not recognise the distinction between the two types of crimes against humanity which has been suggested by this writer and adopted by Committee III, namely the distinction between crimes against humanity of the murder type and "persecutions". (See Docs. C.201, point 2, (a) and (b).) This is probably due to the interpretation of the Berlin Protocol (C.193), where the semi-colon dividing paragraph (c) of Art.6. of the English and French texts of the Charter has been replaced by a comma. The Berlin Protocol is, however, not quoted in the judgment. The International Military Tribunal appears to have interpreted paragraph (c) (crimes against humanity) as amended in the English and French texts by the Berlin Protocol of 6th October 1945, to the effect that the qualification "in execution of, or in connection with any crime within the jurisdiction of the Tribunal" is applicable not only to what Committee III has been used to call persecutions, but also to crimes of the murder type. In the opinion of the Tribunal all the crimes enumerated in Art.6(c) are crimes against humanity only if they were done in execution of or in connection with a crime against peace or a war crime in the narrower sense. In spite of the positive provision of the Charter that it was irrelevant whether the crimes were committed "before or during the war", the Tribunal declined to make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter.

As will be seen later, this statement does not mean that no crime committed before 1st September 1939 can be a crime against humanity. The Tribunal recognised some crimes committed prior to 1st September 1939 as crimes against humanity in cases where their connection with the crime against peace was established.

(2) The Court stated, on the other hand, that insofar as the inhumane acts charged in the indictment and committed after the beginning of the war did not constitute war crimes, they were all committed in execution of, or in connection with, aggressive war and therefore constitute crimes against humanity.

XI. Application of the general statement to the organisations declared criminal.

The Tribunal drew the conclusion from what had been said in the preceding paragraph, in making its decision on the criminality of the Leadership Corps, the Gestapo and S.D., and the S.S. With regard to the Leadership Corps, the Tribunal stated that the basis of its declaring the group criminal was the participation of the organisation in war crimes and crimes against humanity connected with the war. The group declared criminal could not, therefore, include persons who had ceased to hold the positions prior to the 1st September 1939. (p.16939).

A similar statement is contained in the decision of the Tribunal regarding the criminality of the Gestapo and the S.D. (p.16949) and of the S.S. (p.16950).

XII. Application of the general statement to the S.A.

The opinion of the Court that crimes committed before 1st September 1939 were not crimes against humanity within the meaning of the Charter was also instrumental in the Tribunal's decision regarding the S.A. The Tribunal found (p.16962) that until June 1934, the S.A. was a group composed in a large part of ruffians and bullies who participated in the Nazi outrages of that period. It was not shown, however, that these atrocities were part of a specific plan to wage aggressive war, and the Tribunal therefore could not hold that these activities were criminal under the Charter.

After the purge of 30th June 1934, the S.A. was reduced to the status of a group of unimportant Nazi hangers-on.

Although in specific instances, some units of the S.A. were used, after 1934, for the commission of war crimes and crimes against humanity, it cannot be said that its members generally participated in, or even knew of the criminal acts.

The Tribunal mentioned, however, that S.A. units were among the first in the occupation of Austria in March 1938, that the S.A. supplied many of the men and a large part of the equipment which composed the Sudeten Free Corps of Henlein, although it appeared that the corps was under the jurisdiction of the S.S. during its operation in Czechoslovakia (pp.16961/2). Some S.A. units were used to blow up synagogues in the Jewish pogrom of 10th and 11th November 1938. (p.16962).

XIII. Germanization as a war crime and a crime against humanity.

It may be relevant for the purpose for which this paper is written, to mention that in dealing with the Leadership Corps, the Tribunal, on p.16943, describes the steps taken by the Leadership Corps which relate merely to the consolidation of control of the Nazi Party and which are not criminal under the view of the conspiracy to wage aggressive war and contrasts with them under the heading "criminal activity", actions which are described as follows: "But the Leadership Corps was also used for similar steps in Austria and those parts of Czechoslovakia, Lithuania, Poland, France, Belgium, Luxembourg and Yugoslavia which were incorporated into the Reich and within the Gaus of the Nazi Party. In those territories the machinery of the Leadership Corps was used for their

Germanisation through the elimination of local customs and the detection and arrest of persons who opposed German occupation. This was criminal under Art.6(b) of the Charter in those areas governed by the Hague Rules of Land Warfare and criminal under Art.6(c) of the Charter as to the remainder.

The Leadership Corps played its part in the persecution of the Jews. It was involved in the economic and political discrimination against the Jews, which was put into effect shortly after the Nazis came into power. The Gestapo and SD were instructed to co-ordinate with the Gauleiters and Kreisleiters the measures taken in the pogroms of November 9 and 10 in the year 1938. The Leadership Corps was also used to prevent German public opinion from reacting against the measures taken against the Jews in the East. "

The Germanisation of incorporated territory and persecution of the Jews is also mentioned in the conclusions as to the criminality of the Leadership Corps on p.16938 with the following words: "The Leadership Corps was used for purposes which were criminal under the Charter and involved the Germanisation of incorporated territory, the persecution of the Jews, the administration of the slave labour programme, and the mistreatment of prisoners of war. "

It may also be mentioned that on pp.16942/3, in connection with the Gestapo and the S.D., the Tribunal speaks of "the period with which the Tribunal is primarily concerned", meaning the period after September 1939.

XIV. Pre-1939 activities of the Gestapo and the S.D., Concentration Camps, Persecution of the Churches and the Jews.

Under the heading "Criminal Activity" of the Gestapo and the S.D., the Tribunal mentions also activities before September 1939 in stating, on p.16944: "Originally, one of the primary functions of the Gestapo was the prevention of any political opposition to the Nazi regime, a function which it performed with the assistance of the S.D." The principal weapon used in performing this function was the concentration camp. The Gestapo did not have administrative control over the concentration camps, but, acting through the RSHA, was responsible for the detention of political prisoners in those camps. Gestapo officials were usually responsible for the interrogation of political prisoners at the camps.

The Gestapo and the S.D. also dealt with charges of treason and with questions relating to the press, the Churches and the Jews. As the Nazi programme of Anti-Semitic persecution increased in intensity the role played by these groups became increasingly important. In the early morning of 10 November 1938, Heydrich sent a telegram to all offices of the Gestapo and S.D., giving instructions for the organisation of the pogroms of that date and instructing them to arrest as many Jews as the prisons could hold "especially rich ones," but to be careful that those arrested were healthy and not too old. By 11 November 1938, 20,000 Jews had been arrested and many were sent to concentration camps. On 24 January 1939, Heydrich, the Chief of the Security Police and S.D., was charged with furthering the emigration and evacuation of Jews from Germany, and on 31 July 1941, with bringing about a complete solution of the Jewish problem in German-dominated Europe. A special section of the Gestapo office of the RSHA under Standartenfuhrer Eichmann was set up with responsibility for Jewish matters which employed its own agents to investigate the Jewish problem in occupied territory. Local offices of the Gestapo were used first to supervise the emigration of Jews and later to deport them to the East both from Germany and from the territories occupied during the war. "

The Tribunal also mentioned that a special detachment from Gestapo headquarters in the RSHA was used to arrange for the deportation of Jews from Axis satellites of Germany for the "final solution".

XV. Pre-1939 activities of the S.S., Germanisation, Persecution of the Jews.

In dealing with the criminal activities of the S.S., the Tribunal says, on p.16953, that S.S. units were active participants of the steps leading up to aggressive war. "The Verfuegungstruppe was used in the occupation of the Sudetenland, of Bohemia and Moravia and of Memel. The Henlein Free Corps was under the jurisdiction of the Reich Fuehrer S.S. for operations in the Sudetenland in 1938 and the Volksdeutsche Mittelstella financed fifth column activities there.

The S.S. was even a more general participant in the commission of War Crimes and Crimes against Humanity. "

With regard to the part played by the S.S. in the Germanisation of occupied territories and in the persecution of Jews, the following is stated on page 16954: "The Race and Settlement Office of the S.S., together with the Volksdeutsche Mittelstelle were active in carrying out schemes for Germanisation of occupied territories according to the racial principles of the Nazi Party and were involved in the deportation of Jews and other foreign nationals. "

It is pointed out that from 1934 onwards, the S.S. was responsible for the guarding and administration of Concentration Camps, (ibid).

In describing the particularly significant rôle played by the S.S. in the persecution of the Jews, the Tribunal says, on p.16955 that the S.S. was directly involved in the demonstrations of 10th November 1938.

XVI. The Individual Defendants: Goering.

In the verdicts of the Tribunal dealing with the guilt or innocence of individual defendants, there are also many references to crimes against humanity.

Respecting Goering, it is said on p.16973, under the heading "War Crimes and Crimes against Humanity"; "Goering persecuted the Jews, particularly after the November 1938 riots, and not only in Germany where he raised the billion mark fine as stated elsewhere, but in the conquered territories as well." Goering is described as "the creator of the oppressive programme against the Jews and other races at home and abroad." It will be observed that the Court stresses, in both connections, that Goering's crimes were committed not only in Germany, but also in conquered territories.

XVII. Ribbentrop.

Ribbentrop, the Tribunal stated on p.16982, was also responsible for war crimes and crimes against humanity because of his activities with respect to occupied countries and Axis satellites. The Tribunal established that, in September 1942, Ribbentrop ordered the German diplomatic representatives accredited to various Axis satellites to hasten the deportation of Jews to the East. On 17th April 1943, he took part in a conference between Hitler and Horthy on the deportation of Jews from Hungary and informed Horthy that the "Jews must either be exterminated or taken to concentration camps. "

Ribbentrop's activities with regard to Jews of satellite countries in general and of Hungary in particular, are a typical example of crimes against humanity which are not simultaneously war crimes because the victims were not allied subjects, but nationals of the Axis satellite countries.

XVIII. Kaltenbrunner.

In the case of Kaltenbrunner, the Tribunal stated on p.16992, that when he was head of the RSHA, special missions of it scoured the occupied territories and the various Axis satellites, arranging for the deportation of Jews to extermination institutions.

XIX. Frick.

The following statement regarding war crimes and crimes against humanity committed by Frick is on p.17005: "Always rabidly anti-Semitic, Frick drafted, signed and administered many laws designed to eliminate Jews from German life and economy. His work formed the basis of the Nurnberg Decrees, and he was active in enforcing them. Responsible for prohibiting Jews from following various professions, and for confiscating their property, he signed a final decree in 1943, after the mass destruction of Jews in the East, which placed them "outside the law" and handed them over to the Gestapo".

On p.17006 the Tribunal states that though Frick actually exercised little control over Himmler and police matters, he signed the law appointing Himmler Chief of the German police as well as the decree establishing the Gestapo jurisdiction over concentration camps and regulating the execution of orders for protective custody.

The Tribunal further established the following facts as to Frick's activities, (p.17007): "Having created a racial register of persons of German extraction, Frick conferred German citizenship on certain categories of citizens of foreign countries. He is responsible for Germanisation in Austria, Sudetenland, Memel, Danzig, Eastern Territories (West Prussia and Posen) and in the territories of Eupen, Malmady, and Moresnet. He forced on the citizens of these territories, German law, German courts, German education, German police security and compulsory military service.

During the war, nursing homes, hospitals and asylums in which euthanasia was practiced as described elsewhere in this Judgment, came under Frick's jurisdiction. He had knowledge that insane, sick and aged people, "useless eaters", were being systematically put to death. Complaints of these murders reached him, but he did nothing to stop them."

XX. Streicher.

The case of Streicher is particularly relevant to the subject of this paper. The accused Streicher was indicted on Counts 1 and 4, and was found guilty only on the latter.

Under the heading "Crimes against humanity", the Tribunal says, (p.17008):

" For his twenty-five years of speaking, writing and preaching hatred of the Jews, Streicher was widely known as 'Jew-Baiter Number One'. In his speeches and articles, week after week, month after month, he infected the German mind with the virus of anti-Semitism, and incited the German people to active persecution. Each issue of 'Der Stürmer', which reached a circulation of 600,000 in 1935, was filled with such articles, often loud and disgusting.

Streicher had charge of the Jewish boycott of 1 April 1933. He advocated the Nürnberg Decrees of 1935. He was responsible for the demolition on August 10, 1938 of the Synagogue in Nürnberg. And on November 10, 1938, he spoke publicly in support of the Jewish pogrom which was taking place at that time.

But it was not only in Germany that this defendant advocated his doctrines. As early as 1938 he began to call for the annihilation of the Jewish race. Twenty-three different articles of "Der Stürmer" between 1938 and 1941 were produced in evidence, in which extermination "root and branch" was preached. Typical of his teachings was a leading article in September 1938 which termed the Jew as a germ and a pest, not a human being, but "a parasite, an enemy, an evil-doer, a disseminator of diseases who must be destroyed in the interest of mankind". Other articles urged that only when world Jewry had been annihilated would the Jewish problem have been solved, and predicted that fifty years hence the Jewish graves "will proclaim that this people of murderers and criminals has after all met its deserved fate." Streicher, in February 1940, published a letter from one of "Der Stürmer's" readers which compared Jews with swarms of locusts which must be exterminated completely. Such was the poison Streicher injected into the minds of thousands of Germans which caused them to follow the National Socialist policy of Jewish persecution and extermination. A leading article of "Der Stürmer" in May 1939, shows clearly his aim:

" A punitive expedition must come against the Jews in Russia. A punitive expedition which will provide the same fate for them that every murderer and criminal must expect. Death sentence and execution. The Jews in Russia must be killed. They must be exterminated root and branch. "

As the war in the early stages proved successful in acquiring more and more territory for the Reich, Streicher even intensified his efforts to incite the Germans against the Jews. In the record are twenty-six articles from "Der Stürmer", published between August 1941 and September 1944, twelve by Streicher's own hand, which demanded annihilation and extermination in unequivocal terms. He wrote and published on December 25, 1941:

" If the danger of the reproduction of that curse of God in the Jewish blood is to finally come to an end, then there is only one way -- the extermination of that people whose father is the devil. "

And in February 1944, his own article stated:

" Whoever does what a Jew does is a scoundrel, a criminal. And he who repeats and wishes to copy him deserves the same fate, annihilation, death. "

With knowledge of the extermination of the Jews in the occupied Eastern Territory, this defendant continued to write and publish his propaganda of death. Testifying in this trial, he vehemently denied any knowledge of mass executions of Jews. But the evidence makes it clear that he continually received current information on the progress of the "final solution". His press photographer was sent to visit the ghettos of the East in the spring of 1943, the time of the destruction of the Warsaw Ghetto. The Jewish newspaper, "Israelitisches Wochenblatt" which Streicher received and read, carried in each issue accounts of Jewish atrocities in the East, and gave figures on the number of Jews who had been reported and killed. For example, issues appearing in the

summer and fall of 1942 reported the death of 72,729 Jews in Warsaw, 17,542 in Lodz, 18,000 in Croatia, 125,000 in Roumania, 14,000 in Latvia, 85,000 in Yugoslavia, 700,000 in all of Poland. In November 1943 Streicher quoted verbatim an article from the "Israelitisches Wochenblatt", which stated that the Jews had virtually disappeared from Europe, and commented "This is not a Jewish lie". In December 1942, referring to an article in the "London Times", about the atrocities, aiming at extermination, Streicher said that Hitler had given warning that the second World War should lead to the destruction of Jewry. In January 1943 he wrote and published an article which said that Hitler's prophecy was being fulfilled, that world Jewry was being extirpated, and that it was wonderful to know that Hitler was freeing the world of its Jewish tormentors.

In the face of the evidence before the Tribunal it is idle for Streicher to suggest that the solution of the Jewish problem which he favoured was strictly limited to the classification of Jews as aliens, and the passing of discriminatory legislation such as the Nuremberg Laws, supplemented if possible by international agreement on the creation of a Jewish State somewhere in the world, to which all Jews should emigrate.

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

It appears that in the case of Streicher, the Tribunal included among his activities considered criminal, his speaking, writing and preaching hatred of the Jews for 25 years. It therefore went back to the year 1920. The Tribunal enumerated among his crimes, his part in the Jewish boycott of 1st April 1933, in the advocating of the Nuremberg Laws in 1935, in the demolition of the Nuremberg synagogue in August 1938, and his part in the Jewish pogrom of November, 1938. This would appear to indicate that here the Tribunal included within the notion of crimes against humanity these pre-1939 activities. The Tribunal was, however, careful to point out that it was not only in Germany that this defendant advocated his doctrines and the Tribunal stated that with knowledge of the extermination of the Jews in the occupied Eastern territory, Streicher continued to write and publish his propaganda of death.

This leaves open an interpretation of the Judgment to the effect that only acts committed in connection with crimes against peace or war crimes are crimes against humanity within the meaning of the Charter and that Streicher had been found guilty of Count 4 not for his activities within Germany but for his extension of their scope to the occupied territories and for his call for the annihilation of the Jewish race throughout the world.

The reply by the Tribunal to Streicher's defence that the solution of the Jewish problem which he favoured was strictly limited to the classification of Jews as aliens and the passing of the discriminatory legislation, such as the Nuremberg Laws, also indicates that the Tribunal did not consider Streicher's part, e.g. in the passing of the discriminatory legislation as such to constitute a crime against humanity, but only his incitement to murder and extermination at the time when the Jews in the East were being killed under the most horrible conditions. This incitement to murder and extermination of Jews, the Tribunal declared to be persecution on political and racial grounds in connection with war crimes.

XXI. Funk.

In the case of the defendant Funk, the Judgment states, on p.17014, that Funk, in his capacity as Under-Secretary in the Ministry of Propaganda and Vice-Chairman of the Reich Chamber of Culture, had participated in the early Nazi programme of economic discrimination against Jews. The Judgment continues: "On 12 November 1938, after the pogroms of November, he attended a meeting held under the chairmanship of Goering to discuss the solution of the Jewish problem and proposed a decree providing for the banning of Jews from all business activities, which Goering issued the same day under the authority of the Four Year Plan. Funk has testified that he was shocked at the outbreaks of November 10, but on November 15, he made a speech describing these outbreaks as a "violent explosion of the disgust of the German people, because of the criminal Jewish attack against the German people", and saying that the elimination of the Jews from economic life followed logically their elimination from political life."

The Judgment then proceeded in describing Funk's criminal activities in and after 1942.

The wording of the Judgment indicated that Funk's pre-1939 activities were also considered criminal.

It may be mentioned in this connection, that it is stated on p.17015 that Funk was responsible for the seizure of the gold reserves of the Czechoslovak National Bank. This seizure took place some months before September 1939.

XXII. Von Schirach.

The defendant von Schirach was found guilty only of crimes against humanity. The Tribunal stated on p.17037: "As has already been seen, Austria was occupied pursuant to a common plan of aggression. Its occupation is, therefore, a "crime within the jurisdiction of the Tribunal" as that term is used in Art.6(c) of the Charter. As a result, "murder, extermination, enslavement, deportation and other inhumane acts" and "persecutions on political, racial or religious grounds" in connection with this occupation constitute a Crime against Humanity under that Article.

As Gauleiter of Vienna, von Schirach came under the Sauckel decree dated April 6, 1942, making the Gauleiters Sauckel's plenipotentiaries for manpower with authority to supervise the utilization and treatment of manpower within their Gaus. Sauckel's directives provided that the forced labourers were to be fed, sheltered and treated so as to exploit them to the highest possible degree at the lowest possible expense.

When von Schirach became Gauleiter of Vienna the deportation of the Jews had already been begun, and only 60,000 out of Vienna's original 190,000 Jews remained. On 2 October 1940, he attended a conference at Hitler's office and told Frank that he had 50,000 Jews in Vienna which the General Government would have to take over from him. On 3 December 1940, von Schirach received a letter from Lammers stating that after the receipt of the reports made by von Schirach, Hitler had decided to deport the 60,000 Jews still remaining in Vienna to the General Government because of the housing shortage in Vienna. The deportation of the Jews from Vienna was then begun and continued until the early fall of 1942. On 15 September 1942, von Schirach made a speech in which he defended his action in having driven "tens of thousands upon tens of thousands of Jews into the Ghetto of the East" as "contributing to European culture".

While the Jews were being deported from Vienna reports, addressed to him in his official capacity, were received in von Schirach's office from the office of the Chief of the Security Police and S.D. which contained a description of the activities of Einsatzgruppen in exterminating Jews. Many of these reports were initialed by one of von Schirach's principal deputies. On 30 June 1944, von Schirach's office also received a letter from Kaltenbrunner informing him that a shipment of 12,000 Jews was on its way to Vienna for essential war work and that all those who were incapable of work would have to be kept in readiness for "special action".

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

Schirach was in this connection charged only with crimes committed during the war against persons who were not allied nationals. (Austrian Jews). The crimes for which he was sentenced are therefore also clear examples of crimes against humanity which are not simultaneously war crimes in the narrower sense.

XXIII Seyss-Inquart.

In giving the reasons for its Judgment on Seyss-Inquart, the Tribunal distinguished between his "activities in Austria" (p.17052) and his "criminal activities in Poland and the Netherlands" (p.17053). Under the first heading, ("Activities in Austria"), the Tribunal said: "As Reichs Governor of Austria, Seyss-Inquart instituted a programme of confiscating Jewish property. Under his regime Jews were forced to emigrate, were sent to concentration camps and were subject to pogroms. At the end of his regime he co-operated with the Security Police and S.D. in the deportation of Jews from Austria to the East. While he was Governor of Austria, political opponents of the Nazis were sent to concentration camps by the Gestapo, mistreated and often killed."

The insertion of this paragraph under the heading "Activities in Austria" as distinguished from "criminal activities", seems to indicate that the Tribunal was of the opinion that the acts committed by Seyss-Inquart, while in Austria, were not criminal from the point of view of crimes against humanity, under Art.6(c) of the Charter. This interpretation would, however, not be in line with the attitude taken by the Tribunal in the case of von Schirach, where, as stated in the preceding paragraph of this paper, the Tribunal described the occupation of Austria as a crime within the jurisdiction of the Tribunal and persecutions on political, racial or religious grounds committed in connection with this occupation as constituting a crime against humanity under the Article. Under the heading "Activities in Austria", the Tribunal described also Seyss-Inquart's part in the German aggression against Austria, and the part taken by him in the dismemberment of Czechoslovakia, both of which lead to his being found guilty also on Count 2, (Crimes against Peace), and were, therefore, certainly considered by the Tribunal to be criminal. Not too much reliance can, therefore, be placed on the omission of the word "criminal" in the heading of the appropriate paragraph dealing with Seyss-Inquart's activities in Austria.

The case of Seyss-Inquart's activities in Austria can, of course, be distinguished from the case of von Schirach in that the latter became Reichsgauleiter in Austria after September 1939, while Seyss-Inquart left Austria at the beginning of the war for Poland and the Netherlands.

XXIV. von Neurath.

In the case of von Neurath, the Tribunal, under the heading "Criminal Activities in Czechoslovakia", stated, inter alia, the following, (p.17064): "As Reichs Protector, von Neurath instituted an administration in Bohemia and Moravia similar to that in effect in Germany. The free press, political parties and trade unions were abolished. All groups which might serve as opposition were outlawed. Czechoslovakian industry was worked into the structure of German war production, and exploited for the German war effort. Nazi anti-Semitic policies and laws were also introduced. Jews were barred from leading positions in Government and business.

In August 1939, von Neurath issued a proclamation warning against any acts of sabotage and stating that "the responsibility for all acts of sabotage is attributed not only to individual perpetrators but to the entire Czech population."

This indicates that acts committed before 1st September, 1939, in Czechoslovakia, were considered criminal as war crimes and/or crimes against humanity.

XXV. Summary of the judgment respecting crimes against humanity.

The International Military Tribunal, in interpreting the notion of crimes against humanity, lays particular stress on the provision of its Charter, according to which an act in order to come within the notion of a crime against humanity, must have been committed in execution of or in connection with any crime within the jurisdiction of the Tribunal which means that it must be closely connected either with a crime against peace or a war crime in the narrower sense. Therefore the Tribunal has declined (supra IX) to make a general declaration that acts committed before 1939 were crimes against humanity within the meaning of the Charter.

In applying this general principle, the Tribunal is particularly reluctant to acknowledge as crimes against humanity acts committed in Germany against Germans before 1st September 1939.

This represents, however, only the general view of the Tribunal and did not prevent it from treating as crimes against humanity acts committed by individual defendants against German nationals before 1st September 1939, if the particular circumstances of the case appeared to warrant this attitude. The case of the defendant Streicher is here in point, but even in his case the causal nexus between his activities and the crimes committed on occupied allied territory and against non-German nationals has been pointed out and the most that can be said of him is that he was found guilty also of crimes against humanity committed before 1st September 1939 in Germany against German nationals.

In the case of none of the defendants was the position such as would have lead to his conviction only of crimes committed in Germany against Germans before 1st September 1939.

The restrictive interpretation placed on the term "crimes against humanity" as far as German nationals as victims were concerned, was not applied by the Tribunal in the case of victims of other than German nationality. With respect to crimes committed before 1st September 1939, against Austrian nationals, the Tribunal established their connection with the annexation of Austria, which is a crime against peace, and came therefore to the conclusion that they were within the terms of Art.6(c) of the Charter. This is particularly shown by the above quoted reasoning in the case of Baldur von Schirach and, with less precision, in the case of the defendant Seyss-Inquart.

With regard to inhumane acts charged in the indictment and committed after 1st September 1939, the Tribunal made the far reaching statement quoted supra IX, from p.16927, that insofar as they did not constitute war crimes they were all committed in execution of, or in connection with, aggressive war and therefore constituted crimes against humanity.

This is particularly illustrated in the case of the defendant Ribbentrop and his activities with respect to Axis satellites.

From the statement on p.16943, quoted supra XIII, it will be seen that the Tribunal treats the notion of crimes against humanity as a kind of subsidiary provision to be applied when a particular area where a crime was committed, is not governed by the Hague Rules of Land Warfare. Germanisation is, therefore, considered as criminal under Art.6(b) in those areas governed by the Hague Regulations and a crime under Art.6(c) as to the remainder.

In general, the following may be said with respect to the interpretation of the term "crime against humanity" by the Tribunal: Before the promulgation of the decision it was assumed in many quarters that a crime against humanity was a novel type of international crime and that the provisions containing sanctions against it were equally applicable in times of war and of peace, that they protected the human rights of inhabitants of all countries, "of any civilian population", against anybody, including their own states and governments, and that the notion expressed the superiority of International Law over domestic or municipal law. According to the interpretation given to the term by the International Military Tribunal, this is not so.

As interpreted in the Nuremberg Judgment, the term has a considerably narrower connotation. It is, as it were, a kind of by-product of war, applicable only in time of war or in connection with war and destined primarily, if not exclusively, to protect the inhabitants of foreign countries against crimes committed, in connection with an aggressive war, by the authorities and organs of the aggressor state. It serves to cover cases not covered by norms belonging to the traditional "laws and customs of war". It is nothing but a particular type of war crime, a kind of clausula generalis, the purpose of which it is to make sure that inhumane acts violating general principles of the laws of all civilised nations committed in connection with war, should not go unpunished.

XXVI. Comparison of the interpretation by the Tribunal with the "General Propositions" adopted by Committee III (Doc.C.201).

(1) Paragraph 1 of the "General Propositions" has been endorsed by the Tribunal. The Tribunal is also of the opinion that one and the same act may constitute both a war crime in the narrower sense and a crime against humanity; the Tribunal is, however, also conscious of the fact that this overlapping of the two terms does not make the application of the law easier and in the sentence dealing with Germanisation, quoted from p.16943, in paragraphs XIII and XXV of this paper, the term crime against humanity was interpreted as a term covering criminal denationalisation in areas to which the laws and customs of war did not apply. Reference is made to the footnote on page 2 of Doc.C.201, where Committee III also expressed its opinion that in a purely scientific system, violations of the laws and customs of war should not be included in the term "crimes against humanity", which should be restricted to such offences as do not fall under the term of "Violations of the Laws and Customs of War."

- (2) The Tribunal has not acted upon the division of crimes against humanity into the two types of: (1) crimes of the murder type and (2) persecutions. It recognises only one notion of crimes against humanity and applies to all acts falling under this notion the qualification that the act must have been committed in execution of or in connection with a crime against peace or a war crime in the narrower sense.
- (3) No modification of point 3 of Doc.C.201 appears necessary.
- (4) From the fact that the Tribunal does not distinguish between crimes of the murder type and persecutions, it follows that crimes against members of belligerent forces are entirely outside the scope of crimes against humanity.
- (5) The condition that the acts be in execution of or in connection with any crime within the jurisdiction of the International Military Tribunal applies according to the Nuremberg judgment to all kinds of crimes against humanity, and is not restricted to what Committee III called "persecutions". The Tribunal does not seem to admit the possibility that one set of facts may constitute a crime against humanity because of its connection with another crime against humanity.
- (6) The decision of the Nuremberg Tribunal has no bearing at all either by way of confirmation or by way of repudiation on the limitations of the term "crimes against humanity" attempted by Committee III to the following effect:
- " Isolated offences do not fall within the notion. As a rule systematic mass action, particularly if it can be shown to be authoritative, will be necessary to transform a common crime, punishable merely under municipal law, into a crime against humanity which thus becomes also the concern of International Law. Only crimes which either by their magnitude and savagery or by their great number or by the fact that a similar pattern is applied at different times and places, endanger the international community or shock the conscience of mankind, warrant intervention by States other than that on whose territory the crimes have been committed, or whose subjects have been their victims. "
- In the case of the Nuremberg defendants, it was the basic assumption that their acts were not isolated offences, but that they were the organisers of crimes against humanity in very great numbers. The correctness or otherwise of the definition suggested by Committee III will therefore have to be decided in the trials of persons, not major war criminals, accused of committing crimes against humanity before municipal (occupation, military) courts.
- (7) The statement contained in Doc.C.201 that it is irrelevant whether a crime against humanity has been committed before or during the war, though based on the express provision to the same effect contained in the Charter, must be considerably qualified in view of the Nuremberg judgment; although in theory it remains irrelevant whether a crime against humanity was committed before or during the war, in practice it is difficult to establish connection between what is alleged to be a crime against humanity and a crime within the jurisdiction of the Tribunal if the act was committed before the war.
- (8) Committee III has stated that the nationality of the victim is irrelevant. This assumption was based on the words of the Charter "committed against any civilian population". Here again, the proposition remains true in theory, but must, according to the view of the Nuremberg Tribunal, be considerably qualified with regard to acts committed before

the war in Germany against German nationals. Even with regard to revolting and horrible crimes, the connection with the aggression or with war crimes must be proved and where proof is not satisfactory, they are not considered by the International Military Tribunal as crimes against humanity within the meaning of the Charter.

(9) The problem of lesser perpetrators was outside the proceedings before the International Military Tribunal.

(10) The irrelevance of the lex loci has been confirmed by the Tribunal.

(11) The proposition that a crime against humanity can be committed by enacting legislation which orders or permits crimes against humanity, has been endorsed by the Tribunal, as is particularly shown in the cases of the defendants Frick and Neurath.

XXVII. The Authority of the Nuremberg Judgment.

The problem arises whether the attitude of the International Military Tribunal with regard to the notion of crimes against humanity (and for that matter, its interpretation of the law in general) is binding for the decision of other cases to be tried either before the International Military Tribunal itself, (if such subsequent trials should take place, which, I understand, seems hardly probable at present), or by other courts be it the International Military Tribunal for the Far East, or municipal, occupational or military tribunals of other United Nations or Axis Powers.

The Tribunal has expressed its opinion that the making of the Charter was an exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; the undoubted right of these countries to legislate for the occupied territories has now been recognised by the civilised world, (p.16871). From this it appears that the Tribunal considers itself to be not an organ of the international community at large, as, e.g., the Permanent Court of Arbitration, the Permanent Court of International Justice or the International Court of Justice. The Tribunal allots to itself a considerably lesser standing, namely the standing of an occupational court having jurisdiction over Germany and German nationals. This classification of the International Military Tribunal not as a court of the international community of nations, but as a local court for Germany, is, generally speaking, in accordance with some of the provisions of the Four-Power Agreement of 8th August 1945, and of the Charter annexed to it.

Article 1 of the Agreement provides for the establishment of an International Military Tribunal "after consultation with the Control Council for Germany."

Art.22 of the Charter provides, inter alia, that the first meetings of the members of the Tribunal and of the Chief Prosecutors shall be held at Berlin in a place to be designated by the Control Council for Germany.

Art.28 of the Charter provides that the Tribunal shall have the right to deprive the convicted person of any stolen property and order its delivery to the Control Council for Germany.

Art.29 of the Charter provides for the sentences to be carried out in accordance with the orders of the Control Council for Germany, which may at any time reduce or otherwise alter the sentences, but may not increase the severity thereof. Under Art.29, the Control Council for Germany has also the right to contact the Committee of Prosecutors with a view to a re-trial of defendants on the discovery of fresh evidence.

Under Art. 30 of the Charter, the expenses of the Tribunal and of the trials shall be charged by the Signatories against the funds allotted for maintenance of the Control Council for Germany.

These provisions in their totality point in the direction of considering the International Military Tribunal as an organ of the present government of the territory of Germany as a condominium of the four Powers, which is called upon to apply law flowing from the Control Council for Germany, as the organ in which supreme authority over Germany and the Germans is vested at the present time.

There are, on the other hand, features in the Four-Power Agreement and in the Charter annexed to it, according to the International Military Tribunal a higher status, transcending the boundaries of Germany and of the local legal order of one country. These features are:

- (a) The provision of Art. 6 of the Charter, according to which the jurisdiction of the Tribunal is not restricted to German major war criminals, but, in theory at least, comprises also the right to try and punish the major war criminals of all the European Axis Countries.
- (b) The provision of Art. 5 of the Agreement giving any Government of the United Nations the right to adhere to the Agreement, a right of which the following 19 States have availed themselves: Greece, Denmark, Yugoslavia, the Netherlands, Czechoslovakia, Poland, Belgium, Ethiopia, Australia, Honduras, Norway, Panama, Luxemburg, Haiti, New Zealand, India, Venezuela, Uruguay and Paraguay.

If the opinion is correct that the International Military Tribunal is a municipal (occupational) court for Germany, it is clear that its decision cannot possibly lay down law binding on the courts of other countries, whether or not the laws of these countries are based on the system of binding precedent, and the decision is therefore for other courts only of persuasive authority, which means that any other courts may follow the Nuremberg interpretation, if it considers it correct, and may disagree with it, if it considers it incorrect.

The position would not be otherwise if the Tribunal were a court of the international community, as, e.g., an International Court of Justice under its San Francisco Statute. In Art. 59 of the Statute of the International Court of Justice, it is laid down (as it was in Art. 59 of the Statute of the Permanent Court of International Justice), that the decision of the court has no binding force except between the parties in respect of that particular case.

This general rule applies, of course, only to the extent to which there is no express provision to the contrary in the Charter. The latter is the case with respect to decisions of the Tribunal with regard to criminal organisations; in such cases

the criminal nature of the group or organisation is, under Art. 10 of the Charter, considered proved and shall not be questioned in national, military or occupational courts of any Signatory, (Great Britain, France, the United States of America and the U.S.S.R.). Apart from this particular aspect, the decision of the International Military Tribunal ius facit inter partes only.

This is not to say that the decision of the Tribunal is not bound to influence any Court throughout the world, which will be faced with similar facts. He would be a bold judge of any national, occupational or military court who would decline to be guided by the reasoned judgment of a court composed of four eminent members of the legal profession of the four Great Powers, arrived at after a trial, unique in history,

backed by the authority not only of the four Signatories, but also of nineteen "adherent" states, always provided that the facts - and the law to be applied - are the same. That the latter is not the case as far as crimes against humanity to be tried under the Control Council Law No.10 are concerned, will be shown in the following paragraph XXVII of this paper.

XXVII. The Nuremberg decision and the Control Council Law No.10.

The Control Council Law No.10, published in the Official Gazette of the Control Council for Germany, No.3., p.50, (see also Military Government Gazette, Germany, British Zone of Control, No.5. p.46; Documents Series of the Research Office No.15 bis, and this writer's commentary in Doc.Misc.No.9.), has been promulgated by the Control Council "in order to give effect to the terms of the Moscow Declaration of 30th October 1943, the London Agreement of 8th August 1945, and the Charter issued pursuant thereto."

Art.I. of the Law No.10 ordains that, inter alia, the London Agreement is made an integral part of this law. Art.II provides that each of the following acts is recognised as a crime and enumerates under (a), crimes against peace, under (b) war crimes, under (c), crimes against humanity, and under (d), membership in a category of a criminal group or organisation declared criminal by the International Military Tribunal.

We are here concerned with crimes against humanity. The respective provision of Law No.10 reads as follows:

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

If we compare the definition of "Crimes against Humanity" under Law No.10 with the definition of crimes against humanity in the Charter, we find the following differences:

- (1) The definition of Law No.10 begins with the words "Atrocities and offences, including but not limited to" These words are not contained in the Charter. This means that the enumeration in the Charter is exhaustive, in Law No.10 exemplative. This difference does not amount to too much, because the words used in the Charter, "or other inhumane acts", are so wide that the enumeration is, in practice, also only exemplative.
- (2) Among the acts enumerated in Law No.10 are the following, which are not enumerated in the Charter, namely: "imprisonment, torture and rape".
- (3) The word "and" before "other inhumane acts" is replaced in Law No.10 by the word "or". This again indicates that the intention of the makers of Law No.10 was to give it a wider scope, although the practical effect of this alteration should not be too great.
- (4) The words "before or during the war" are omitted in Law No.10. It is submitted that this alteration has no practical importance because from other provisions of Law No.10 it is quite clear that Law No.10 too applies to crimes committed both before and during the war. One of the provisions bearing this out is Art.II(5) of Law No.10

regarding the Statutes of Limitation. (See para.XI of Doc.Misc.9).

The omission of the words "before or during the war" may have the reason that the legislators intended that the provisions should cover not only acts committed before and during the war, but also acts committed after the war.

(5) Law No.10 does not contain the words "in execution of or in connection with any crime within the jurisdiction of the Tribunal". This, of course, is the most fundamental and most striking difference between the Charter and Law No.10, particularly in view of the great importance attributed by the International Military Tribunal to these very words. From this difference between the text of the Charter and the text of Law No.10, it follows that this important qualification of the term "Crime against Humanity", as understood by the International Military Tribunal, is entirely inapplicable in proceedings under Law No.10. Contrary to what was said by the International Military Tribunal with regard to the law to be applied by the International Military Tribunal on p.16927 (quoted supra IX), it is not necessary under Law No.10 to prove that acts, to fall under the notion of crime against humanity within the meaning of Law No.10, must have been in execution of, or in connection with a crime against peace or a war crime in the narrower sense.

The effect of this fundamental difference between the Charter on the one hand, and Law No.10 on the other, makes the whole jurisprudence evolved by the International Military Tribunal with a view to restricting crimes against humanity to those closely connected with the war, irrelevant for the courts which are dealing or will be dealing with crimes against humanity under Law No.10.

It seems, on first sight, to be rather startling that the law applied to the major war criminals who were tried under the Charter, should be less comprehensive and therefore less severe than the law applied to not-so-high-ranking perpetrators. To this objection it may be replied:

(a) That it is only a theoretical and doctrinal one, because the major war criminals were caught in the net of the law in spite of the qualification contained in Art.6(c) of the Charter.

(b) That the striking difference in the texts of the Charter on the one hand, and of Law No.10 on the other, does not permit of any other interpretation. / There remains one difficulty in the interpretation of Law No.10. Art.I makes the London Charter an integral part of the Law. Art.II contains, as shown, provisions respecting, inter alia, crimes against humanity, which differ from the London Charter. Which provision is to prevail? I submit that Art.II is the operative provision, the quoted part of Article I only incorporating the provisions regarding major war criminals in the local law of Germany. The guilt, or innocence of persons other than the major war criminals, is, in my view, governed by Article II.

I understand that a Carrying-out-Law to the Control Council Law No. 10 has been prepared by the British authorities for the British zone. It may be that the statement of the law, as contained in this paragraph will have to be supplemented or qualified when the text of the Carrying-out-Law for the British zone is available.

XXIX. The different approach of a Criminal Court on the one hand and of the United Nations War Crimes Commission on the other.

In considering the judgment of the International Military Tribunal in its bearing on the activities of the Commission, it should be borne in mind that the approach of the International Military Tribunal and, for that matter, of any other court administering penal law, to certain facts and their legal relevance, must necessarily be different from the approach to the same facts by the United Nations War Crimes Commission. While the International Military Tribunal as a court of law has had to establish, and did actually establish, whether a certain fact is proved "beyond reasonable doubt" (cf. the acquittal of Schacht, (p.17022) and the acquittal of Papen (p.17051)), the Commission has only to decide whether there is a prima facie case against a certain person or a group of persons.

The Commission has further to consider that the law to be applied to "crimes against humanity" by national, occupational or military courts need not necessarily be the same as the law which was applied by the Nuremberg Tribunal. With regard to Germany, it has been shown in paragraph XXVIII supra that the law laid down by the Control Council differs from the law of the Charter.

III/63
29th October, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III

Yugoslav-Italian charges of Crimes against
Humanity referred to Committee III by
Committee I.

Draft Report by Committee III.

By the Secretary to Committee III.

- I. Committee I has been examining a considerable number of charges brought by the Yugoslav National office against certain Italian nationals. These charges include Charges Nos. 1323, 1462, 3296, 4031, 4032, 4033, 4034, 4035, 4036, 4037. Of these charges, the Charges Nos. 1462 and 4037 deal with the same facts.
- The charges mentioned were referred to Committee III by Committee I, the terms of reference being that Committee III should give its opinion as to whether or not the alleged crimes should be considered as Crimes Against Humanity, and for what reasons.
- II. The facts of the cases referred to Committee III are reproduced in Docs. III/32, III/45 and III/56. The Yugoslav representative on the United Nations War Crimes Commission, Dr. R. ZIVKOVIC, supplemented the charges by two memoranda, which are contained in Docs. III/57 and III/59.
- III. In the meeting of Committee III held on 2nd October, 1946, (Committee III Minutes 21/46) Dr. ZIVKOVIC proposed that the consideration of the case No. 1323 (annex to Doc. III/32) should be adjourned, because it was not directly connected with the other cases enumerated above. This was agreed to by Committee III and this report deals accordingly with all the cases mentioned in para I of this paper, with the exception of the Charge No. 1323, on which a special report will be prepared in due course.
- IV. From the following report, it will be seen that the individual charges brought by the Yugoslav National Office, and dealt with in this report, deal in some cases with a considerable number of different sets of facts. On some of such sets of facts, or "counts", the information so far produced by the Yugoslav National Office was not considered sufficient and the decision on some counts has accordingly also been adjourned until additional information is forthcoming.
- V. In presenting this report, Committee III states:
1. That it is not concerned with the question whether the persons charged by the Yugoslav government should be listed by the Commission at the instance of the Yugoslav government.
 2. That it is not concerned with the question whether the persons should be extradited or handed over to the Yugoslav government.
 3. That it is not concerned with the guilt of each individual accused.

The only question on which Committee III has to give its opinion is whether the facts set out in the Yugoslav charges constitute crimes against humanity and if so, to give the reasons. The task of Committee

III is therefore restricted to a reply to this theoretical legal question only.

Considering the charges referred to it from this restricted angle, Committee III makes the observations contained in the following paragraphs of this paper.

VI. Case No:3296(Doc.III/45)
This charge contains eight different counts, with which Committee III dealt as follows:-

Count 1.

The decision was adjourned until the Yugoslav National Office could supply further information.

Counts 2 and 3.

There the accused is charged that his troops, in a terror raid, pillaged the property of three people, and that a unit of his troops beat and tortured a man, threatening him with death and looting his belongings.

In the course of the discussion of these charges, the question was raised whether crimes against property could be considered as crimes against humanity, and it was pointed out by some speakers that the acts occurred when rebellion against the Italian authorities was in progress. It was also pointed out that it was relevant whether or not the acts were committed in the course of operations against partisans, and if this was not the case, whether they were committed according to a pattern, the object of which was the persecution of the civilian population for political or racial grounds. The Yugoslav representative, on the other hand, drew the Committee's attention to the fact that the crimes described in Counts 2 and 3 (and for that matter, all crimes charged in case No. 3296) had been committed after the Italian armistice and that, accordingly, the accused were rebels in relation to their own government, which had capitulated to the Allies. They had, in the Yugoslav representative's submission, no claim to the status of a belligerent force. Other members replied that the "Fascist-Republican" forces *via facti* had been treated by the Allies as combatant belligerent units. The Committee came to the conclusion that the facts as alleged in counts 2 and 3 were crimes and that it will decide whether they fall under the notion of crimes against humanity, when considering the whole of the cases submitted.

Count 4.

This count deals with two different sets of facts. In its first paragraph, one of the accused is charged that a unit under his command arrested an inhabitant and deported him to a concentration camp in Germany. As to this, the Committee came to the same conclusion as with regard to counts 2 and 3, namely that a *prima facie* case for a crime having been committed has been made out, and that the question of its classification as a crime against humanity would be considered when the whole of the charges will have been under review.

The second paragraph of Count 4 (regarding the killing of Kamilo Stepanoi) was adjourned until the Yugoslav National Office will have had supplied information regarding the question why the victim had been killed.

Counts 5, 6 and 7.

These three counts all deal with pillage. The decision of Committee III was to the same effect as in the above-quoted counts two and three.

Count 8.

This count contains a charge that a Commander of the Partisan Brigade was taken to a house, where he was tied to the staircase for two days, beaten and tortured. He was then taken to the River Isonzo and shot without trial. The Committee decided that the torture and the shooting without trial constituted a crime, the qualification of which would be considered in connection with the whole of the charges submitted.

VII. Case No. 4031.

Counts 1 and 2.

are, according to the statement by Dr. Zivkovic, important as illustrations of a pattern, but were not charges in themselves.

Count 3.

This count deals with opening fire on people in a house, the wounding of two Yugoslav students who were inside and who were arrested together with two other men. The house was burnt down, allegedly as a reprisal. The Committee came to the conclusion that a crime had been committed and its qualification as a crime against humanity would be considered in connection with the other charges. The Committee did not, however, regard the mere arrest of two students and two other men in itself as a crime.

Counts 4 and 5.

These two counts refer to shooting of captured partisans without trial. The Committee is of the opinion that the facts establish a prima facie case of a crime, the qualification of which will be considered in connection with other charges submitted.

Count 6.

This case refers to the wanton destruction by fire of a house. Here again, the Committee is of the opinion that a prima facie case of a crime has been established.

Count 7.

This count consists of three different sets of facts described in three paragraphs.

Paragraphs 1 and 3 of count 7 were adjourned.

As to paragraph 2, which contains the charge of shooting civilians arrested for violation of a curfew while allegedly trying to escape, the Committee considers that there is a reasonable suspicion of a crime having been committed, the qualification of which will be considered in connection with the whole scheme.

Count 8.

This count concerns the shooting of a captured partisan while allegedly trying to escape. The Committee considers this charge as a prima facie case of a crime.

VIII. Case No. 4032.

This charge concerns the pillaging of villages, setting fire to houses and the murder and deportation of persons. The committee decided that a prima facie case of a crime had been made out.

IX. Case No. 4033.

The Committee arrived at the same decision with regard to this case, count 1 of which concerns the shooting of nine hostages, and the second the shooting of three women under the pretence that they attempted to escape.

X.

Case No. 4034.
Counts 1 to 5 of this
charge refer to:-

Count 1.

Imprisonment of 45 men and deportation to concentration camps in Germany.

Count 2.

A so-called "mopping up" action, in the course of which persons were arrested, one of them hanged, the others released, and the village pillaged. The hanging took place without trial.

Count 3.

The torture and capture of partisans, taking some of them to a house, stripping some of them and torturing them to death.

Count 4.

The hanging of four men without trial.

Count 5.

The pillaging of a village, setting houses on fire, killing people, including women and children.

The Committee considered that with regard to all five counts, a prima facie case of a crime had been made out.

The charge preferred in Count 6 of the same case was abandoned by Dr. Zivkovic.

XI.

Case No. 4035.

Count 1.

The Yugoslav representative pointed out that the offences alleged to have been committed under count 1 (and also counts 7, 8, 9 and 13) were committed arbitrarily. The Committee came to the conclusion that the shooting alleged under Count 1 constitutes a prima facie case of a crime.

Count 2.

The Yugoslav representative abandoned this count.

Count 3.

Here the Committee came to the same conclusion as in respect of count 1.

Count 4.

The Yugoslav representative abandoned count 4.

Count 5.

The Committee adjourned this count on the suggestion of the Yugoslav representative.

Count 6.

This count was abandoned by the Yugoslav representative as far as the alleged robbery was concerned. The shooting however constitutes, in the Committee's opinion, a prima facie case of a crime.

Counts 7, 8 and 9.

The same applies to the shooting alleged under counts 7, 8 and 9.

Count 10.

The Yugoslav representative explained that by internment in Germany, internment in a concentration camp was meant. The Committee came therefore to the conclusion that as far as deportations to concentration camps were concerned, a prima facie case of a crime had been made out.

Counts 11 and 12. As far as the deportations to Concentration camps alleged under these counts are concerned, the Committee found a prima facie case of a crime.

Count 13. The same applies to the facts alleged under count 13 as far as the shooting of the victim is concerned.

Count 14.

With regard to the alleged beating and torture of the victim, the committee finds a prima facie case of a crime.

XII.

Case No. 4036.

The Yugoslav representative abandoned the charge of wrongful arrest. As regards the detaining without food and the order that victims be sent to concentration camps, the Committee find a prima facie case of a crime to be established.

The case was adjourned as far as the committing of a crime by ordering forced labour was alleged.

XIII.

Case No. 4037.

Here the Committee dealt with the counts reproduced in paragraph I on page 11 of Doc. III/56 in the following way:-

Count 1.

The Committee adjourned the consideration of this case and asked the Yugoslav National office, to furnish the text of the regulations which were in force in the occupied Yugoslav region of Ljubljana.

Count 2.

Here the Committee arrived at the opinion that the shooting of the prisoner Furlan during an alleged attempt to escape constituted a crime.

Counts 3, 4 and 5.

The Yugoslav representative explained that apart from the charge of killing a partisan, the facts described under these counts were brought forward to illustrate the general atmosphere and did not purport to allege that they were crimes in themselves.

The decision on the charge in count 4, regarding the killing of a partisan named Sasa, was adjourned, to enable the Yugoslav National office to furnish further information on the circumstances of the killing.

Count 6.

The consideration of this count was adjourned, the Yugoslav National office promising to give further information respecting the circumstances of the killing of the three partisans.

Counts 7, 8, 9, 10 and 11.

The Yugoslav representative declared that the facts contained in these points were recorded only for illustration of the general atmosphere.

Count 12.

The Yugoslav representative supplemented the charge by stating that the homes of the killed partisans had been set on fire deliberately and without military necessity and certainly not in the course of fighting. Thereupon the Committee decided that this wanton destruction of property constitutes a crime, the opinion on the qualification of which will be expressed in connection with the other alleged facts.

Count 13.

The Committee came to the conclusion that the shooting of a young man for shouting communist slogans, and slogans advocating the freedom of Slovenia, made out a prima facie case of a crime, both in the event of his having been shot without trial, and in the event of a trial having been held, because the punishment would in any case have been excessive.

Count 14.

The Committee came to the conclusion that a prima facie case of a crime committed by the wanton destruction of two houses had been made out.

Count 15.

sub-para 1. - The Committee decided that the sending of the relatives to concentration camps constituted a crime.

sub-paragraph 2. - This case was adjourned until further information would be forthcoming.

Counts 16 and 17.

The Committee arrived at the opinion that the facts described there (internment of relatives of young people in concentration camps) constituted a crime.

Count 18.

The decision on this count was adjourned.

With regard to the counts contained in case No. 4037 (Doc. III/56 under II) the opinion of the Committee is as follows:-

Count 1.

The killing of a man while allegedly attempting to escape constitutes a crime. The same applies to the wanton destruction of 81 buildings dealt with under the same count.

Count 2.

This case was adjourned for the same reasons as count 1 of paragraph I and the Yugoslav National Office was asked to provide the text of the provisions valid in Ljubljana province.

XIV.

The Committee took note of the two papers III/57 and III/59 presented by the Yugoslav representative, particularly of the speech made by Mussolini in Gorizia on 31st July, 1942, where Mussolini, in words, the bearing of which is unambiguous, announced that he had given the order to change the methods of dealing with Italian citizens of the Yugoslav race radically. Mussolini spoke of the "inflexibility of the Roman law", from which allegedly followed that those who refuse to give up their mad dreams should know that they will be completely annihilated and that their property will literally be razed to the ground. Mussolini referred to an alleged fact that after one barbaric tribe had tried to attack the Romans three times, Caesar gave the order to annihilate all the males of that population. It goes without saying that under the "barbaric tribe", the population of Yugoslav origin, living in the Julian March, was meant.

The Committee considers Mussolini's speech particularly relevant, because of the opinion which it has expressed in its preliminary report containing "General Propositions" defining the term crimes against humanity (Doc. C. 201).

In this paper, Committee III has stated that in its opinion, isolated cases do not fall within the notion of crimes against humanity. As a rule, systematic mass action, particularly if it can be shown to be authoritative, will be necessary to transform a common crime, punishable merely under municipal law, into a crime against humanity, which thus becomes also the concern of International Law (para 6 of Doc.C.201). The authoritative character of the crimes alleged by the Yugoslav National office could not be established more clearly than by the admission by the then Dictator of Italy that all the crimes, not only against the life and liberty of Italian citizens of Yugoslav race, but also against their property, have been ordered and instigated by him.

XV. From the individual Yugoslav charges, as analysed above, in connection with the speech by Mussolini, it appears that a great number of examples of crimes have been established, including acts of murder, extermination, enslavement, deportation and other inhumane acts committed against the civilian population, and persecutions on political and racial grounds. The Committee particularly points out that *prima facie* cases have been made out:

shooting of prisoners while allegedly trying to escape are contained in charge 4031, counts 7(para.2) and 8; in charge 4033, count 2; in charge 4037; paragraph I count 2 and paragraph II count 1(1);

shooting of hostages, case 4033, count 1;

internment under inhumane conditions, case No;4036, count 1(1);

torture - case No.3296, counts 3 & 8; case 4034, count 3; case 4035, count 14;

deportation to concentration camps - case 3296, count 4(1); case 4034, count 1; case 4035, counts 10,11,12; case 4037, counts 15(1) and 16;

murder and attempted murder, case 3296, count 8; 4035, counts 1,3,6,7,8,9,13; case 4037, count 13;

wanton destruction of property, case 4031, counts 3(2) and 6; case 4037, counts 12 and 14; case 4037(I), counts 12 and 14 and (II) count 1;

execution without trial, case 4031, counts 4 & 5; and case 4034, counts 2 and 4;

pillage, case 3296, counts 2,3(2 para 4) 5,6,7.

different other inhumane acts, case 4032; case 4034 count 5.

XVI. The International Military Tribunal at Nuremberg, in its judgment against the major German war criminals, stated on page 16,927 of the official transcript(quoted in Doc.III/62,para IX,page 6) the following:-

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

This distinction made by the International Military Tribunal is based on the words in Article 6(c) of the Charter of the International Military Tribunal "in execution of or in connection with any crime within the jurisdiction of the Tribunal". In the present case, it is not necessary to examine the question whether this restriction on the notion of a crime against humanity, which is indicated in the Charter of the International Military Tribunal, applies also to cases like those now under consideration by Committee III, because the crimes alleged in the Yugoslav charges were committed during the war and were therefore all committed in execution of or in connection with the aggressive war which Italy joined in 1940, and started waging against Yugoslavia in 1941, so that it follows that the crimes described in the foregoing paragraphs of this paper fall within the notion of "crimes against humanity". This statement refers, of course, only to these charges and counts which are discussed in this paper, and at present, not to those which have been adjourned.

III/64.
31st October, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III

The Criminal Organisations in the Nuremberg Judgment.

By Egon Schwelb, Legal Officer.

The Legal Secretariat proposes to circulate, in due course, papers examining and analysing those parts of the Nuremberg Judgment which appear to be of practical importance for the Commission and for its Third and First Committees.

The present paper is the second of this series.

The first, dealing with the notion of crimes against humanity, as interpreted by the International Military Tribunal, was circulated as Document III/62.

C O N T E N T S.

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I. The Provisions of the Charter regarding Criminal Organisations.

The provisions of the Charter annexed to the Four-Power Agreement of the 8th August 1945, dealing with what may be called "criminal organisations" are contained in Articles 9 - 11 of the Charter, which read as follows:

" Article 9.

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

After receipt of the Indictment the Tribunal shall give such notice as it thinks fit that the prosecution intends to ask the Tribunal to make such declaration and any member of the organisation will be entitled to apply to the Tribunal for leave to be heard by the Tribunal upon the question of the criminal character of the organisation. The Tribunal shall have power to allow or reject the application. If the application is allowed, the Tribunal may direct in what manner the applicants shall be represented and heard.

Article 10.

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

Article 11.

Any person convicted by the Tribunal may be charged before a national, military or occupation court, referred to in Article 10 of this Charter, with a crime other than of membership in a criminal group or organisation and such court may, after convicting him, impose upon him punishment independent of and additional to the punishment imposed by the Tribunal for participation in the criminal activities of such group or organisation. "

II. The binding character of the Tribunal's declaration.

The Tribunal quotes, on p.16928, Art. 9 of the Charter, and adds:

" Art.10 of the Charter makes clear that the declaration of criminality against the accused organisation is final and cannot be challenged in any subsequent criminal proceedings against a member of that organisation. "

It may be pointed out that the binding effect of the Tribunal's decision, as it is described in the Judgment, applies only to courts of any "Signatory" of the Four-Power Agreement, i.e. to British, United States, Soviet and French national, military or occupation courts. It does not, in strict law, apply to courts and authorities of other nations, even though they may have adhered to the Four-Power Agreement by virtue of its Article 5. It goes without saying, however, that also in such courts as are not bound by the Tribunal's declaration in strict law, the Tribunal's decision will necessarily have very great authority indeed.

III. Illustration by the Control Council Law No.10.

The effect of the declaration of criminality of the Tribunal is, as the Tribunal pointed out, (ibid), well illustrated by Law No.10 of the Control Council for Germany, passed on 20th December 1945, from which the Tribunal quotes the following provisions of Art.II, (p.16929):

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

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

....
(3) Any person found guilty of any of the crimes above mentioned may upon conviction be punished as shall be determined by the Tribunal to be just. Such punishment may consist of one or more of the following:

- (a) Death,
- (b) Imprisonment for life or a term of years, with or without hard labour,
- (c) Fine, and imprisonment with or without hard labour, in lieu thereof. "

The Tribunal adds (p.16929) : "In effect, therefore, a member of an organisation which the Tribunal has declared to be criminal may be subsequently convicted of the crime of membership and be punished for that crime by death. This is not to assume that international or military courts which will try these individuals will not exercise appropriate standards of justice. This is a far reaching and novel procedure. Its application, unless properly safeguarded, may produce great injustice. "

IV. The novelty of the procedure.

The novelty of the provision, which is pointed out by the Tribunal, consists in the fact that the result of proceedings to which the individual members of the criminal organisation, to be accused later, were not parties has effect in these subsequent proceedings. Some procedural safeguards of the rights of individual members which may be prejudiced by the general declaration by the Tribunal, are contained in paragraph 2 of Article 9 of the Charter, quoted above, according to which the Tribunal, after receipt of the indictment, shall give such notice as it thinks fit that the prosecution intends to ask the Tribunal to make such declaration and any member of the organisation will be entitled to apply to the Tribunal for leave to be heard by the Tribunal upon the question of the criminal character of the organisation.

The Tribunal actually applied this provision to a very great extent, as is stated on p.16797: "The Tribunal appointed Commissioners to hear evidence relating to the organisations and 101 witnesses were heard for the Defence before the Commissioners, and 1,809 affidavits from other witnesses were submitted. Six reports were also submitted, summarising the contents of a great number of further affidavits.

38,000 affidavits, signed by 155,000 people were submitted on behalf of the Political Leaders, 136,213 on behalf of the S.S., 10,000 on behalf of the S.A., 7,000 on behalf of the S.D., 3,000 on behalf of the General Staff and OKW, and 2,000 on behalf of the Gestapo. "

V. Judicial Discretion in the application of Art.9.

The Tribunal pointed out on p.16969 that: "Art.9. uses the words: "The Tribunal may declare" so that the Tribunal is vested with discretion as to whether it will declare any organisation criminal. This

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

VI. Knowledge of criminal purposes as the test for personal guilt.

The Tribunal, on p.16930, says that a criminal organisation is analogous to a criminal conspiracy, in that the essence of both is co-operation for criminal purposes: "There must be a group bound together and organised for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter. Since the declaration with respect to the organisations and groups will, as has been pointed out, fix the criminality of its members, that definition should exclude persons who had no knowledge of the criminal purposes or acts of the organisation and those who were drafted by the State for membership, unless they were personally implicated in the commission of acts declared criminal by Article 6 of the Charter, as members of the organisation. Membership alone is not enough to come within the scope of these declarations. "

As will be shown in analysing the Tribunal's decision on each of the accused organisations, the Tribunal, dealing in accordance with well settled legal principles, generally applied by civilized nations, has given to its declarations of the criminal character of the organisations a form and content different from what at first sight would appear to be provided in the Charter.

The Charter, in its Article 9, envisages a declaration that the group or organisation as such, as a body, as a unit, was a criminal organisation. The Tribunal exercised its judicial discretion by considerably narrowing the scope of its declarations by excluding persons who had no knowledge of the criminal purposes or acts of the organisation and those who were drafted by the State for membership. The Tribunal's ruling that membership alone is not enough to come within the scope of these declarations should allay any misgivings by other courts, particularly by courts in Germany, in giving effect to the provisions of the Charter, and to the declaration of the Tribunal. As interpreted and illustrated by the Tribunal, its declaration does not fasten criminal responsibility on membership in a criminal organisation itself, as such, but introduces the subjective factor. The Tribunal's declaration neither relieves the courts in subsequent proceedings of their duty, nor does it take from them the right to examine the dolus or mens rea of each individual defendant, who will be tried for membership in a criminal organisation.

In all cases where the prosecution will not be able to establish that the member of a criminal organisation had knowledge of the criminal purpose or acts of the organisation, or where the accused will be able to prove that he was drafted by the State for membership, the subsequent proceedings against the individual member in question will lead to his acquittal, provided always that the accused was not personally implicated in the commission of acts declared criminal by Article 6 of the Charter, (crimes against peace, war crimes, crimes against humanity), as a member of the organisation.

VII. The provisions, as interpreted by the Tribunal, are not contrary to settled legal principles.

It will be seen that, interpreted and applied in this way, the provisions regarding criminal organisations have far less a revolutionary character than there is generally assumed. If a person voluntarily becomes a member of an organisation or remains a member having knowledge of its criminal purpose or acts, it is by no means contrary to the general principles of criminal law of civilised nations, to fasten upon him criminal responsibility for acts committed by the group. Although the provisions of the criminal law of individual states regarding the possible parties to a crime differ from State to State, such membership in a criminal organisation will, under one denomination or another, make necessary the classification of such individual defendant as particeps criminis, either, e.g., as in British law, as actual offender (principal in the first degree), as aider and abetter at the time when the crime is committed, (principal in the second degree), or as accessory before the fact or, in certain circumstances, as accessory after the fact. Corresponding provisions are, of course, contained in the criminal codes of all countries.

The appropriate provisions of the German Criminal Code concerning principals and accessories are to the following effect:

" 47. If several persons carry out a criminal offence in common, then each will be punished as a principal.

48. Anyone who has deliberately induced another to commit a criminal offence by gifts or promises, by threats, by misuse of supervision or of authority, by intentionally causing or promoting a mistake or by other means shall be punishable as an instigator.

The punishment of an instigator shall be determined according to the law which applies to the act he has knowingly instigated.

49. Anyone who has by word or deed knowingly given assistance to an offender in the commission of a crime or delict shall be punished as an accessory before the fact.

The punishment of an accessory before the fact shall be determined according to the law for the act in which he has knowingly assisted, however, it shall be modified according to the principles concerning the punishment of attempts. "

The French Criminal Code of 1810 (Code Pénal), as amended, contains the following provisions, which are quoted as further illustrations of a general principle:

Art. 60. Seront punis comme complices d'une action qualifiée crime ou délit, ceux qui, par dons, promesses, menaces, abus d'autorité ou de pouvoir, machinations ou artifices coupables, auront provoqué à cette action ou donné des instructions pour la commettre;

Ceux qui auront procuré des armes, des instruments, ou tout autre moyen qui aura servi à l'action, sachant qu'ils devaient y servir;

Ceux qui auront, avec connaissance, aidé ou assisté l'auteur ou les auteurs de l'action, dans les faits qui l'auront préparée ou facilitée, ou dans ceux qui l'auront consommée, sans préjudice des peines qui seront spécialement portées par le présent Code contre les auteurs de complots ou de provocations attentatoires à la sûreté intérieure ou extérieure de l'Etat, même dans le cas où le crime qui était l'objet des conspirateurs ou des provocateurs n'aurait pas été commis.

Art. 61. Ceux qui, connaissant la conduite criminelle des mal-fauteurs exerçant des brigandages ou des violences contre la sûreté de l'Etat; la paix publique, les personnes ou les propriétés, leur fournissent habituellement logement, lieu de retraite ou de réunion, seront punis comme leurs complices.

Art. 265. (L. 18 décembre 1893). Toute association formée, quelle que soit sa durée ou le nombre de ses membres, toute entente établie dans le but de préparer ou de commettre des crimes contre les personnes ou les propriétés, constituent un crime contre la paix publique.

Art. 266. Sera puni de la peine des travaux forcés à temps, quiconque se sera affilié à une association formée ou aura participé à une entente établie dans le but spécifié à l'article précédent.

Art. 267. Sera puni de la reclusion quiconque aura sciemment et volontairement favorisé les auteurs des crimes prévus à l'article 265, en leur fournissant des instruments de crime, moyens de correspondance, logement ou lieu de réunion.

Provisions on similar lines are contained in sections 5 and 6 and 211-221 of the Czech (Austrian) Criminal Code.

VIII. Analysis of the Tribunal's general ruling.

The detailed effect of the Tribunal's ruling on this fundamental question will be analysed in detail below when dealing with the declarations on each of the accused organisations. In this connection, suffice it to say that the declarations made by the Tribunal are not, in effect, declarations stating the criminal character of the organisations, they are declarations of the criminality of acts or omissions of individuals who were not only members of these organisations, but who were members or remained members after having acquired knowledge of the criminal purpose or acts of the organisations and this only if they were not drafted for membership by the State. The statement that they are personally responsible if they were personally implicated in the commission of criminal acts, does not introduce any novelty into the law, because the responsibility for acts in which the perpetrator was personally implicated does not need any support by way of declaration of criminality of the organisation.

The actual practice of the courts before which subsequent proceedings will be conducted, will show what consequences, if any, the Tribunal's declarations will have on the proceedings against individual members. As the Tribunal has excepted from its declarations those persons of whom it cannot be proved that they had knowledge of the criminal character of the organisation, and those persons who were drafted into the organisation by the German State, it does not seem that the burden of proof to be discharged by the prosecution in subsequent proceedings has been eased at all.

This statement of the writer's personal view does not purport to express an opinion on the correctness or soundness of the Tribunal's ruling, nor does it imply that more sweeping declarations would have served the cause of just retribution better and would have more facilitated the task of prosecuting and judicial authorities charged with the duty to give effect to the Nuremberg judgment.

The Tribunal has stated, in giving its reasons for its decision re the Reich Cabinet (pp.16963/4; see below, para. XV of this paper, that a declaration obviates the necessity of inquiring as to the criminal character of the organisation in the later trial of members who are accused of participating through membership and thus saves much time and trouble. It is, of course, much more difficult to establish in criminal proceedings the guilty knowledge of an accused individual, than the criminal purposes of an organisation of the kind of those that were declared criminal by the Tribunal.

IX. General Recommendations by the Tribunal de lege ferenda.

On pp.16930-31, we find the following statement by the Tribunal: "Since declarations of criminality which the Tribunal makes will be used by other courts in the trials of persons on account of their membership in the organisations found to be criminal, the Tribunal feels it appropriate to make the following recommendations:

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

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

The De-Nazification Law of March 5, 1946, however, passed for Bavaria, Greater-Hesse and Wuerttemberg-Baden, provides definite sentences for punishment in each type of offence. The Tribunal recommends that in no case should punishment imposed under Law No.10 upon any member of an organisation or group declared by the Tribunal to be criminal exceed the punishment fixed by the De-Nazification Law. No person should be punished under both laws.

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

X. The accused organisations.

The Indictment, (British Command Paper Cmd.6696) enumerates under II,p.3, the groups or organisations for whose declaring criminal the Prosecution had asked:

" II. The following are named as Groups or Organisations (since dissolved) which should be declared criminal by reason of their aims and the means used for the accomplishment thereof and in connection with the conviction of such of the named defendants as were members thereof: DIE REICHSREGIERUNG (REICH CABINET); DAS KORPS DER POLITISCHEN LEITER DER NATIONALSOZIALISTISCHEN DEUTSCHEN ARBEITERPARTEI (LEADERSHIP CORPS OF THE NAZI PARTY); DIE SCHUTZSTAFFELN DER NATIONALSOZIALISTISCHEN DEUTSCHEN ARBEITERPARTEI (commonly known as the "SS") and including DIE SICHERHEITSDIENST (commonly known as the "SD"); DIE GEHEIME STAATSPOLIZEI (SECRET STATE POLICE, commonly known as the "GESTAPO"); DIE STURMABTEILUNGEN DER N.S.D.A.P. (commonly known as the "SA"); and the GENERAL STAFF and HIGH COMMAND of the GERMAN ARMED FORCES. "

More detailed definitions of the groups and organisations are contained in Appendix B of the Indictment, on pages 40-44 of the British Command Paper. The Judgment does not follow the order of the Indictment but takes first those organisations which have been found criminal (pp.16932 and following) and deals at the end with those organisations with regard to which no declaration has been made (pp.16963 and following).

This paper follows the order as it is contained in the judgment.

XI. The Leadership Corps of the Nazi Party.

It is not proposed to recapitulate in this connection, the crimes and criminal schemes for which the Leadership Corps has been held responsible in the Judgment, as they are set out on p.16932-16939.

The conclusions by the Tribunal are as follows, (pp.16938/9):

" The Leadership Corps was used for purposes which were criminal under the Charter and involved the Germanisation of incorporated territory, the persecution of the Jews, and administration of the slave labour programme, and the mistreatment of prisoners of war. The defendants Bormann and Sauckel, who were members of this organisation, were among those who used it for these purposes. The Gauleiters, the Kreisleiters, and the Ortsgruppenleiters participated, to one degree or another, in these criminal programmes. The Reichsleitung as the staff organisation of the Party is also responsible for these criminal programmes as well as the heads of the various staff organisations of the Gauleiters and Kreisleiters. The decision of the Tribunal on these staff organisations includes only the Amtsleiters who were heads of offices on the staffs of the Reichsleitung, Gauleitung and Kreisleitung. With respect to other staff officers and party organisations attached to the Leadership Corps, other than the Amtsleiters referred to above, the Tribunal will follow the suggestion of the Prosecution in excluding them from the declaration.

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

It will be seen that the Tribunal applies here its general rules elaborated by it (see supra V) according to which only those persons fall under the Tribunal's declaration who became or remained members of the organisation with knowledge that it was being used for the commission of acts declared criminal by Article 6 of the Charter, or who were personally implicated as members of the organisation in the commission of such crimes.

The declaration is based on the fact that the Leadership Corps has been found guilty of war crimes and crimes against humanity. As it is the general attitude of the Tribunal, described in detail in Doc.III/62 (pp.6 et seq) that acts committed before 1st September 1939 do not generally fall under the term of a crime against humanity, the Tribunal has excluded from its finding, persons who had ceased to hold positions in the Leadership Corps prior to 1st September 1939.

This finding proceeds on the understanding that no act committed before 1st September 1939 could have been either a war crime or a crime against humanity. Though this is the general attitude of the Tribunal, the Tribunal has made exceptions where the particular facts of the case of the individual defendants warranted it (see Doc. III/62, para. X).

Obviously the Tribunal did not consider these exceptional cases relevant enough to provide for them in connection with the statement as to the criminality of the organisation.

It will be noted that the finding of the Tribunal speaks only of war crimes and crimes against humanity and does not speak of crimes against peace of which the Leadership Corps was also accused (p. 41 of the Indictment). The latter were necessarily or predominantly committed before 1st September 1939 but the Tribunal did not make a statement to the effect that the Leadership Corps of the Nazi Party was responsible for them. Otherwise the time limit (1st September 1939) could not have been decreed.

XII. The Gestapo and SD.

The conclusions regarding criminal activities of the Gestapo and SD as contained on pages 16948/9 are as follows:

" The Gestapo and SD were used for purposes which were criminal under the Charter, involving the persecution and extermination of the Jews, brutalities and killings in concentration camps, excesses in the administration of occupied territories, the administration of a slave labour programme and the mistreatment and murder of prisoners of war. The defendant Kaltenbrunner, who was a member of this organisation, was among those who used it for these purposes. In dealing with the Gestapo the Tribunal includes all executive and administrative officials of Amt IV of the RSHA or concerned with Gestapo administration in other departments of the RSHA and all local Gestapo officials serving both inside and outside of Germany, including the members of the Frontier Police, but not including the members of the Border and Customs Protection or the Secret Field Police, except such members as have been specified above. At the suggestion of the Prosecution the Tribunal does not include persons employed by the Gestapo for purely clerical, stenographic, janitorial or similar unofficial routine tasks. In dealing with the SD the Tribunal includes Amts III, VI, VII and V of the RSHA and all other members of the SD, including the local representatives and agents, honorary and otherwise, whether they were technically members of the SS or not. (*)

The Tribunal declares to be criminal within the meaning of the Charter the group composed of those members of the Gestapo and SD holding the positions enumerated in the preceding paragraph who became or remained members of the organisation with knowledge that it was being used for the commission of acts declared criminal by Article 6 of the Charter, or who were personally implicated as members of the organisation in the commission of such crimes. The basis for this finding is the participation of the organisation in war crimes and crimes against humanity connected with the war; this group declared

(*) This part of the judgment was later corrected by the Tribunal by the following statement: "Because the prosecution had expressly excluded the honorary informers who were not members of the SS, and members of the Abwehr who were transferred to the SD, the Tribunal also excludes those persons from the SD which was declared criminal. (p. 16969).

criminal cannot include, therefore, persons who had ceased to hold the positions enumerated in the preceding paragraph prior to September 1, 1939. "

Here the same applies as has been said in the preceding paragraph with respect to the criminality of the Leadership Corps of the Nazi Party and the fixing of the time limit (1st September 1939). Both the SD, which was indicted as part of the SS, and the Gestapo, were in the indictment (pages 42 and 43), charged also under Counts 1 and 2 (conspiracy and crimes against peace); the Tribunal did not make a statement to the effect that these organisations were responsible for crimes against peace and it therefore applied also to them the time limit of 1st September 1939.

XIII. The SS.

About the criminality of the SS, the Tribunal states, inter alia, on p.16953, the following: "Criminal Activities: SS units were active participants in the steps leading up to aggressive war. The Verfuegungstruppe was used in the occupation of the Sudetenland, of Bohemia and Moravia and of Memel. The Henlein Free Corps was under the jurisdiction of the Reichs Fuehrer SS for operations in the Sudetenland in 1938 and the Volksdeutsche Mittelstelle financed fifth column activities there.

The SS was even a more general participant in the commission of War Crimes and Crimes against Humanity. "

The conclusions at which the Tribunal arrived with regard to the SS are stated on pp.16958/9, as follows:

" The SS was utilized for purposes which were criminal under the Charter involving the persecution and extermination of the Jews, brutalities and killings in concentration camps, excesses in the administration of occupied territories, the administration of the slave labour programme and the mistreatment and murder of prisoners of war. The defendant Kaltenbrunner was a member of the SS implicated in these activities. In dealing with the SS the Tribunal includes all persons who have been officially accepted as members of the SS including the members of the Allgemeine SS, members of the Waffen SS, members of the SS Totenkopf Verbaende and the members of any of the different police forces who were members of the SS. The Tribunal does not include the so-called SS riding units. The Sicherheitsdienst des Reichsfuehrer SS (commonly known as the SD) is dealt with in the Tribunal's Judgment on the Gestapo and SD.

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

It will be seen that the Tribunal's conclusions do not speak of the utilization of the SS in the steps leading up to aggressive war, although their participation in the crime against peace is expressly enumerated among the criminal activities on p.16953.

Because the Tribunal did not mention in its conclusions the part played by the SS in the crime against peace, it applied also in the case of the SS the time limit of 1st September 1939, although it had established their part in the steps leading up to aggressive war, particularly their part in the occupation of the so-called Sudetenland, of Bohemia and Moravia, and of the Memel territory.

XIV. The SA.

The SA was indicted under all four counts, (page 43 of the Indictment). The conclusions arrived at by the Tribunal with regard to the SA were as follows, (p.16962): "Up until the purge beginning on June 30, 1934, the SA was a group composed in large part of ruffians and bullies who participated in the Nazi outrages of that period. It has not been shown, however, that these atrocities were part of a specific plan to wage aggressive war, and the Tribunal therefore cannot hold that these activities were criminal under the Charter. After the purge, the SA was reduced to the status of a group of unimportant Nazi hangers-on. Although in specific instances some units of the SA were used for the commission of War Crimes and Crimes against Humanity, it cannot be said that its members generally participated in or even knew of the criminal acts. For these reasons the Tribunal does not declare the SA to be a criminal organisation within the meaning of Art.9. of the Charter".

The Tribunal's Judgment on the SA is an application of its interpretation of the term "crimes against humanity" as being restricted to inhumane acts connected with the war.

XV. The Reich Cabinet (Majority Decision.)

The Tribunal made the following observations regarding the application by the prosecution that the Reich Cabinet should be declared a criminal group or organisation (pp.16963/4):

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

As to the first reason for our decision, it is to be observed that from the time that it can be said that a conspiracy to make aggressive war existed the Reich Cabinet did not constitute a governing body, but was merely an aggregation of administrative officers subject to the absolute control of Hitler. Not a single meeting of the Reich Cabinet was held after 1937, but laws were promulgated in the name of one or more of the cabinet members. The Secret Cabinet Council never met at all. A number of the cabinet members were undoubtedly involved in the conspiracy to make aggressive war; but they were involved as individuals, and there is no evidence that the cabinet as a group or organisation

took any part in those crimes. It will be remembered that when Hitler disclosed his aims of criminal aggression at the Hossbach Conference, the disclosure was not made before the cabinet and that the cabinet was not consulted with regard to it, but, on the contrary, that it was made secretly to a small group upon whom Hitler would necessarily rely in carrying on the war. Likewise no cabinet order authorized the invasion of Poland. On the contrary, the defendant Schacht testifies that he sought to stop the invasion by a plea to the Commander-in-Chief of the Army that Hitler's order was in violation of the Constitution because not authorized by the cabinet.

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

As to the second reason, it is clear that those members of the Reich Cabinet who have been guilty of crimes should be brought to trial; and a number of them are now on trial before the Tribunal. It is estimated that there are 48 members of the group, that eight of these are dead and seventeen are now on trial, leaving only 23 at the most, as to whom the declaration could have any importance. Any others who are guilty should also be brought to trial; but nothing would be accomplished to expedite or facilitate their trials by declaring the Reich Cabinet to be a criminal organisation. Where an organisation with a large membership is used for such purposes, a declaration obviates the necessity of inquiring as to its criminal character in the later trial of members who are accused of participating through membership in its criminal purposes and thus saves much time and trouble. There is no such advantage in the case of a small group like the Reich Cabinet. "

From this verbatim quotation it appears that in not making the declaration asked for by the prosecution, the Tribunal did not express an opinion on the merits of the case, namely on the question whether or not the persons forming the Reich Cabinet were guilty of crimes or not. The decision of the majority to reject the prosecution's application is based on two grounds, which are of a procedural nature only. The first ground, namely that after 1937 the Reich Cabinet did never really act as a group or organisation, amounts to saying that, as far as the time considered relevant was concerned, the Reich Cabinet had ceased to be a "group or organisation" within the meaning of Article 9 of the Charter and that therefore the declaration asked for could not be made. It is a consideration of adjective law and by no means a consideration of substance or of the merits of the case which forms the first ground for the rejection.

The second ground is still more a procedural one. It has been quoted under V, supra, from p.16929, that the Tribunal considered itself vested with discretion as to whether it would declare any organisation criminal. This discretion may be based either on reasons of substance, or on reasons of procedure. Here the Tribunal was of the opinion that the group of persons charged was so small (estimated 49 members of whom 8 were dead and 17 on trial, leaving 23 at the most) that members could be conveniently tried in proper cases without resort to a declaration by the Tribunal.

XVI. The Reich Cabinet (Dissenting opinion of Major General Nikitchenko).

Paragraph V of the dissenting opinion by Maj.Gen.Nikitchenko states that he could not agree with the refusal by the Tribunal to declare the Hitler Government a criminal organisation. On pages 19 - 21 of his

dissenting opinion, Maj.Gen.Nikitchenko summarises in detail a considerable number of facts established by the Tribunal which, in his opinion, made it untenable and rationally incorrect to refuse to declare the Reich Cabinet, the directing organ of the State with a direct and active rôle in the working out of the criminal enterprises, a criminal organisation. A reproduction of the detailed reasons adduced by Maj. Gen.Nikitchenko is outside the purpose of this paper.

To the first of the two reasons on which the majority based their decision, namely that it was not shown that, after 1937, the Reich Cabinet ever really acted as a group or organisation, the Soviet Judge replied that the verdict of the Tribunal justly pointed out certain peculiarities of the Hitler Government, as the directing organ of the State, namely the absence of regular cabinet meetings, the occasional issuance of laws by the individual ministers having unusual independence of action, the tremendous personal power of Hitler himself. In Maj. Gen.Nikitchenko's view these peculiarities did not refute, but on the contrary further confirmed the conclusion that the Hitler Government was not an ordinary rank and file cabinet, but a criminal organisation.

Maj.Gen.Nikitchenko does not deal with the second reason on which the decision of the majority rested, namely that the group of persons was so small that members could be conveniently tried in proper cases without resort to a declaration that the cabinet of which they were members was criminal.

From Maj.Gen.Nikitchenko's dissenting opinion it appears, however, by implication, that he did not share the majority's view which was based on grounds of procedural expediency.

On p.21 he said that the statement asked for by the prosecution regarding the Reich Defence Council headed by Goering ought to have been made. He recalled that the following were members of the Defence Council, in addition to Goering: Hess, Frick, Funk, Keitel, Raeder, and Lammers. It will be seen that all the members of the Reich Defence Council, with the exception of one, (Lammers), were actually in the dock before the Tribunal and were also found guilty and sentenced. The practical effect of the declaration regarding the Reich Defence Council would, therefore, have had effect only with regard to one member of this organisation, namely Lammers. It is therefore clear that Maj. Gen.Nikitchenko did not consider a declaration by the Tribunal to be a matter of procedural expediency with regard to subsequent proceedings only, but that in his view it was a matter of legal, moral or political importance transcending questions of adjective law.

XVII. The General Staff and High Command. (Majority Decision).

The Tribunal declined to make a declaration of criminality with respect to the General Staff and High Command for the following reasons, (p.16965): "The number of persons charged, while larger than that of the Reich Cabinet, is still so small that individual trials of these officers would accomplish the purpose here sought better than a declaration such as is requested. But a more compelling reason is that in the opinion of the Tribunal, the General Staff and High Command is neither an "organisation" nor a "group" within the meaning of these terms as used in Article 9 of the Charter.

Some comment on the nature of this alleged group is requisite. According to the Indictment and evidence before the Tribunal, it consists of approximately 130 officers, living and dead, who at any time during the period from February 1938, when Hitler reorganized the Armed Forces, and May 1945, when Germany surrendered, had certain positions

in the military hierarchy. These men were high-ranking officers in the three armed services; OKH - Army, OKM - Navy, and OKL - Air Force. Above them was the overall armed forces authority, OKW - High Command of the German Armed Forces with Hitler as the Supreme Commander. The officers in the OKW, including defendant Keitel as Chief of the High Command, were in a sense Hitler's personal staff. In the larger sense they co-ordinated and directed the three services, with particular emphasis on the functions of planning and operations.

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

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

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

The Tribunal does not so find. According to the evidence, their planning at staff level, the constant conferences between staff officers and field commanders, their operational technique in the field and at headquarters was much the same as that of the armies, navies and air forces of all other countries. The overall effort of OKW at co-ordination and direction could be matched by a similar, though not identical form of organisation in other military forces, such as the Anglo-American Combined Chiefs of Staff.

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

Much of the evidence and the argument has centred round the question of whether membership in these organisations was or was not voluntary; in this case, it seems to the Tribunal to be quite beside the point. For this alleged criminal organisation has one characteristic, a controlling one, which sharply distinguishes it from the other five indicted. When an individual became a member of the SS for instance, he did so, voluntarily or otherwise, but certainly with the knowledge that he was joining something. In the case of the General Staff and High Command, however, he could not know he was joining a group or organisation for such organisation did not exist except in the charge of the Indictment. He knew only that he had achieved a certain high rank in one of the three

services, and could not be conscious of the fact that he was becoming a member of anything so tangible as a "group", as that word is commonly used. His relations with his brother officers in his own branch of the service and his association with those of the other two branches, were, in general, like those of other services all over the world.

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

It will be seen that this decision also rests on procedural grounds, namely foremost on the ground that the General Staff and High Command are neither an organisation nor a group within the meaning of those terms as used in Article 9 of the Charter, and also on the ground of procedural expediency (small number of persons involved).

Here also, the Tribunal made it entirely clear that its decision was not an expression of an opinion on the merits of the case, namely on the question whether or not the leaders of the German Armed Forces had committed crimes falling under Article 6 of the Charter. On the contrary, the Tribunal expressed its view regarding the criminality of very many high ranking German officers in the following words (pp.16967-16968): "Although the Tribunal is of the opinion that the term "group" in Article 9 must mean something more than this collection of military officers, it has heard much evidence as to the participation of these officers in planning and waging aggressive war, and in committing war crimes and crimes against humanity. This evidence is, as to many of them, clear and convincing.

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

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

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

It will also be remembered that all high-ranking soldiers and sailors who were accused before the Tribunal, (Keitel, Jodl, Raeder, Doenitz) were found guilty and sentenced to severe penalties.

XVIII. The General Staff and High Command. (Dissenting opinion of Major General Nikitchenko.)

The Soviet Judge, in paragraph VI of his dissenting opinion, (pp.22-30), stated that the rejection of the accusation of criminal activity of the General Staff and of the OKW contradicted both the actual situation and the evidence submitted in the course of the trial.

He emphatically contradicted the reasons of the majority which he formulated as follows, (p.24): "(a) That the crimes were committed by representatives of the General Staff and of the OKW as private individuals and not as members of a criminal conspiracy. (b) That the General Staff and the OKW were merely weapons in the hands of the conspirators and interpreters or executors of the conspirators' will. "

The following is a summary of his general propositions which he illustrated with quotations from the proceedings and from the documents submitted:

- (1) The leading representatives of the General Staff and of the OKW, along with a small circle of the higher Hitlerite officials, were called upon by the conspirators to participate in the development and the realization of the plans of aggression, not as passive functionaries, but as active participants in the conspiracy against peace and humanity.
- (2) OKW and the General Staff issued the most brutal decrees and orders for relentless measures against the unarmed peaceful population and the prisoners of war.
- (3) The High Command, along with the SS and the Police, is guilty of the most brutal police actions in the occupied regions.
- (4) The representatives of the High Command acted in all the echelons of the army as members of a criminal group.

III/65.
4th November, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

Netherlands cases regarding the
criminal responsibility of
Administrators of seized property and
other similar questions.

Memorandum by the Netherlands Representative,
Commander M.W. Mouton.

At the meeting of Committee I on the 19th July 1946, charge 244 (3379) was referred to Committee III.

At the meeting on the 31st July 1946, charge 231 (3627) was adjourned, and at the meeting on the 16th October 1946, charge 354 (4154) was adjourned.

I made enquiries as to the opinion of the Department of Justice.

The Department of Justice informed me that legal actions to recover real property were nearly always successful even when this property had been transferred to a third party.

In connection with the contents of the law concerned, it is practically impossible in these cases for the present possessor of real property to make his "bona fide" admissible.

If he asserts he did not know that it was Jewish real property, he will always be met with the objection that had he used normal care, he could have known the origin of the property.

2. Under the Netherlands system of registration of real property-transactions, it is usual to consult the registers concerned before the deal. To ask for a "certificate of origin" the title of possession of the seller, is not enough because in the previous transactions a proper title might be lacking.

This was even more important during the occupation.

Proper notaries public always informed their client whether the transaction concerned original Jewish property. Whoever employed a notary public who was a collaborator, for such transactions, has to suffer the consequences for the names of such were well known during the war. Whoever did a deal without employing the services of a notary public at all, acted carelessly.

3. The above mentioned applies "a fortiori" to "Verwalter" who always knew who the original owner was.

4. If the confiscation of Jewish property by the German authorities was illegal, the "Verwalter" who bought this property or any goods belonging to it, committed the crime of "receiving stolen goods".

On top of that the "Verwalter" will be prosecuted according to article 27 of the Special Penal Code, if he bought such property for a price considerably below the real value.

Article 27 reads:-

Article 27.

He who, during the time of the present war intentionally made use of or threatened to make use of any force, occasion or means offered him by the enemy or by the enemy occupation to illegally prejudice another in his property or to benefit himself or another, shall be punished with imprisonment for 15 years at the most.

I also consulted the views of members of the University and got the following answer from Dr. Verzijl, Professor of International law and Vice President of the Special High Court of Cassation, who gave the following opinion (translation of his letter):

"About the question of 'receiving stolen goods', I discussed the matter with Prof. Pompe (Professor of Criminal Law). His opinion was that this case comes under 'receiving stolen goods', whether the goods were bought for a normal price or below the value. Art. 416 of the Netherlands Penal Code clearly states the word "buy" without any further restriction. (This in contrast with "selling in view of profits to be got.")

"The question remains of course whether a German "Verwalter" realises that an object placed under "Verwaltung" "has been criminally obtained". That is the question concerning the "dolus" (Art. 416: "He who willfully buys any goods obtained by crime.")"

So far Prof. Verzijl.

In the "Code Penal" "receiving stolen goods" was originally not an independent crime, but was considered to be complicity in larceny or theft. Later it became a crime on its own.

In Dutch penal law it is an independent crime, but, as Prof. Simons (Textbook of the Netherlands Penal Code) says, it is an act which results in the perpetuation of the loss of property. "Dolus" is necessary to constitute the crime. According to Prof. Simons the judge can assume "dolus" when the accused had, or on the strength of the circumstances must have had the knowledge that the object had been obtained by crime.

In the opinion of the Department of Justice and in my own opinion the "Verwalter" knew that the object had been obtained by crime, and this can certainly be assumed as a prima facie proof.

The maximum punishment for this crime is, according to the special penal law, 6 years imprisonment. The same punishment will be meted out to him who willfully profits by any object obtained by crime. (Paragraph 2 of the same section).

In English law the punishment is even heavier. According to Kenny (outlines of criminal law p. 293): 1. If the original stealing or obtaining was a felony, the receiver is guilty of felony. The maximum punishment is fourteen years penal servitude. 2. If the original stealing or obtaining was a misdemeanor (e.g. if the goods had been obtained by false pretences), the receiving is a misdemeanor, and punishable with a maximum punishment of seven years' penal servitude. 3. If the original stealing was by the Larceny-act 1861, a petty offence punishable on summary conviction (e.g. if the thing stolen were only a dog), the receiving is only a similar offence, and is punishable just as the stealing itself. (Section 97 of the Larceny Act 1861).

Speaking of the forms of theft (p. 274) Kenny mentions in class I:

"The owner gives up no rights at all, and the article is taken entirely without his consent. This clearly is Larceny."

On page 249 he makes a distinction between simple larceny as now defined by the Larceny Act 1916, punishable with penal servitude for not more than 5 years and aggravated larceny i.e. robbery (if the owner is led to give up his property by being put in fear of force being used). The maximum punishment is fourteen years' penal servitude.

It appears from this, that for receiving stolen goods, at least the same punishment is meted out as for larceny (theft).

As for the object capable of being stolen under the Larceny Act 1916, s. 46(1) "All deeds and instruments relating to or evidencing the title or right to any property (real or personal) or giving a right to recover or receive any money or goods" are capable of being stolen.

CONCLUSION.

1. Larceny or theft comes under No. XIII (pillage) or No. XIV (confiscation of property) of the 1919 list.
2. The confiscation of plain theft of Jewish property (the owner gives up no rights at all) is a war crime, apart from the above classification in the 1919 list as a violation of Art. 43, 46, 47 and 52, of The Hague regulations.
3. Receiving stolen goods is a crime, originally considered as complicity in theft and at any rate closely related to theft (as it results in the perpetuation of the loss of property). It is according to English law punishable with at least the same punishment as theft. It would, therefore, seem logical to class it as a war crime the same as theft. The position of the buyer (receiver) according to international law, falls under "post-liminium" and is clearly described in Oppenheim p.312:

"Immoveable private enemy property may under no circumstances or conditions be appropriated by an invading belligerent. Should he confiscate and sell private land or buildings, the buyer would acquire no right whatever to the property."

and page 483:

"If the occupant has performed acts which, according to International Law, he was not competent to perform, post-liminium makes the invalidity of these illegitimate acts apparent. If he has appropriated and sold private property as may not legitimately be appropriated by a military occupant, it may afterwards be claimed from the purchaser without payment or compensation."

4. Committee I has adopted this view, e.g. by accepting the French case No. 4092 and listed Spitzer on A in the meeting (3rd October 1946) for receiving stolen goods.
5. The case of a "Verwalter" who was appointed to manage a confiscated Jewish business or to take care of confiscated Jewish property, buying this property, falls under the description of "receiving stolen goods."

The necessary "dolus" can be assumed at least prima-facie.

Actually buying this property consolidates the mens rea of the confiscator because the legal cloak of "care taking" is pierced as the goods were sold. The price paid is irrelevant as to the illegality of the act. (The term "buying in the Dutch penal law is not conditioned.)

6. Apart from and in addition to the afore said, buying illegally confiscated Jewish property forms part of the persecution of Jews and being done in connection with a war crime (confiscation) falls under the heading of crimes against humanity.
7. The buying of illegally confiscated Jewish property by a "Verwalter" constitutes a war crime.

Q. E. D.

The Netherlands Representative submits these views to the consideration of Committee III.

III/66
5th November, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

Statement by Committee III
comparing Doc. C.201 with the law
applied by the
International Military Tribunal.

Draft prepared by the Secretary to Committee III.

General Propositions
contained in
Doc. C. 201.

Comment on the General Propositions
in the light of the
Nuremberg Judgment.

1) According to the basic documents (Charter of the International Military Tribunal annexed to the Four-Power Agreement of 8th August 1945, as rectified by the Berlin Protocol of 6th October 1945; the Control Council Law No.10; the Charter of the International Military Tribunal for the Far East), crimes against humanity may consist in the violation

either of the laws and customs
or war(*)
or of positive municipal provisions of criminal law,
or of the general principles
of criminal law as derived
from the criminal law of all
civilized nations.

(*) Footnote to paragraph 1.

It might be argued that in a purely scientific system, violations of the laws and customs of war should not be included in the term "crimes against humanity", which should be restricted to such offences as do not fall under the term of violations of the laws and customs of war, but the Committee's task is to interpret the basic documents.

1) The Nuremberg Judgment deals only with the law to be applied by the Tribunal, i.e., the law formulated in the Charter annexed to the Four-Power Agreement of 8th August 1945.

The Tribunal is also of the opinion that one and the same act may constitute both a war crime in the narrower sense and a crime against humanity.

Footnote to paragraph 1.

The Tribunal felt that there was this overlapping of the terms "war crime" and "crimes against humanity". It used the term "crime against humanity" also in a narrower sense, comprising only such activities as are not violations of the laws and customs of war, e.g., on p.16943, where the Tribunal, dealing with Germanization, interpreted the expression "crime against humanity" as a term covering criminal denationalisation in areas to which the laws and customs of war did not apply.

2) Under the basic documents there are two different types of crimes against humanity which, with a few exceptions, are subject to the same provisions, namely:

- (a) crimes of the murder type, (murder, extermination, enslavement, deportation and other inhumane acts.) The words "other inhumane acts" may be held to cover only serious crimes of a character similar to murder, extermination, enslavement and deportation - eiusdem generis rule of interpretation;
- (b) persecutions (on political and racial, under the Charter of 8th August 1945, also religious, grounds.)

3) The Charter of the European International Military Tribunal (Art.6) and the Charter of the International Military Tribunal for the Far East (Art.5) start from the basic assumption that the major war criminals committed crimes against humanity acting in the interest of the European Axis Countries, or in the interest of the Japanese war effort ("Far Eastern War Criminals"), as the case may be.

This assumption is not expressed in the local law of Germany, as laid down by the Control Council Law No.10 for criminals other than major war criminals.

4) Under the terms of the Charters of the International Military Tribunals, "crimes against humanity" of the murder type are offences committed against civilian populations.

Crimes against members of belligerent forces are outside the scope of this type of crime; as regards crimes of the persecution type, the Committee assumes that the intention is to exclude also this type of crime, though the wording is not quite clear.

5) "Persecutions" constitute crimes against humanity only if perpetrated on political and racial (under the European Charter also religious) grounds. In the case of the major war criminals, it is a further condition that "persecutions" be in execution of or in connection

2) Though the Nuremberg Judgment does not speak of two different types of crimes against humanity, crimes of the murder type, and persecutions, it remains possible to make a distinction between these two types. This does not imply, however, that practical consequences arise from the distinction.

3) No comment on paragraph 3 is called for.

4) The Tribunal does not distinguish between crimes of the murder type and persecutions. This does not, however, make necessary a modification of paragraph 4.

5) The opinion that the acts be in execution of or in connection with any crime within the jurisdiction of the International Military Tribunal applies, according to the Nuremberg Judgment, to all kinds of crimes against humanity committed by the major German war criminals, and is not restricted to what in

with any crime within the jurisdiction of an International Military Tribunal (i.e. crimes against peace, violations of the laws and customs of war, crimes against humanity of the murder type.)

Doc.C.201 was called persecutions. As far as the major war criminals who were tried at Nuremberg were concerned, it is now established that the connection with the war is necessary in both types of crimes against humanity.

This rule is, however, restricted to cases falling under the Charter of the International Military Tribunal. It does not apply in the case of other than the "major war criminals", particularly in the cases to be adjudicated upon under the Control Council Law No.10, the corresponding provision of which does not contain the words "in execution of or in connection with any crime within the jurisdiction of the Tribunal". (See Doc.III/62, paragraph XXVII).

6) Isolated offences do not fall within the notion. As a rule systematic mass action, particularly if it can be shown to be authoritative, will be necessary to transform a common crime, punishable merely under municipal law, into a crime against humanity which thus becomes also the concern of International Law. Only crimes which either by their magnitude and savagery or by their great number or by the fact that a similar pattern is applied at different times and places, endanger the international community or shock the conscience of mankind, warrant intervention by States other than that on whose territory the crimes have been committed, or whose subjects have become their victims.

7) It is irrelevant whether a crime against humanity has been committed before or during the war.

6) As the Judgment deals only with the major war criminals, the statement contained in paragraph 6 is not affected.

7) As far as the German major war criminals are concerned, the statement that it is irrelevant whether a crime against humanity has been committed before or during the war, though based on the express provision to the same effect contained in the Charter, must be considerably qualified in view of the Nuremberg Judgment. Although in theory it remains irrelevant whether a crime against humanity was committed before or during the war, in practice it is difficult to establish the connection between what is alleged to be a crime against humanity and a crime within the jurisdiction of the Tribunal, if the act was committed before the war.

On the other hand, if the commission of an inhumane act charged in the Indictment took place during the war, its connection with the war has been assumed by the Tribunal. Inhumane acts committed in Austria after the occupation by Germany, are to be considered crimes against humanity because of their connection with the occupation of Austria, which was an act of aggression and therefore a crime against peace. Inhumane acts committed on Czechoslovak territory after the occupation of the so-called Sudeten territory, are, in the light of the Nuremberg Judgment, either crimes against humanity or war crimes in the narrower sense.

As far as crimes against humanity allegedly committed by minor perpetrators are concerned, the Judgment does not necessarily mean that the Commission should regard them as crimes against humanity only, if they are connected with the war, because this connection is made a condition only in the law to be applied to major war criminals.

8) The nationality of the victims is irrelevant.

8). The Committee's statement that the nationality of the victim is irrelevant, was based on the words of the Charter, "committed against any civilian population". Here again, the proposition remains true in theory, but must, according to the view of the Nuremberg Tribunal, be considerably qualified with regard to acts committed before the war by the German major war criminals in Germany against German nationals. Even with regard to revolting and horrible crimes the connection with aggression or with war crimes in the narrower sense must be proved and where the proof is not satisfactory, they are not considered by the International Military Tribunal as crimes against humanity within the meaning of the Charter.

The restriction applies only as far as the law to be applied to major war criminals is concerned.

9) Not only the ringleaders but also the actual perpetrators of crimes against humanity are criminally responsible.

9) The problem of lesser perpetrators was outside the proceedings before the International Military Tribunal.

10) It is irrelevant whether or not a crime against humanity has been committed in violation of the lex loci.

11) A crime against humanity can be committed by enacting legislation which orders or permits crimes against humanity, e.g. unjustified killing, deportations, racial discrimination, suppression of civil liberties, etc.

10) The irrelevance of the lex loci has been confirmed by the Tribunal.

11) The proposition that a crime against humanity can be committed by enacting legislation which orders or permits crimes against humanity, has been endorsed by the Tribunal as is particularly shown in the case of the defendants Frick and von Neurath.

UNITED NATIONS WAR CRIMES COMMISSION.

Plunder of Public and Private Property
in the Nuremberg Judgment.

By Egon Schwelb. Legal Officer.

The present paper is the third of the series of studies dealing with those parts of the Judgment of the International Military Tribunal which may be of practical interest to the Commission and to its Third and First Committees.

The first paper of this kind, dealing with crimes against humanity, was circulated as Doc. III/62, the second, dealing with criminal organisations, as Document III/64.

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I. The Provisions of the Charter.

Article 6(b) of the Charter of the International Military Tribunal defines war crimes as violations of the laws or customs of war. It provides that such violations shall include, but not be limited to, inter alia, "plunder of public or private property."

II. Plunder of Public and Private Property in the Indictment.

The Indictment deals with the war crime of "Plunder of Public and Private Property" under Count 3(E) on pages 22 - 27 of the British Command Paper Edition, (Cmd.6696). The general statement regarding this type of war crime contained in the Indictment is as follows:

" The Defendants ruthlessly exploited the people and the material resources of the countries they occupied, in order to strengthen the Nazi war machine, to depopulate and impoverish the rest of Europe, to enrich themselves and their adherents, and to promote German economic supremacy over Europe.

The Defendants engaged in the following acts and practices, among others:

1. They degraded the standard of life of the people of occupied countries and caused starvation, by stripping occupied countries of foodstuffs for removal to Germany.
2. They seized raw materials and industrial machinery in all of the occupied countries, removed them to Germany and used them in the interest of the German war effort and the German economy.
3. In all the occupied countries, in varying degrees, they confiscated businesses, plants and other property.
4. In an attempt to give color of legality to illegal acquisitions of property, they forced owners of property to go through the forms of "voluntary" and "legal" transfers.
5. They established comprehensive controls over the economies of all of the occupied countries and directed their resources, their production and their labour in the interests of the German war economy, depriving the local populations of the products of essential industries.
6. By a variety of financial mechanisms, they despoiled all of the occupied countries of essential commodities and accumulated wealth, debased the local currency systems and disrupted the local economies. They financed extensive purchases in occupied countries through clearing arrangements by which they exacted loans from the occupied countries. They imposed occupation levies, exacted financial contributions and issued occupation currency, far in excess of occupation costs. They used these excess funds to finance the purchase of business properties and supplies in the occupied countries.
7. They abrogated the rights of the local populations in the occupied portions of the USSR and in Poland and in other countries to develop or manage agricultural and industrial properties, and reserved this area for exclusive settlements, development, and ownership by Germans and their so-called racial brethren.

8. In further development of their plan of criminal exploitation, they destroyed industrial cities, cultural monuments, scientific institutions, and property of all types in the occupied territories to eliminate the possibility of competition with Germany.
9. From their programme of terror, slavery, spoliation and organised outrage, the Nazi conspirators created an instrument for the personal profit and aggrandizement of themselves and their adherents. They secured for themselves and their adherents
 - (a) Positions in administration of business involving power, influence, and lucrative perquisites.
 - (b) The use of cheap forced labour.
 - (c) The acquisition on advantageous terms of foreign properties, business interests, and raw materials.
 - (d) The basis for the industrial supremacy of Germany.

These acts were contrary to International Conventions, particularly Articles 46 to 56 inclusive of the Hague Regulations, 1907, the laws and customs of war, the general principles of criminal law as derived from the criminal laws of all civilized nations, the internal penal laws of the countries in which such crimes were committed and to Article 6 (b) of the Charter. "

The Indictment then enumerates, by way of example and without prejudice to the production of evidence of other cases, a great number of actual facts and figures respecting plunder both in the Western and in the Eastern Countries.

III. General Observations by the Tribunal on this type of war crime.

The Tribunal states on p.16885 that the evidence relating to war crimes has been overwhelming in its volume and in its detail. "It is impossible for this Judgment adequately to review it, or to record the mass of documentary and oral evidence that has been presented. The truth remains that War Crimes were committed on a vast scale, never before seen in the history of War."

On p.16886, it is stated: "Public and private property was systematically plundered and pillaged in order to enlarge the resources of Germany at the expense of the rest of Europe. "

IV. Statement of the Law by the Tribunal.

On p.16902 the Tribunal states the law as to economic war crimes as follows: "Article 49 of the Hague Convention provides that an occupying power may levy a contribution of money from the occupied territory to pay for the needs of the army of occupation, and for the administration of the territory in question. Article 52 of the Hague Convention provides that an occupying power may make requisitions in kind only for the needs of the army of occupation, and that these requisitions shall be in proportion to the resources of the country. These articles, together with Article 48, dealing with the expenditure of money collected in taxes, and Articles 53, 55 and 56, dealing with public property, make it clear that under the rules of war, the economy of an occupied country can only be required to bear the expenses of the occupation, and these should not be greater than the economy of the country can reasonably be expected to bear. "

V. Text of the Articles of the Hague Regulations referred to by the Court.

" Art.48. If, in the territory occupied, the occupant collects the taxes, dues and tolls payable to the State, he shall do so, as far as is possible, in accordance with the legal basis and assessment in force at the time, and shall in consequence be bound to defray the expenses of the administration of the occupied territory to the same extent as the national Government had been so bound.

Art.49. If, in addition to the taxes mentioned in the above Article, the occupant levies other money contributions in the occupied territory, they shall only be applied to the needs of the army or of the administration of the territory in question.

Art.53. An army of occupation shall only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations.

Except in cases governed by naval law, all appliances adapted for the transmission of news, or for the transport of persons or goods, whether on land, at sea, or in the air, depots of arms, and, in general, all kinds of war material may be seized, even if they belong to private individuals, but they must be restored at the conclusion of peace, and indemnities must be paid for them.

Art.55. The occupying State shall be regarded only as administrator and usufructuary of public buildings, landed property, forests and agricultural undertakings belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of such properties and administer them in accordance with the rules of usufruct.

Art.56. The property of local authorities, as well as that of institutions dedicated to public worship, charity, education, and to science and art, even when State property, shall be treated as private property.

Any seizure or destruction of, or wilful damage to, institutions of this character, historic monuments and works of science and art, is forbidden, and should be made the subject of legal proceedings."

VI. General Conclusions by the Tribunal.

The Tribunal states on p.16903: "The evidence in this case has established, however, that the territories occupied by Germany were exploited for the German war effort in the most ruthless way, without consideration of the local economy, and in consequence of a deliberate design and policy. There was in truth a systematic "plunder of public or private property", which was criminal under Article 6(b) of the Charter. "

On pp.16903-6, the Tribunal describes in detail the criminal activities of this kind and their direction by the persons in the dock, especially by Goering, Rosenberg and Ribbentrop.

VII. The Individual Defendants.
Goering.

About the part played by Goering in the spoliation of acquired territory, the following is stated on p.16973:

" As Plenipotentiary, Goering was the active authority in the spoliation of conquered territory. He made plans for the spoliation of Soviet territory long before the war on the Soviet Union. Two months prior to the invasion of the Soviet Union, Hitler gave Goering the overall direction for the economic administration in the territory. Goering set up an economic staff for this function. As Reichsmarshal of the Greater German Reich, "the orders of the Reichsmarshal cover all economic fields, including nutrition and agriculture". His so-called "Green" folder, printed by the Wehrmacht, set up an "Economic Executive Staff, East." This directive contemplated plundering and abandonment of all industry in the food deficit regions, and, from the food surplus regions, a diversion of food to German needs. "

In connection with the persecution of the Jews, it is stated on pp.16973/4: "Goering persecuted the Jews, particularly after the November 1938 riots, and not only in Germany where he raised the billion mark fine as stated elsewhere, but in the conquered territories as well. His own utterances then and his testimony now shows this interest was primarily economic - how to get their property and how to force them out of the economic life of Europe. "

VIII. Ribbentrop.

It is stated on p.16982 that Ribbentrop was responsible for the general economic and political policies put into effect in the occupation of Denmark and France.

IX. Rosenberg.

The Tribunal states on p.16995: "Rosenberg is responsible for a system of organized plunder of both public and private property throughout the invaded countries of Europe. Acting under Hitler's orders of January 1940, to set up the "Hohe Schule", he organized and directed the "Einsatzstab Rosenberg", which plundered museums and libraries, confiscated art treasures and collections, and pillaged private houses. His own reports show the extent of the confiscations. In "Action-M" (Moebel), instituted in December 1941 at Rosenberg's suggestion, 69,619 Jewish homes were plundered in the West, 38,000 of them in Paris alone, and it took 26,984 railroad cars to transport the confiscated furnishings to Germany. As of July 14, 1944, more than 21,903 art objects, including famous paintings and museum pieces, had been seized by the Einsatzstab in the West. "

On p.16996 it is stated that Rosenberg had knowledge of and took an active part in stripping the Eastern territories of raw materials and foodstuffs which were all sent to Germany.

X. Frank.

The Tribunal states on p.16999: "The economic demands made on the General Government were far in excess of the needs of the army of occupation, and were out of all proportion to the resources of the country. The food raised in Poland was shipped to Germany on such a wide scale that the rations of the population of the occupied territories were reduced to the starvation level, and epidemics were widespread. Some steps were taken to provide for the feeding of the agricultural workers who were used to raise the crops, but the requirements of the rest of the population were disregarded. It is undoubtedly true, as argued by counsel for the defence, that some suffering in the General Government was inevitable as a result of the ravages of war and the economic confusion resulting therefrom. But the suffering was increased by a planned policy of economic exploitation."

The Tribunal says on p.17001: Frank was a "willing and knowing participant", inter alia, "in the economic exploitation of Poland in a way which lead to the death by starvation of a large number of people."

XI. Funk.

The following activities of Funk were found criminal: "In 1942 Funk entered into an agreement with Himmler under which the Reichsbank was to receive certain gold and jewels and currency from the SS and instructed his subordinates, who were to work out the details, not to ask too many questions. As a result of this agreement the SS sent to the Reichsbank the personal belongings taken from the victims who had been exterminated in the concentration camps. The Reichsbank kept the coins and bank notes and sent the jewels, watches and personal belongings to Berlin Municipal Pawn Shops. The gold from the eyeglasses, and gold teeth and fillings was stored in the Reichsbank vaults. Funk has protested that he did not know that the Reichsbank was receiving articles of this kind. The Tribunal is of the opinion that Funk either knew what was being received or was deliberately closing his eyes to what was being done.

As Minister of Economics and President of the Reichsbank, Funk participated in the economic exploitation of occupied territories. He was President of the Continental Oil Company which was charged with the exploitation of the oil resources of occupied territories in the East. He was responsible for the seizure of the gold reserves of the Czechoslovakian National Bank and for the liquidation of the Yugoslavian National Bank. On June 6, 1942, Funk's deputy sent a letter to the OKW requesting that funds from the French Occupation Cost Fund be made available for black market purchases. "

XII. Schacht.

Schacht was indicted only under Counts 1 and 2, (Conspiracy and Crimes against Peace). He was not indicted of responsibility for war crimes, and the judgment delivered in his case does not, therefore, contain any material relevant to the question dealt with in this paper.

XIII. Seyss-Inquart.

Under Seyss-Inquart's "activities in Austria", the Tribunal enumerated on p.17053 that, as Reich Governor of Austria, he instituted a programme of confiscating Jewish property. Under the heading "Criminal Activities in Poland and the Netherlands", the judgment states, on p.17053 that in November 1939, "while on an inspection tour through the General Government, Seyss-Inquart stated that Poland was to be so administered as to exploit its economic resources for the benefit of Germany. "

With regard to his criminal activities in the Netherlands, the following is stated on p.17054: "Seyss-Inquart carried out the economic administration of the Netherlands without regard for the rules of the Hague Convention which he described as obsolete. Instead, a policy was adopted for the maximum utilization of the economic potential of the Netherlands, and executed with small regard for its effect on the inhabitants. There was widespread pillage of public and private property which was given colour of legality by Seyss-Inquart's regulations and assisted by manipulations of the financial institutions of the Netherlands under his control. "

The Tribunal further states: "One of Seyss-Inquart's first steps as Reich Commissioner of the Netherlands was to put into effect a series of laws imposing economic discriminations against the Jews."

XIV. Speer.

Speer was found guilty of being involved in the utilization of forced labour and in the use of prisoners of war in armament industries. His case is therefore not strictly in point in respect to the subject of this paper, but it is of interest in this connection, that some activities of Speer's, which consisted in the preservation of economic values, were recognised in mitigation in his case. It is stated on p.17061: "In mitigation it must be recognised that Speer's establishment of blocked industries did keep many labourers in their homes and that in the closing stages of the war he was one of the few men who had the courage to tell Hitler that the war was lost and to take steps to prevent the senseless destruction of production facilities, both in occupied territories and in Germany. He carried out his opposition to Hitler's scorched earth programme in some of the Western countries and in Germany by deliberately sabotaging it at considerable personal risk. "

XV. Neurath.

In the case of Neurath, it is only stated on p.17065 that he argued that anti-Semitic measures and those resulting in economic exploitations, were put into effect in the Protectorate as the result of policies decided upon in the Reich.

However this may be, the Tribunal stated, he served as the chief German official in the Protectorate knowing that war crimes and crimes against humanity were being committed under his authority.

XVI. Bormann.

The Tribunal says on p.17072 that Bormann controlled the ruthless exploitations of the subjected populace, that he was interested in the confiscation of art and other properties in the East. His letter of 11th January 1944 called for the creation of a large scale organisation to withdraw commodities from the occupied territories for the bombed-out German populace.

III/68.
6th November, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

Netherlands Cases Nos. 3379, 3627, 4077 and 4154.

referred to Committee III by Committee I.

Statement by the Secretary to Committee III.

I. The Netherlands National Office submitted to the United Nations War Crimes Commission, inter alia, the four charges Nos. 3379, 3627, 4077 and 4154. Copies of the four charges are appended to this paper.

II. The case No. 3379 (Willer and 2 others.)

This case was first considered by Committee I in its meeting of 27th June 1946, (Minutes No. 64). The case was adjourned in order that the National Office might be asked for further information as to (a) complicity of the accused in general policy and measures introduced by German authorities in expropriating Jews in Holland, and (b) the real value of the property acquired by the accused.

The case came up again for discussion in the meeting of Committee I held on 19th July, 1946, (Minutes No. 67).

After some additional discussion which was necessitated by the National Office's request to reconsider the Committee's decision of 27th June 1946, the latter was adhered to, with the proviso that after additional information was submitted by the National Office (see Minutes No. 64), the case would be automatically referred to Committee III for its opinion as to whether or not the alleged crime should be considered as a war crime and for what reasons.

III. The case No. 3627. (Offermann).

In the meeting of Committee I held on 31st July 1946, (Minutes No. 69), the case was adjourned in order that the National Office might be asked for further information as to (a) complicity of the accused in general policy and measures introduced by German authorities in expropriating Jews in Holland and (b) the real value of the property acquired by the accused.

IV. The Case No. 4077 (Rickmann).

In the meeting of Committee I held on 26th September 1946 (Minutes No. 75), the accused was listed on 'A' for pillage. Regarding the second count, the case was referred to Committee III for its opinion as to whether or not the alleged crime should be considered as a war crime and for what reasons.

V. The case No. 4154 (Lütter).

In the meeting of Committee I held on 16th October 1946, (Minutes No. 78), the case was referred to Committee III for its opinion as to whether or not the alleged crime should be considered as a war crime and for what reasons.

VI. A memorandum on the cases by Commander M.W. Mouton was circulated as Document III/65.

UNITED NATIONS WAR CRIMES COMMISSION.

NETHERLANDS CHARGES AGAINST GERMAN WAR CRIMINALS.

Charge No: 244 (21.6. '46)

For the use of the Secretariat.

Registered number

Date of receipt in Secretariat.

Name of accused, his rank and unit, or official position.

(Not to be translated)

1. WILLER, B., born at Bodelschlingh, Dortmund, on the 7th June, 1910, tailor, probably served in the German Army and is believed to have been killed at Tiraspol on the Eastern Front.
2. WILLER - KLOONENKEMPER, Katharina, wife of B. WILLER, born at Herten, Germany, on the 24th November, 1910, present address unknown, Very pro-Nazi.
3. SCHWEILER, Henriette Elisabeth, born on the 21st November, 1903, at Swensen, Germany, living at Alstrattestrasse, 9, Gronau, Germany. Very pro-Nazi.

Date and place of commission of alleged crime.

Enschede.

18th August, 1941, and 30th April, 1945.

Number and description of crime in war crimes list.

No. XIII, Pillage.

References to relevant provisions of national law.

Neth. Penal Code.
Art. 27 of the B.B.S.

SHORT STATEMENT OF FACTS.

The first accused bought a Jewish clothing business, from German authorities in charge of such businesses in Holland, for about 65.550 guilders. The business was run, during his absence in military service, by his wife and another German woman. Between the middle of August, 1941 and the end of April, 1945, all the accused removed money and textiles to Germany amounting to approximately 105.498 guilders. In September, 1944, the third accused replaced some of the stolen goods with textiles from Germany of an infinitely inferior quality.

TRANSMITTED BY.....

PARTICULARS OF ALLEGED CRIME.

The following particulars are contained in statements, extracts from which have been compiled in his own words by the Head of the Netherlands War Crimes Commission in London.

Political Investigation Service
Enschede.

S T A T E M E N T.

In connection with the announcement "Summons to the population to make known war crimes, no matter where committed, perpetrated by persons other than Dutch or Dutch subjects", we, Joannes Gerardus Lambertus KRABBE and Berend van der KAMP, both detectives with the Political Investigation Service in the District of Enschede, also special state constables, with reference to the appended plaint by G. Holl, dated 3rd December, 1945, instituted an inquiry on the 13th February, 1945, and heard:

Gerrit H O L L,

43 years old, accountant. living at Cort van der Lindelaan, 45, Enschede, who stated as follows:

"I am a Dutchman. Before a "Verwalter" was engaged, I was employed as accountant with the firm Woudstra Bros. at Haaksbergerstraat, 21-23, Enschede. After the liberation of Enschede - 1st April, 1945 - I was reinstated as accountant by the administrator, Mrs. Woudstra. The owner of this business, Frits Samuel Woudstra, was arrested as a "Jew" by the Germans in 1941. After Woudstra had been in custody about 1 month, Mrs. Woudstra received a message from a German authority to say that her husband had died.

Mrs. Woudstra has asked me to lodge a complaint against:

1. B. W I L L E R, born at Bodensingh, Durtmund, on the 17th June, 1910, tailor, According to rumours he died on the Eastern Front at Tiraspol.
2. Katharina A L O C K E N K E M P E R, wife of B. WILLER, born at Metelen, Germany, on the 24th November, 1910, present address unknown.
3. Henriette Elisabeth S C H W E I L E R, born on the 21st November, 1903, at Swentsen, Germany, living in the Alstättestrasse, 9, Gronau.

WILLER was engaged as "Verwalter" of the firm of Woudstra Bros. on the 18th August, 1941. On the 1st July, 1943, WILLER bought the business from the N.A.G.U. for the sum of 65,550,12fl. (sixty five thousand, five hundred and fifty five guilders and twelve cents).

In the autumn of 1941 WILLER went into German military service and his wife carried on the business, with H. E. SCHWEILER as confidential lady-clerk.

Between 18th August, 1941 and the first April, 1945, WILLER, with the aid of his wife and SCHWEILER, withdrew the sum of 105,439.12 fl. from the firm Woudstra.

Especially in the September days of 1944 were Mrs. WILLER and SCHWEILER guilty of looting from the business. At this time they removed nearly all the stocks of textiles to Germany, as well as all the money which was available."

After it has been read aloud to him he signs his statement.

Taken down in draft and signed.

sgd. G.Holl.

Witness 1. Flora L O W E N S T E I N,
widow of Frits Samuel Woudstra, aged 50, living at Nijverheidstraat, 15, Enschede confirms the foregoing statement.

Witness 2 Hendrika Marie Anna van de G R A V E N,
aged 22, bookkeeper, living at Hegeboerweg, 11, Enschede, stated as follows:
"I am of Dutch nationality, Since August, 1941, I have been employed as bookkeeper with the firm Woudstra Bros. in the Haaksbergerstraat, 21-23, Enschede.
I was engaged at the time by the Head of the firm, SCHWEILER. B. WILLER was then already "Verwalter" of the business. I did not know WILLER in this business; he was already in military service at the time. I saw him in the place a few times when he came on leave.

-4-

In my opinion WILLER's wife and SCHWEIZER did not commit any crime in connection with this business before the September days of 1944.

With the tense September days of 1944 Mrs. WILLER gave instructions to pack the stocks of textile goods in cases and boxes. Mrs. WILLER, SCHWEIZER and I then packed the entire stock of textile goods available in the business.

When I returned to the firm a few days later the whole shop was empty and all the textiles had vanished.

From SCHWEIZER I heard later that the entire stock had been taken to Germany.

Mrs. WILLER and SCHWEIZER also left for Germany during the tense September days. This was on a Tuesday. SCHWEIZER came back again on the following Monday. After her flight to Germany in September, 1944, Mrs. WILLER did not return to the firm.

After this, SCHWEIZER went once or twice a week to Gronau, (Germany). Each time she came from Gronau she had a small quantity of textiles on the back of her bicycle. This was with which to carry on the business. The textiles which she brought back into the shop in this way were of very poor quality. The fine quality materials presumably remained in Germany.

Mrs. WILLER and SCHWEIZER were pro-German and harboured Nazi sentiments. SCHWEIZER, who had already worked in the business for about 20 years before the war, was lord and master of it during the last years of the occupation. She ruled everything concerning this business."

After her statement has been read aloud she signs and subscribes to it.

Taken down in draft and signed.

sgd. H.H.A. van de Graven.

Witness 3. Wilhelmina Henrica O L D E V E R D E.
confirms H.H.A. van de Graven's statement.

Whereof this statement is drawn up on oath of office at Enschede on the 21st February, 1946.

The investigators,
sgd. J.G.L. Krabbe.
" B. van der Lamp.

NOTES ON THE CASE.

Case is complete.

No defence seems possible.

UNITED NATIONS WAR CRIMES COMMISSION.

NETHERLANDS CHARGES AGAINST GERMAN WAR CRIMINALS.

Charge No. 279 (25.7.46)

For the use of the Secretariat

Registered number	Date of receipt in Secretariat
Name of accused, his rank and unit, of official position. (not to be translated)	OFFERMAN, G., German, living at Gronau, Germany, "Verwalter", owns a clothing-factory at Gronau. Fervent Nazi-member of S.A. in Gronau.
Date and place of commission of alleged crime	Enschede, 3 September, 1941 until 28 March 1945.
Number and description of crime in war crimes list	No. XIII, Pillage.
References to relevant provisions in national law	Netherlands Penal Code. art: 47, 48, 310, 321. Art. 27 of the B.B.S.

SHORT STATEMENT OF FACTS.

The accused, who was made "Verwalter" over a Jewish concern in Holland, began by dismissing all the Jewish personnel and then the director. He bought the factory and machinery from a German authority and had the machinery from it transferred to his own factory in Germany. In all, he caused the factory owners a loss of fl. 245,000. The factory was burnt out in an airraid in 1944, and the accused received war damages amounting to nearly 54,000 guilders, of which hardly anything is left.

TRANSMITTED BY.....

PARTICULARS OF ALLEGED CRIME.

The following particulars are contained in statements, extracts from which have been compiled in his own words by the Head of the Netherlands War Crimes Commission in London.

Police Enschede.
Political Detective Department.

S T A T E M E N T .

On the 12th March, 1946, we, Joannes Gerardus Lambertus Krabbe and Berend van der Kamp, both detectives with the P.D.D. and both special state constables, with reference to a plaint received from E.Dotsch, dated 12th March, 1946, instituted an inquiry, and heard:

Eliazer DOTSCH,
aged 47, clothing manufacturer, living at Emmastraat, 21, Enschede, who stated:

"I am a Dutchman. Since 1928 I have been director of the "N.V. Handelsmaatschappij S. Rozendaal", established at Enschede. The factory belonged entirely to I. Rozendaal, now living in New York. The inventory, including the stocks of goods there, belonged entirely to the foregoing company.

As the company subsisted entirely on Jewish capital a "Verwalter" was placed over it on the 3rd September, 1941. The Verwalter was a German, A.G.A. OFFERMANN, who lived at Gronau, Germany.

On the 15th November, 1941, all the Jewish personnel was dismissed from the factory. To my question as to whether I was being dismissed too, as I was a Jew, OFFERMANN replied: "No, not for the time being".

OFFERMANN dismissed me from my post as director on the 31st December, 1941. I received a letter from him at the time, bearing his signature, saying that as from the 31st December, 1941, I was dismissed by order of the "Reichskommissaris". I did not return to the firm after that date.

On the 13th February, 1943, I went into hiding and remained there until the liberation of Nijverdal - 9th April, 1945 -, where I had been hiding for the latter part of the time. When I returned to Enschede on the 24th April, 1945, I discovered that the whole factory had been destroyed by fire and by the air raid of the 22nd February, 1944, and that the machines had disappeared from the factory. I also found that the money from the bank and clearing had been used.

On the 12th September, 1941, OFFERMANN bought the firm's machinery from the N.A.G.U., as well as the inventory. On the 24th April, 1943, he bought the factory from the N.A.G.U.

The Administrative Institute appointed me as administrator over S. Rozendaal's Handelsmaatschappij N.V. and over the private funds of I. Rozendaal. As administrator and director I bring a plaint against A.G.A. OFFERMANN.

During the time that OFFERMANN was "Verwalter" and buyer (owner), Rozendaal suffered a financial loss of 45,000 guilders. This amount was taxed on the 16th January, 1941, by the architectural engineering office Beltman at Enschede, in connection with the insurance of this factory.

"Rozendaal's Handelsmaatschappij N.V." suffered a loss of 200,000 guilders at the same time.

As the firm is short of machinery and especially as OFFERMANN is using the firm's machinery in Gronau, I request that a speedy investigation be made in this case, and that the aforementioned goods be returned. A list giving the number of the stolen machines is attached."

After reading aloud and subscribing to his statement, he signs his statement.

Taken down in draft and signed:

sgd. E. Dotsch.

On the 25th March, 1946, we heard:
Witness: Antonius Marinus KEMPER,
aged 22, office clerk, living at Altsteedschestraat, 9, Enschede, who stated:

"In 1942, I do not know the exact date, OFFERMANN bought the afore-mentioned form from the N.A.G.U. Although he never expressed political opinions towards the staff, he was nevertheless well-known amongst them as a fervent Nazi. I know that OFFERMANN belonged to the S.A. in Gronau.

When I entered OFFERMANN's service in 1943, I noticed that a whole row of machines had already disappeared from the factory and heard that they had been taken to Gronau. OFFERMANN had a similar sort of concern in Gronau and with the machines which he took from Rozendaal's he extended his own factory. On the 22nd February, 1944, Rozendaal's was practically destroyed by fire and bombing".

After reading aloud and subscribing to his statement he signs in draft.
sgd. A.M. Kemper.

On the 26th March, 1946, we heard:

Bernardus Jan Willem DERKSEN,
aged 49, tailor in a clothing-factory, living at Merelstraat, 10, Enschede, who stated as follows:

"I am a Dutchman. I have worked for S. Rozendaal's Handelsmaatschappij N.V. at Enschede since about 1932. As the firm was under Jewish ownership and as director Dotsch was also a Jew, a "Verwalter" was appointed over this firm in 1942. He was a German called A. OFFERMANN and lives in Gronau. At the end of 1941 Dotsch was dismissed from his post as director.

After OFFERMANN had been "Verwalter" there for about a year he took the firm over and bought it from some German authority or other.

I know that in 1942 OFFERMANN gradually transferred 16 complete sewing-machines with under-frame to Gronau, where he had a clothing-factory. From 1942 until the 28th March, 1945, I worked for OFFERMANN in his clothing-factory at Gronau. I saw then that the machines which had been removed from Rozendaal's factory at Enschede were set up in Offermann's factory at Gronau. From conversations which I had with various Germans whilst I was working there, it appeared that OFFERMANN was an ardent party-man and a fierce persecutor of Jews.

Not only did he take the machines from Rozendaal's factory to Gronau, but he also took a lot of raw materials to Gronau. I saw him take 2 large cases and a sample trunk, containing yarns, to Gronau."

After reading aloud and subscribing to his statement, he signs in draft.
sgd. B.J.W. Derksen.

Drawn up on our oath of office at Enschede on the 29th March, 1946.

The Interrogators,
sgd. J.G.L. Krabbe.
" B.v.d. Kamp.

Copy of a letter from "Rozendaal's Handelsmaatschappij N.V."

EXTRACT.

Factory: Altsteedschestraat 15a.
Office: Emmastraat, 21.

To:
E. Dotsch Esq.,
Enschede,

Enschede, 10th December, 1945.

... Through the bill of sale of the 19th March, 1942, the N.A.G.U. (N.V.

Netherlands Company for the

Netherlands Company for the winding-up of business concerns) transferred the clothier's concern of Rozendaal's Handelsmaatschappij N.V. to OFFERMANN for the sum of 127,000 guilders.

..... This clothier's business carried on by the Rozendaal's Handelsmaatschappij N.V. and taken over by OFFERMANN was practically lost. During the air-raid on the 22nd February, 1944, the premises in which this business was situated was destroyed.

..... According to information from his staff, OFFERMANN had part of the machinery of Rozendaal's Handelsmaatschappij N.V. transferred to Gronau.

OFFERMANN received benefits for war damage amounting to fl.53,947.22 from the "O.O.M.", of which amount practically nothing is left."

Yours faithfully,
sgd. Illegible.

Case No. 4077 Annexed to Doc. III/68.

UNITED NATIONS WAR CRIMES COMMISSION.

NETHERLANDS CHARGES AGAINST GERMAN WAR CRIMINALS.

Charge No. 333 (12-9-46)

For the use of the Secretariat.

Registered Number

Date of receipt in Secretariat

Name of accused, his rank and
unit, or official position.

(not to be translated)

RICKLIHN, Wilhelm, Heinrich, German "Ver-
walter", born at VREDEN, Westphalia, Ger-
many, 8th January, 1900, now believed to
be living in Germany, probably VREDEN.
Originally locksmith by trade. Was a
member of the N.S.V. and N.S.D.A.P. and a
fervent "party-man".
Addresses in Holland:
1. 126, Nieuwe Kampweg, Boekelo.
2. 70^a, Hengelosestraat, Enschede.

Place and date of commission
of alleged crime

ENSCHDE, between 24 June, 1941 and 1 April,
1945.

Number and description of crime
in War crimes list

No. XIII. Pillage.
No. XIV. Confiscation of property.

References to relevant
provisions of national law

Netherlands Penal Code.
Art. 47, 48, 310, 321.

SHORT STATEMENT OF FACTS.

The accused was appointed "Verwalter" of the Jewish firm "NERAS",
at Enschede. He applied monies belonging to the firm to his own use and
in 1943 bought this firm from the N.A.G.U. for the low sum of Fl. 1500,-

TRANSMITTED BY.....

PARTICULARS OF ALLEGED CRIME .

The following particulars are contained in statements made by witnesses, extracts from which have been compiled in his own words by the Head of the Netherlands War Crimes Commission in London.

Enschede Police.
Political Investigation Department.

S T A T E M E N T .

In connection with the announcement "Appeal to the population to come forward with information as to war crimes committed anywhere by others than Dutchmen and Dutch subjects" we, Joannes Gerardus Lambertus Krabbe and Berend van der Kamp, both detectives belonging to the P.R.A., district of Enschede, and also special state constables, in respect of the accompanying charge laid by J.N.Menko, dated 7th May, 1946, heard:

Joseph Nico MENKO,
aged 42, factory owner, living at 70^a, Hengeloschestraat, Enschede, who stated:

" Before the war the factory NEERIS belonged to my father Nathan Jacob MENKO, who died at Enschede on 5th September, 1944 whilst hiding.

As Jewish capital was responsible for the business, and also because its owner was a Jew, it had to be placed under "Verwaltung".

On 24th June, 1941 the German W.H. RICKMANN, appeared as "Verwalter" of the business of which I was already director, my father having grown too old.

This RICKMANN deprived me of all powers concerning Bank and Clearance monies, as also those in connection with all transactions having to do with the business. This took place immediately after his arrival. From 1st May, 1942 access to the office and factory buildings where I had been able to go up to then, was also denied me by him.

During the time that I was still in the business RICKMANN took Fl. 500.- from the firm's cash every month. I cannot tell you whether this continued after I was no longer allowed to appear at the works, but the documents which I will have made out at your request will be sure to show.

In 1943 RICKMANN, as shown by the books, bought the firm of NEERIS from the N.A.G.U. for the sum of Fl. 1500.-. Everything was included, for example: office furniture, a typewriter, machinery tools, large lathe, four small lathes, one automatic lathe of another variety, three drills, four grinding machines, one small excentre press, raw materials, half-finished goods, finished articles, one welding apparatus, a planing machine and tools."

After mentioning the bombing of the factory in 1943 the statement continues:

"As according to the regulations this company (Onderlinge Oorlogersrisico Mij) was not allowed to pay out to German nationals, RICKMANN sent in a statement of damage suffered through the bombing to the "Hilfsausschutz" and received from it a sum of Fl. 14,000. This shows clearly that the purchase price of Fl. 1,500.- was much too low.

The Fl. 14,000 received by RICKMANN for damage incurred was paid in full to his private account and none of it went to the firm.

When Enschede was liberated -1st April, 1945- there was still a sum of Fl. 65.- in RICKMANN's account at the Twentsche Bank so that RICKMANN with a probability bordering on certainty, must have seen the chance of placing his money safely in a Bank in Germany.

RICKMANN did indeed have the bombed portion of the factory partly restored but this he paid for with the firm's money.

That RICKMANN, after

That RICKMANN, after the famous days of September, 1944, no longer paid for insurance stamps or health insurance for the workers so as in this way to enrich himself at the firm's expense, makes for the conclusion that he had taken up the standpoint that he would get as much money out of the firm as possible."

After it had been read over to and subscribed to by him, witness signed his statement.

Rough draft made out and signed.

sgd. J. N. Menko.

On 5th June, 1946, we, the investigators, heard:

Sijbren LEFERS,
aged 23, chauffeur, living at 109, Oosterstraat, Enschede, who stated as follows:

" I am of Dutch nationality.

With my fellow worker Duvée, who lives in the Poolmansweg, Enschede, by RICKMANN's orders I had to empty about 6 houses belonging to Jews. The furniture from these houses was shared out by RICKMANN among German war victims in Enschede and poor German families. As far as I know RICKMANN sent no furniture to Germany.

I do not know where RICKMANN is living but the name VREOEN, a place in Germany, has certainly been mentioned."

After it had been read over to and subscribed to by him, witness signed his statement.

Rough draft made out and signed.

sgd. S. Lefers.

To this we, the investigators, would add that RICKMANN was known in Enschede as a fervent "party-man". He was often seen in Enschede wearing the uniform of the S.A., which consisted of a brown uniform with a red band on which was a swastika.

This statement has been drawn up by us on oath of office at Enschede on the 5th June, 1946.

The investigators,
sgd. F. G. L. Krabbe.
" B. van der Kamp.

NEDERLANDSCHE P.SSERDOOZEN- en INSTRUMENTEN FABRIEK "NERAS".
Hengeloschestraat, 70, Enschede.

Balance Sheet, 24th July, 1941.

Cash	101,57	Creditors	509,27
Postgiro	19,75	Various charges	500,-
Debtors	3.279,61	Income tax	8,55
Bad debts	35,00	Loans:	
Stocks	3.244,61	B. J. Menko	100,-
Machinery	14.057,35	J. N. Menko	1.428,55
Depreciation	5921,-	Jac. Menko	1.178,85
	3.563		2.707,40
		Capital 1.1.41.	
			12.717,04
		Deposits	1.128,15
			13.845,19
		Profits	3.415,87
		Capital	17.261,06.
Fl.	20.986,28	Fl.	20.986,28

NOTES ON THE CASE.

The case is complete.

No defence is possible.

UNITED NATIONS WAR CRIMES COMMISSION

NETHERLANDS CHARGES AGAINST GERMAN WAR CRIMINALS.

Charge No. 354 (9-10-46)

For the use of the Secretariat.

Registered Number.

Date of receipt in Secretariat.

Name of accused, his
rank and unit, or
official position.

LUTTER, A.E.R., president of the
Kring Apeldoorn, of the N.S.D.A.P.
Living at 38, Middenlaan, Apeldoorn.
Liquidator of a presumably Jewish
business. Charge has already
been accepted by the committee.

Place and date of
commission of al-
leged crime.

Amersfoort.
August, 1941 to January 1942.

Number and description
of crime in war crimes
list.

No. XIV, Conviscation of property
or complicity in.
No. XIII, Pillage.

References to rele-
vant provisions of
national law

Neth. Penal Code.
Art. 310, 47, 48.

SHORT STATEMENT OF FACTS

The accused entered the shop of Hartog de Vries, showed letters in German purporting to be from the Reichskommissar for the Occupied Netherlands announcing the liquidation of the shop and the appointment of the man in question as liquidator. The accused then pocketed the money in the till, made a requisitioning order on complainant's clients for a sum of money, blocked witness' giro account and from September 1941 to January 1942, made a weekly collection of the shop's takings and the amounts received in respect of his requisitioning order.

TRANSMITTED BY.....

Amersfoort Police.

Pro-Justitia.

-13-

Extract of this statement has been made in his own words by the Netherlands Representative on the United Nations War Crimes Commission.

S T A T E M E N T

submitted by Antoon Spierings, police detective, Amersfoort in connection with a charge laid before the sub-commission for the Investigation of War Crimes at Utrecht.

The investigator interrogated:

HARTOG de VRIES,

ironmonger at Amersfoort, who stated that on 7th August 1941 an unknown man entered his shop and said that his name was A.E.R. LUTTER, that he lived in Apeldoorn, that he was the president of the Kring Apeldoorn of the N.L.D.A.P. and that he came in the name of the Reichskommissar for the Occupied Netherlands. He then produced two letters written in German, one saying that witness' business was liquidated and the other, that A.E.R. LUTTER had been appointed liquidator by the Reichskommissar. Witness then had to count up the money in the till which amounted to F.830,70 and this the accused put in his pocket. The latter then wrote down a sum of F.2539,46 to be claimed in his name from witness' clients, and took an inventory of stocks in the shop. He also announced that he would fetch each week the sum received in the shop. Accused then went to the Amersfoort post office where, as witness was informed, he blocked his giro account of F.403,90.

From 4th September to 9th January 1942 inclusive, LUTTER appeared in witness' shop practically once every week to fetch the shop's takings and the sums received in respect of the requisitioning. Each time he gave a receipt signed by himself, which receipts witness deposited with Notary S. van t'Eind, Amersfoort.

The investigator adds that on enquiry at the notary's office he was shown receipts totalling F.14744,32 signed by A.E.R. LUTTER, being for monies received by him from the liquidated ironmongery of Hartog de Vries.

Regarding the blocked giro account, the post office official concerned stated that nothing was known of this in Amersfoort, but that the Central Giro office at The Hague might be able to give some information.

The statement was concluded and signed on his oath of office by the investigator at Amersfoort on 28th June, 1946.

NOTES ON THE CASE

The case is completed.

No defence seems possible.

III/69.
8th November, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

Denunciation as a War Crime.

Committee I, in its meeting held on 7th November 1946,
referred to Committee III the question to what extent
denunciation should be regarded as a war crime in International
Law.

UNITED NATIONS WAR CRIMES COMMISSION.

Sea Warfare in the Nuremberg Judgment

By Egon Schwelb, Legal Officer.

C O N T E N T S.

- I. Sea Warfare in the Charter and in the Indictment.
- II. Crimes committed on the High Seas in the General Part of the Judgment.
- III. The Defendant Doenitz. His alleged implication in the common plan and conspiracy and his part in the crime against peace.
- IV. Doenitz. His implication in war crimes.
- V. Analysis of the Judgment against Doenitz.
- VI. Doenitz' responsibility for the application of unrestricted submarine warfare in its application to British armed merchant ships.
- VII. Doenitz' responsibility for the proclamation of operational zones and the application of unrestricted submarine warfare by sinking neutral merchant vessels.
- VIII. The allegation that Doenitz deliberately ordered the killing of survivors of ship-wrecked vessels.
- IX. Disregard of the Rescue Provisions.
- X. Doenitz' responsibility for the Commando Order, for the use of concentration camp labour, and for violations of the Prisoner of War Convention.
- XI. An attempt at establishing the principles on which the Court acted.
- XII. Raeder. His implication in crimes against peace.
- XIII. Raeder. His implication in war crimes.
- XIV. Attempt at a summary of the Tribunal's opinion.

I. Sea Warfare in the Charter and in the Indictment.

The Charter of the International Military Tribunal mentions warfare at sea in its Article 6(b) only by saying that violations of the laws or customs of war shall include, but not be limited to, murder or ill-treatment of persons on the seas.

The Indictment also does not go into detail when dealing with war crimes committed on the High Seas. In Count 3, "murder and ill-treatment of civilian populations of or in occupied territory or on the high seas" is contained under the heading "A" (page 14 of Command Paper 6696).

The Indictment says of the defendant Raeder that he authorized, directed and participated in the war crimes set forth in Count 3, including particularly war crimes arising out of sea warfare. (p.40 of Command Paper 6696).

The defendant Doenitz is charged in the Indictment with having authorized, directed and participated in the war crimes set forth in Count 3 of the Indictment particularly crimes against persons and property on the high seas, (ibid).

II. Crimes committed on the High Seas in the General Part of the Judgment.

The General part of the Judgment does not contain specific observations on war crimes committed on the high seas. The Judgment refers on pp.16887 and 16925 to the text of Art.6(b) of the Charter which has been quoted in paragraph I of this paper.

The Tribunal's opinion on questions of sea warfare is therefore only to be found in the Judgment on the defendants Doenitz, (pp.17023 et seq), and Raeder, (pp.17031 et seq).

III. The Defendant Doenitz. His alleged implication in the common plan and conspiracy and his part in the crime against peace.

Doenitz was indicted on Counts 1 (conspiracy), 2 (crimes against peace) and 3 (war crimes). The Tribunal found him not guilty on Count 1 of the Indictment and guilty of Counts 2 and 3.

With regard to his alleged responsibility for the common plan and conspiracy and with regard to his part in the crime against peace, the Tribunal stated on p.17023:

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

It is true that until his appointment in January 1943, as Commander-in-Chief he was not an "Oberbefehlshaber". But this statement underestimates the importance of Doenitz' position. He was no mere Army or division commander. The U-boat arm was the principle part of the German fleet and Doenitz was its leader. The High Seas fleet made a few minor, if spectacular, raids during the early

years of the war but the real damage to the enemy was done almost exclusively by his submarines as the millions of tons of allied and neutral shipping sunk will testify. Doenitz was solely in charge of this warfare. The Naval War Command reserved for itself only the decision as to the number of submarines in each area. In the invasion of Norway, for example, Doenitz made recommendations in October 1939 as to submarine bases, which he claims were no more than a staff study, and in March 1940, he made out the operational orders for the supporting U-boats, as discussed elsewhere in this Judgment.

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

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

As late as April 1945 when he admits he knew the struggle was hopeless, Doenitz as its Commander-in-Chief urged the Navy to continue its fight. On 1 May 1945 he became the Head of State and as such ordered the Wehrmacht to continue its war in the East, until capitulation on 9 May 1945. Doenitz explained that his reason for these orders was to insure that the German civilian population might be evacuated and the Army might make an orderly retreat from the East.

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

IV. Doenitz. His implication in war crimes.

The following is said with regard to Doenitz' part in the commission of war crimes:

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

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

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

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

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

In the actual circumstances of this case, the Tribunal is not prepared to hold Doenitz guilty for his conduct of submarine warfare against British armed merchant ships.

However, the proclamation of operational zones and the sinking of neutral merchant vessels which enter those zones presents a different question. This practice was employed in the War of 1914-1918 by Germany and adopted in retaliation by Great Britain. The Washington conference of 1922, the London Naval Agreement of 1930 and the Protocol of 1936 were entered into with full knowledge that such zones had been employed in the First World War. Yet the Protocol made no exception for operational zones. The order of Doenitz to sink neutral ships without warning when found within these zones was, therefore, in the opinion of the Tribunal, a violation of the Protocol.

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

The evidence further shows that the rescue provisions were not carried out and that the defendant ordered that they should not be carried out. The argument of the defence is that the security of the submarine is, as the first rule of the sea, paramount to rescue and that the development of aircraft made rescue impossible. This may be so, but the Protocol is explicit. If the commander cannot rescue,

then under its terms he cannot sink a merchant vessel and should allow it to pass harmless before his periscope. These orders, then, prove Doenitz is guilty of a violation of the Protocol.

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

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

In one instance, when he was Commander-in-Chief of the Navy, in 1943, the members of an allied motor torpedo boat were captured by German Naval Forces. They were interrogated for intelligence purposes on behalf of the local admiral, and then turned over by his order to the SD and shot. Doenitz said that if they were captured by the Navy their execution was a violation of the commando order, that the execution was not announced in the Wehrmacht communique, and that he was never informed of the incident. He pointed out that the admiral in question was not in his chain of command, but was subordinate to the army general in command of the Norway occupation. But Doenitz permitted the order to remain in full force when he became commander-in-chief, and to that extent he is responsible.

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

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

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

The prosecution insisted that "the measures" referred to meant the Convention should not be denounced, but should be broken at will. The defence explanation is that Hitler wanted to break the Convention for two reasons: to take away from German troops the protection of the Convention, thus preventing them from continuing to surrender in large groups to the British and Americans; and also to permit reprisals against Allied prisoners of war because of Allied bombing raids. Doenitz claims that what he meant by "measures" were disciplinary measures against German troops to prevent them from surrendering, and that his words had

no reference to measures against the Allies; moreover that this was merely a suggestion, and that in any event, no such measures were ever taken, either against Allies or Germans. The Tribunal, however, does not believe this explanation. The Geneva Convention was not, however, denounced by Germany. The defence has introduced several affidavits to prove that British naval prisoners of war in camps under Doenitz' jurisdiction were treated strictly according to the Convention, and the Tribunal takes this fact into consideration, regarding it as a mitigating circumstance. "

V. Analysis of the Judgment against Doenitz.

From the text as reproduced in paragraphs III and IV of this paper, it appears that Doenitz was acquitted of the charge of being a participant in the criminal conspiracy to wage aggressive war (Count 1) and that he was also found not guilty of having planned, prepared or initiated aggressive war. His implication in the crime against peace was only his part in the waging of a war of aggression for the initiation of which he has not been found responsible.

With respect to Doenitz' implication in war crimes, we must distinguish the following different questions dealt with in the Judgment.

- (a) The unrestricted submarine warfare in its application to British armed merchant ships. Here Doenitz was found not guilty. (see below, paragraph VI.)
- (b) The proclamation of operational zones and the application of unrestricted submarine warfare by sinking neutral merchant vessels. Here Doenitz was found guilty, but no punishment was awarded for this offence. (See below, paragraph VII.)
- (c) The allegation that Doenitz deliberately ordered the killing of survivors of ship-wrecked vessels. Here Doenitz was found not guilty. (See below, paragraph VIII.)
- (d) The disregard of rescue provisions. Here Doenitz was found guilty, but no punishment was awarded for this offence. (See below, paragraph IX.)
- (e) Doenitz' responsibility for Hitler's Commando Order of 18th October 1942.
- (f) Doenitz' implication in the use of concentration camp labour.
- (g) Doenitz' responsibility for violations of the Prisoner of War Convention.

With respect to the facts under (e), (f) and (g), which have no bearing on the law of sea warfare, Doenitz was found guilty in a more or less remote way.

VI. Doenitz' responsibility for the application of unrestricted Submarine warfare in its application to British armed merchant ships.

Oppenheim-Lauterpacht say, in "International Law", 6th (revised) Edition, 1944, Volume 2, paragraph 181(a), on pp.362 et seq., on defensively armed merchant vessels, the following:

" In 1913 the British Admiralty announced that in the event of war it was their intention to supply British merchant vessels with guns and ammunition for the purpose of defending themselves, thus reviving the former practice by which merchant vessels always carried defensive armament. In making that announcement the British Government insisted

on the clear distinction between converted armed merchant cruisers and defensively armed merchantmen. The methods of submarine warfare adopted by the Central Powers in the World War called for the execution of this policy, and accordingly it became the practice of the Allied Powers in that war to arm their merchant vessels defensively and so enable them more effectively to exercise their right, as above stated, of resisting attack by force. An overwhelming weight of authority recognised that their defensive armament in no way altered the legal status of these vessels.

At the same time, it is clear that the arming of merchant vessels raises problems of substantial difficulty. In the first place, it is not easy to draw a line of distinction between defensive and offensive acts. Secondly, the encouragement of even defensive hostilities on the part of private vessels is fraught with danger inasmuch as it threatens to undermine the abolition of privateering by the Declaration of Paris of 1856 between commissioned and non-commissioned vessels. Thirdly, the fact that a merchantman is armed and that she is entitled to resist actual or anticipated attack makes it impossible for enemy submarines to exercise their right of visit and capture in accordance with International Law without running the risk of destruction by the superior armament of the merchant vessel or by being rammed by her.

It has been rightly suggested that the obvious consequence of the inability of submarines to exercise the customary rights of visit and capture in relation to defensively armed merchantmen in accordance with International Law is abstention from activities prohibited by the law. The novelty of a weapon does not by itself carry with it a legitimate claim to a change in the existing rules of war. The same principle applies with regard to capture and attack by aircraft in relation to merchantmen. "

As stated by Oppenheim-Lauterpacht, "an overwhelming weight of authority recognized that the defensive armaments of merchant vessels in no way altered their legal status". It appears that the Tribunal did not follow this weight of authority, and proceeded on the basis that the British merchantmen which were armed or which were convoyed with armed escort or which had received orders to send position reports upon sighting submarines, and had thus been integrated into the network of Naval Intelligence, and had been ordered to ram U-boats if possible, had thereby lost their status as merchantmen and did not partake of the protection afforded by customary and conventional International Law to merchant vessels, their passengers, crews and papers. The controversy which existed on this point appears to have been solved by the Tribunal in favour of the greater freedom of action of submarines.

Doenitz was accordingly found not guilty for his conduct of submarine warfare against British armed merchant ships.

VII. Doenitz' responsibility for the proclamation of operational zones and the application of unrestricted submarine warfare by sinking neutral merchant vessels.

The Tribunal pointed out that the proclamation of operational zones and the sinking of neutral merchant vessels which entered those zones, presented a question different from the conduct of submarine warfare against British (i.e. from the German point of view, enemy) armed merchant ships. The Tribunal recalled that this practice was employed in the war of 1914-1918 by Germany, and adopted in retaliation by Great Britain. It referred to three international documents which must now be examined in greater detail:

- (a) The Washington Treaty of 6th February 1922 (Command Paper 1627).
- (b) The International Treaty for the Limitation and Reduction of Naval Armaments, dated London 22nd April 1930, (Command Paper 3758).
- (c) The London Protocol relating to the Rules of Submarine Warfare of 6th November 1936, (Command Paper 5302).

(a) The Washington Treaty.

The Washington Treaty which was signed by the United States of America, the British Empire, France, Italy and Japan, but never ratified, was concluded in the desire "to make more effective the rules adopted by civilized nations for the protection of the lives of neutrals and non-combatants at sea, at time of war."

The abortive Treaty contained, inter alia, the following provisions:

Article I.

The Signatory Powers declare that among the rules adopted by civilised nations for the protection of the lives of neutrals and non-combatants at sea in time of war, the following are to be deemed an established part of international law:-

1. A merchant vessel must be ordered to submit to visit and search to determine its character before it can be seized.

A merchant vessel must not be attacked unless it refuse to submit to visit and search after warning, or to proceed as directed after seizure.

A merchant vessel must not be destroyed unless the crew and passengers have been first placed in safety.

2. Belligerent submarines are not under any circumstances exempt from the universal rules above stated; and if a submarine cannot capture a merchant vessel in conformity with these rules the existing law of nations requires it to desist from attack and from seizure and to permit the merchant vessel to proceed unmolested.

Article II.

The Signatory Powers invite all other civilized Powers to express their assent to the foregoing statement of established law so that there may be a clear public understanding throughout the world of the standards of conduct by which the public opinion of the world is to pass judgment upon future belligerents.

Article III.

The Signatory Powers, desiring to ensure the enforcement of the humane rules of existing law declared by them with respect to attacks upon and the seizure and destruction of merchant ships, further declare that any person in the service of any Power who shall violate any of those rules, whether or not such person is under orders of a governmental superior, shall be deemed to have violated the laws of war and shall be liable to trial and punishment as if for an act of piracy and may be brought to trial before the civil or military authorities of any Power within the jurisdiction of which he may be found.

Article IV.

The Signatory Powers recognise the practical impossibility of using submarines as commerce destroyers without violating, as they were violated in the recent war of 1914-1918, the requirements universally accepted by civilised nations for the protection of the lives of neutrals and non-combatants, and to the end that the prohibition of the use of submarines as commerce destroyers shall be universally accepted as a part of the law of nations they now accept that prohibition as henceforth binding as between themselves and they invite all other nations to adhere thereto. "

The work, "The International Law of the Sea", by Higgins and Colombos contains, inter alia, in paragraph 418, the comment that the Treaty reaffirmed a principle for which Great Britain and her allies stood during the late war (the war of 1914-1918), namely, the maintenance of the rule of International Law forbidding the sinking of merchant ships on sight, whether such ships be enemy or neutral, and requiring that crews and passengers be placed in safety if the vessel is destroyed owing to unavoidable circumstances. This rule had never in the past been violated by any State till the German submarine campaign (of the 1914-1918 war) began.

(b) The London Naval Treaty of 1930.

The London Naval Treaty of 1930 between the United States, Great Britain, the British Dominions and India, France, Italy and Japan, contains in its Part IV, the provision of Art.22 which reads as follows:

" Article 22.

The following are accepted as established rules of International Law:

(1) In their action with regard to merchant ships, submarines must conform to the rules of International Law to which surface vessels are subject.

(2) In particular, except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety. For this purpose, the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board.

The High Contracting Parties invite all other Powers to express their assent to the above rules. "

This part of the Treaty must, as Oppenheim-Lauterpacht pointed out, be deemed to be declaratory of International Law as it existed prior to its conclusion. It was laid down in Part V (Art.23) that Part IV, the text of which has just been quoted, shall remain in force without limit of time.

Accordingly, when the Treaty of 1930 was allowed to expire on 31st December 1936, its Part IV remained binding upon the parties. However, with a view to enlarging the number of States expressly accepting the obligations in question, the United States, Great Britain, the British Dominions and India, France, Italy and Japan signed, on 6th November 1936, the Protocol incorporating verbatim the provisions of Part IV of the 1930 Naval Treaty relating to submarines.

(c) The London Protocol of 1936.

According to Higgins-Colombos, l.c., paragraph 420, 48 States, including Germany, Italy and Japan, had adhered to the London Protocol of 6th November 1936, by the end of August 1939. The rules expressed in Art. 22 of the 1930 Treaty having been embodied in the London Protocol of 1936, constituted, therefore, immediately before the outbreak of the Second World War, conventional international law agreed to by almost all seafaring nations.

Mention should, in this connection, also be made of the International Agreement for Collective Measures against Piratical Attacks in the Mediterranean by Submarines, concluded at Nyon on 14th September 1937, (the so-called Nyon Agreement, Cmd. 5568). In the Preamble to this Agreement, which concerned attacks by submarines against merchant vessels in the course of the Spanish civil war, the provisions of the Naval Treaty of 1930 and of the London Protocol of 1936 were referred to, in effect, as declaratory of International Law. (Oppenheim-Lauterpacht, II, page 381, Note 1). The Preamble to the Nyon Agreement, speaks of attacks which "are violations of the rules of International Law referred to in Part IV of the Treaty of London of 22nd April 1930, with regard to the sinking of merchant ships and constitute acts contrary to the most elementary dictates of humanity, which should be justly treated as acts of piracy."

The Tribunal proceeded on the basis of these rules forming part of valid International Law, but only as far as neutral ships were the victims of illegal attacks. Therefore the Tribunal found that the order of Doenitz to sink neutral ships without warning when found within the operational zones, was a violation of the Protocol.

Although the Court asserted the further existence of this rule as far as neutral merchantmen were concerned, it considered them only, as it were, as a lex imperfecta. The Tribunal found Doenitz guilty of this violation, but it stated with regard to it, that the sentence on Doenitz was not assessed on the ground of his breaches of the International Law of submarine warfare.

VIII. The allegation that Doenitz deliberately ordered the killing of survivors of ship-wrecked vessels.

With regard to the assertions by the Prosecution that Doenitz deliberately ordered the killing of survivors of ship-wrecked vessels, both enemy and neutral, the Tribunal expressed the opinion that the evidence did not establish with the certainty required, that Doenitz deliberately ordered the killing of shipwrecked survivors. His orders were, however, undoubtedly ambiguous and deserved the strongest censure. It appears that Doenitz was, in effect, acquitted of this part of the accusation.

IX. Disregard of the Rescue Provisions.

Under the London Treaty and under the London Protocol, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation, a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety. An exception is made only in the case of persistent refusal to stop on being duly summoned or of active resistance to visit or search. For the purpose of this provision, the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in existing sea and weather conditions by the proximity of land, or the presence of another vessel which is in a position to take them on board.

The evidence showed that the rescue provisions of the London Protocol were not carried out and that the defendant Doenitz ordered that they should not be carried out. The argument of the defence was that the security of the submarine was, as the first rule of the sea, paramount to rescue, and that the development of aircraft made rescue impossible.

To this the Court replied that this might be so, but the Protocol was explicit. If the commander could not rescue, then, under its terms, he could not sink a merchant vessel, and should allow it to pass unharmed before his periscope. The opinion adopted by the Court, is therefore in line with what has been quoted above from Oppenheim-Lauterpacht, paragraph 181(a), which is to the effect that "it has been rightly suggested that the obvious consequences of the inability of submarines to exercise the customary rights in accordance with International Law, is abstention from activities prohibited by the law".

This order, the Court continued, then proved Doenitz guilty of a violation of the Protocol.

But also with regard to this violation by Doenitz of the rules of International Law, the Court, though it found Doenitz guilty, stated that his sentence was not assessed on the ground of his breaches of the International Law of Submarine warfare. This conclusion was based on all the facts proved and, in particular, on an order of the British Admiralty announced on 8th May 1940, according to which all vessels should be sunk on sight(*) in the Skegerrak and the answers to interrogatories by Admiral Nimitz stating that unrestricted submarine warfare was carried on in the Pacific Ocean by the United States from the first day that nation entered the war.

X. Doenitz' responsibility for the Commando Order for the use of Concentration Camp labour, and for violations of the Prisoner of War Convention.

These charges, dealt with in the Judgment against Doenitz, do not concern the law of sea warfare, and are therefore outside the scope of this paper.

XI. An attempt at establishing the principles on which the Court acted.

It will be seen that with regard to the unrestricted submarine warfare against British armed merchant ships, (Supra, V(a) and VI), the Tribunal came to the conclusion that Doenitz had not committed an offence at all.

With regard to the Proclamation of operational zones, and the application of unrestricted submarine warfare to neutral vessels, and with respect to the disregard of the rescue provisions of the London Protocol, (supra V(b) and (d) and paragraphs VII and IX), the Tribunal found Doenitz guilty, but imposed no sentence on him.

As all these activities, both against British merchant vessels and against neutral merchant ships, were technically violations of the laws as laid down in the London Protocol, it is important to find out the principle on which the Tribunal acted when acquitting Doenitz entirely in the case where British ships were the victims, and when abstaining from imposing the penalty where the victims were neutral merchantmen.

(*) The copy of the transcript available to this Secretariat says "at night", but probably the correct meaning is "at sight", as contained in the text of this paper.

In the case of British armed merchantmen, the Tribunal appears to have based its judgment on the consideration that in being not only defensively armed and convoyed by armed escort, but having accepted orders to send position reports upon sighting submarines and to ram U-boats if possible, the British armed merchantmen had ceased, for the purposes of naval warfare, to be merchant ships and had become parts of the British belligerent naval forces.

As far as the second problem is concerned, namely that the Court abstained from imposing penalties for what it established to be violations of the laws of sea warfare, the Tribunal referred to the fact that similar practices had been adopted by the British and American navies.

With regard to the adoption of similar practices by the British and American navies, the following has been stated by Higgins-Colombos, paragraph 437:

" In spite of her signature of the London Protocol, Germany, in September 1939 proclaimed a German naval submarine campaign concentrated upon "the blockade of England", which went beyond anything attempted during the unrestricted submarine warfare of 1917-1918. The German Government had in advance made up its mind to resort to an indiscriminate attack upon all shipping whatsoever and as a result had placed German submarines in position before the outbreak of the war.

Its breach of the obligation to which it had solemnly subscribed was therefore quite flagrant and deliberate, and its example was afterwards followed by the two other members of the "Axis" alliance, Italy and Japan. As a retaliatory measure, Great Britain and the United States also employed their submarines in 1942 for the destruction of enemy merchant vessels carrying supplies and munitions of war, but only after all their protests against the barbarous methods adopted by their enemies had proved unavailing. "

As the exhibits of the Nuremberg trial, particularly the answers to interrogatories by Admiral Nimitz, are not available at the present moment, it is not possible to arrive at a final conclusion, with regard to the principle on which the Court acted. If the statement by Higgins-Colombos is correct, and Great Britain and the United States employed their submarines for the destruction of enemy merchant vessels only after all their protests against the barbarous methods adopted by the enemy had been unavailing, as a retaliatory measure, the following problem arises: the adoption of measures which otherwise would be illegal, is legitimate when these measures are adopted as legitimate reprisals. The position then is that an act done by the side which initiated the illegal warfare is illegal, and is, as a reprisal, not illegal when applied by the other belligerent. If, on the other hand, the activities by the British and United States navies were not reprisals, but in the opinion of the Tribunal, illegitimate acts, then, in strict theory, there was still less reason to abstain from enforcing a penalty. The perpetrator of a crime A. is not excused by the fact that another perpetrator B has committed the same act. (*)

This is not to imply that the result at which the Tribunal has arrived does not represent a just and appropriate decision. It is, on the contrary, a case where a disregard for technicalities and the avoidance of applying merely theoretical conclusions to practical facts, lead to a higher justice than a mechanical application of legal principles would do.

(*) It should be borne in mind that the victims were neutral vessels and towards them at least, the disregard of valid provisions even by both belligerents would not make an illegal act legitimate.

Mention should be made in this connection of an opinion expressed by Professor Lauterpacht in his article "The law of nations and the punishment of war crimes", in the British Year Book of International Law, 1944, on page 77. Professor Lauterpacht writes:

"Moreover, there is room for the view that if the victorious belligerent has himself, in pursuance of reprisals, set aside international law in a particular sphere, he cannot properly make such acts on the part of his opponent the subject of prosecution for a war crime."

XIII. Raeder. His implication in crimes against peace.

The Tribunal stated with regard to Raeder's implication in crimes against peace, the following, (p.17031):

"In the 15 years he commanded it, Raeder built and directed the German Navy; he accepts full responsibility until retirement in 1943. He admits the Navy violated the Versailles Treaty, insisting it was "a matter of honour for every man" to do so, and alleges that the violations were for the most part minor, and Germany built less than her allowable strength. These violations, as well as those of the Anglo-German Naval Agreement of 1935, have already been discussed elsewhere in this Judgment.

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

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

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

On 10 October Raeder discussed the matter with Hitler; his War Diary entry for that day says Hitler intended to give the matter consideration.

A few months later Hitler talked to Raeder, Quisling, Keitel and Jodl; OKW began its planning and the Naval War Staff worked with OKW staff officers. Raeder received Keitel's directive for Norway on 27 January 1940 and the subsequent directive of 1 March, signed by Hitler.

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

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

Raeder endeavoured to dissuade Hitler from embarking upon the invasion of the USSR. In September 1940, he urged on Hitler an aggressive Mediterranean policy as an alternative to an attack on Russia. On 14 November 1940, he urged the war against England "as our main enemy" and that submarine and naval air force construction be continued. He voiced "serious objections against the Russian campaign before the defeat of England", according to the notes of the German Naval War Staff. He claims his objections were based on the violation of the Non-Aggression Pact as well as strategy. But once the decision had been made, he gave permission six days before the invasion of the Soviet Union to attack Russian submarines in the Baltic Sea within a specified warning area and defends this action because these submarines were "snooping" on German activities.

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

It will be seen that as distinguished from Doenitz, Raeder was found guilty not only of waging aggressive war, but also of participation in the conspiracy (Count 1) and in the planning, in addition to waging, of aggressive war. (Count 2).

IV. Raeder. His implication in war crimes.

Raeder was also found guilty of Count 3 (War Crimes) for the reasons stated on pp.17033/4, as follows:

" Raeder is charged with war crimes on the high seas. The "Athenia", an unarmed British passenger liner, was sunk on 3 September 1939, while outward bound for America. The Germans two months later charged that Mr. Churchill deliberately sank the "Athenia" to encourage American hostility to Germany. In fact, it was sunk by the German U-boat 30. Raeder claims that an inexperienced U-boat commander sank it in mistake for an armed merchant cruiser, that this was not known until the U-30 returned several weeks after the German denial and that Hitler then directed the Navy and Foreign Office to continue denying it. Raeder denied knowledge of the propaganda campaign attacking Mr. Churchill.

The most serious charge against Raeder is that he carried out unrestricted submarine warfare, including sinking of unarmed merchant ships, of neutrals, non-rescue and machine-gunning of survivors, contrary to the London Protocol of 1936. The Tribunal makes the same finding on Raeder on this charge as it did as to Doenitz, which has already been announced, up until 30 January 1943, when Raeder retired.

The Commando Order of the 18 October 1942 which expressly did not apply to naval warfare, was transmitted by the Naval War Staff to the lower naval commanders with the direction it should be distributed orally by flotilla leaders and section commanders to their subordinates. The commandos were put to death by the Navy, and not by the SD, at Bordeaux on the 10th December 1942. The comment of the Naval War Staff was that this was "in accordance with the Fuehrer's special order, but is nevertheless something new in international law, since the soldiers were in uniform". Raeder admits he passed the order down through the chain of command, and he did not object to Hitler. "

With regard to the problems of sea warfare, the Tribunal made the same finding on Raeder, as on Doenitz, up until 30th January 1943, when Raeder retired.

XV. Attempt at a summary of the Tribunal's opinion.

From what has been said it follows that the Tribunal considers the London Protocol to continue to be binding International Law of war.

In view of the actual development during World War II, the Tribunal has, however, interpreted the provision of the Protocol in favour of greater liberty of action by submarines.

This restrictive interpretation has two consequences:

- (a) the scope of the application of the London Protocol has been narrowed by exempting from its protection merchantmen of enemy nationality which are (1) armed, (2) under armed escort, (3) helping their navies in the detection of submarines, (4) have received orders to ram U-boats.
- (b) The second narrowing of the scope of the Protocol is that although its violations remain technically war crimes, no punishment is inflicted for such violations as have been committed also by the other belligerent. With regard to this second restriction, it is not clear from the material at present available to this writer, whether the abstaining from imposing penalties is conditioned by the fact that the other belligerent committed the same act on his own initiative, or whether it also applies when the other belligerent committed the same act as a legitimate reprisal.