

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

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(\*) 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 Verfuergungstruppe 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 Reichsfuehrers 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.

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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.

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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.

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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 an 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. SCHWEIZER, 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 T.  
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 Kamp.

#### NOTES ON THE CASE.

Case is complete.

No defence seems possible.



Case No. 3627 annexed to Doc. III/68.

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.<br>(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.<br>art: 47, 48, 310, 321.<br>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."

E X T R A C T.

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<sup>a</sup>, Hengeloeschestraat, 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.  
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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<sup>a</sup>, Hengelochestraat, Enschede, who stated:

" Before the war the factory NEPUS 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 NEPUS 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 "NERIS".  
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. 334 (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 those 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.

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(\*) 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.

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(\*) 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 Hoeszbach 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 endeavored to dissuade Hitler from embarking upon the invasion of the USSR. In September 1940, he urged on Hitler an aggressive Mediterranean policy as an alternative to an attack on Russia. On 14 November 1940, he urged the war against England "as our main enemy" and that submarine and naval air force construction be continued. He voiced "serious objections against the Russian campaign before the defeat of England", according to 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.

III/71.  
20th November, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

Denouncing as a War Crime.

Subsequent to the information contained in Doc.III/69, members of Committee III are hereby informed that Committee I, in its meeting held on 14th November 1946, (Minutes No.81), formulated its decision of 7th November 1946 (Minutes No.80), to refer the question whether denouncing is a war crime to Committee III, to read as follows:

" In connection with these and similar cases it was also decided to refer to Committee III for its opinion the general question as to what extent and for what reasons denunciation as defined in Czechoslovak Law should be regarded as a war crime in International Law. "

The decision arose in connection with the Czechoslovak Charge No. 4210 accusing a certain Leopold Klima of complicity in deportation, punishable under Sections 93 and 95 of the Czechoslovak Penal Code and Section 7 of the Czechoslovak Retribution Act.

The statement of facts contained in the charge No.4210, is as follows:

" The accused served as an informer of the Gestapo in Brno. He denounced several Czech citizens to the Gestapo and caused their arrest and deportation to concentration camps.

In the autumn of 1939 he denounced the Czech citizen DOSTAL from Brno to the Gestapo. The Gestapo arrested and tortured him.

He denounced the School Headmaster ZOUBEK, in Brno to the Gestapo. ZOUBEK was arrested by the Gestapo and died in prison. The same was the case of the Czech Citizen Maria BOUSKOVA. "



III/72.  
20th November 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

Netherlands Case No. 4262.

referred to Committee III by Committee I.

- I. The Netherlands National Office submitted to the United Nations War Crimes Commission on 8th November 1946, a charge against Wilhelm Brämer, Hermann Schuler and a certain Blekman, (No.4262).  
  
A copy of this charge is appended to this paper.
- II. Committee I decided in its meeting held on 14th November 1946, (Minutes No.81), to list the accused No.2 (Schuler) for pillage. The cases of the accused Nos. 1 and 3 (Brämer and Blekman) were adjourned and referred to Committee III for its opinion in connection with other similar Netherlands cases now under consideration by that Committee. In addition, the Netherlands National Office was asked to submit a copy of the order issued by the first accused, (Brämer).
- III. The other, similar Netherlands cases, referred to in the decision of Committee I are the four cases annexed to Doc.III/68.

## UNITED NATIONS WAR CRIMES COMMISSION

## NETHERLANDS CHARGES AGAINST GERMAN WAR CRIMINALS

Charge No. 383 (2-11-1946)

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. BRÄUER, Wilhelm, employee of "Omnia Treuhandgesellschaft, N.V.", Amsterdam. Charged by Reichskommissar with liquidation of a Jewish concern. Born 21st June 1895 at Verningerode, Germany, lived 31 Sophialaan, A'dam. Went to Erfurt, Germany, 2nd February 1943.
2. SCHULER, Hermann, N.S.B., employee of "Omnia Treuhandgesellschaft, N.V." (Dismissed for embezzlement). Replaced Bräuer. Born 27th July 1891 at Leonberg, Germany, lived at 20 Gerard Brandstraat, Amsterdam. About 6th September 1944 left with family for Germany.
3. BLEKMAN, head of "Omnia Treuhandgesellschaft, N.V.", Amsterdam. Fled about 6th September 1944.

Place and date of  
commission of al-  
leged crime.

Amsterdam,  
1942 - 1944.

Number and description  
of crime in war crimes  
list.

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

References to rele-  
vant provisions of  
national law.

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

SHORT STATEMENT OF FACTS

The accused were successively in charge of a Jewish firm, the liquidation of which had been ordered by the Reichskommissar for the Occupied Netherlands Territories.

BRÄUER threatened the owner with the Gestapo if he offered any opposition. He also made an employee give him two months' salary paid to her in advance, later using pressure to make her give up a document showing her recognised claim to this.

SCHULER sold the firm's property, deposited the proceeds in an account under a false name, and failed to account to the administration for the total sum.

BLEKMAN, as head of "Omnia" can be considered responsible for his subordinates' actions.

TRANSMITTED BY . . . . .



Political Investigation Service,  
Head Office, Amsterdam.

Extract of these statements has been made in his own words by the Netherlands Representative of the United Nations War Crimes Commission.

#### S T A T E M E N T

submitted by W. Prasing, police officer 1st class, special constable of the Amsterdam municipality, attached to the above Service, in connection with a charge of theft brought against various Germans.

Witness H.J. Joënsberg, a German Jew now stateless, living in Amsterdam, states that he was the owner of a business called "Enfli" (Eerste Nederlandsche Figuren en Letter Industrie). He had a partner, Ludwig Kugler, who was deported in June 1943 and died in Bergen-Belsen on 10th February 1945.

In October 1942 "Enfli" was liquidated by the "Omnia Trusthand-gesellschaft, N.V.", by order of the Reichskommissar for the Occupied Netherlands Territories. (No compensation has been paid.)

W. BRÄMER appeared at witness' business saying he had orders from the Reichskommissar to liquidate it. He showed witness his authorisation. He took the key, ordered witness to make out and hand over an inventory, forbade him to carry out any business transactions under threat of having him arrested by the Gestapo should witness oppose him, and finally forbade witness to enter the premises. BRÄMER also ordered an employee, Maria Woortman, to return F.160, being 2 months' salary paid in advance. This he seized.

In 1943 BRÄMER was replaced by the N.S.B. man SCHULER of "Omnia". SCHULER was later dismissed by "Omnia" for embezzlement and witness was told by a certain Koes that the embezzlement was partly in connection with "Enfli". SCHULER was said to have sold the entire stock and to have paid in the proceeds to an account under a false name and without any further details, and without having accounted to the administration for the complete sum.

BEKMAN followed SCHULER but appeared to have played a subordinate role.

After "Dolle Dinsdag" (5th September 1944) witness found the above-mentioned Koes, a Dutchman, in charge. Koes told him the "Gentlemen" had taken all monies belonging to the business with them. Later he said that the bank where the money was deposited was not paying out any more.

After the liberation witness found his shop had been converted into a private dwelling and that nothing was left of his business. He estimates his total loss in money and material at F.7180.-.

Witness M. Woortman confirms the previous statement in respect of BRÄMER and also that she had to return the F.160, two months' salary. A declaration was made out and deposited with the administration saying that in the event of the business being liquidated the F.160 was her property. She resigned shortly afterwards, but when she took a copy of the declaration and asked for her money BRÄMER demanded the former and on her refusal to hand it over, took it from her under pressure.

Witness Koes states that he worked for "Omnia" and knew BEKMAN, a German, who was head of it. The latter fled in September 1944 at the time of "Dolle Dinsdag".

Witness adds that all monies from liquidated Jewish concerns were deposited with the "Bank voor Nederlandsche Arbeid", Amsterdam. After "Dolle Dinsdag" (5th September 1944) this bank stopped its payments and

Political Investigation Service,  
Head Office, Amsterdam.

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Witness adds that all monies from liquidated Jewish concerns were deposited with the "Bank voor Nederlandsche Arbeid", Amsterdam. After "Dolle Dinsdag" (5th September 1944) this bank stopped its payments and



was transported to Germany.

Statement drawn up under oath of office at Amsterdam, 5th September,  
1946.

s/ W. Prasing.

NOTES ON THE CASE.

The case is complete.

No defence seems possible,

III/73.  
22nd November, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

Yugoslav-Italian charges of Crimes against Humanity

referred to Committee III by Committee I.

Report by Committee III. (Second Draft).

- 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 and 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 paragraph 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 the 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.

Committee III deals in the following with the individual charges and the counts forming them, always pointing out in the course of the analysis of the individual cases and charges whether, in its opinion, the facts alleged constitute crimes under common law (general principles of penal law) reserving the consideration of the question whether these crimes are on such a scale or of such a character as to warrant their qualification as crimes against humanity to the concluding parts of this report. (Paragraphs XIV to XVI infra).

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.

Provided that the acts alleged were not committed in the course of military operations, they constitute in the Committee's opinion, crimes.

Count 4.

In the Committee's opinion, the facts dealt with in paragraph 1 of Count 4, constitute crimes.

The second paragraph of Count 4 (regarding the killing of Kamilo Stepanovic) 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.

The facts alleged constitute crimes. Attention is drawn to the Committee's opinion which will be explained later, (paragraph XVIII) that these crimes do not, however, constitute crimes against humanity.

Count 8.

The Committee is of the opinion that the torture and the shooting without trial referred to in the charge, constitute crimes.

VII. Case No. 4031.

Counts 1 and 2.

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

Count 3.

The Committee is of the opinion that the burning down of the house, allegedly as a reprisal, and the shooting, constitute crimes. The Committee does not, however, regard the mere arrest of two students and two other men, in itself, as a crime.

Counts 4 and 5.

The shooting of captured partisans without trial alleged in the charge, constitute, prima facie, a crime.

Count 6.

The Committee is of the opinion that the wanton destruction by fire of the house, as it is alleged in the charge, constitutes a crime.

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.

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.

The crime of pillage does not, however, in the Committee's view, constitute a crime against humanity.

IX. Case No. 4033.

In the Committee's opinion, both Counts of this case constitute crimes, (shooting of hostages in Count 1, and shooting of three women under the pretence that they attempted to escape in Count 2).

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.

The 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 victims, 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 constitutes 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 constituted a crime.

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 Commission is of the opinion that a crime has been committed by sending to concentration camps persons for being relatives of men who had left their homes to join the partisans.

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



Counts 16 and 17.

The Committee arrived at the same opinion as with respect to Count 15, sub-para.1., namely that it constitutes a crime to intern persons for no other reason than that of being relatives of youths who had joined the partisans.

Count 18.

The decision on this count was adjourned.

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

Count 1.

The Committee arrived at the opinion that a prima facie case of a crime had been established with regard to the killing of a man while allegedly attempting to escape. The wanton destruction of 81 buildings also constitutes a crime.

Count 2.

This case was adjourned for the same reasons as count 1 of part 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 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).

Reference to the "General Propositions" and their application to the present case will be made in paragraph XVI of this paper.

- 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 for:

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 I(1); No.4037, Part I, Nos. 15(1), 16 and 17.

torture, Case No.3296, Counts 3 & 8; Case No.4034, Count 3; Case No.4035, Count 14;

deportation to concentration camps - case No.3296, Count 4(1); Case No.4034, Count 1; Case No.4035, Counts 10, 11 and 12; Case No.4036; Case No.4037, Counts 15 (1) and 16;

murder and attempted murder, case No.3296, Count 8; Case No.4035, Counts 1, 3, 6, 7, 8, 9, 13; Case No.4037, Count 13.

wanton destruction of property, Case No.4031, Counts 3(2) and 6; Case No.4037, Counts 12 and 14; Case 4037(I), Counts 12 and 14 and (II), Count 1;

execution without trial, Case No.4031, Counts 4 and 5; and Case No.4034, Counts 2 and 4;

different other inhumane acts, Case No.4032; Case No.4034, Counts 2 and 5.

- XVI. Committee III has submitted to the Commission, on 30th May 1946, a paper called "General Propositions defining the term 'Crimes against Humanity'", (Doc.C.201), and among the general propositions, the Committee stated, in paragraph 6, the following:

" 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. "

Having regard to the whole mass of information which has been presented to the Committee by the Yugoslav representative, the Committee has arrived at the opinion that the inhumane acts described in the preceding paragraphs of this paper and in the documents referred to, are, as a consequence of their magnitude and savagery, and of the great number, and as a consequence of the fact that a similar pattern was applied at different times and places, of such a kind, that they warrant the intervention by States other than those on whose territory the crimes have been committed, or whose subjects have become the victims of the crimes. The Committee adds that in the present cases it has been also shown that the systematic mass action which was in progress, was authoritative, and this authoritative character has transformed the number of individual common crimes, punishable merely under municipal law, into crimes against humanity, which thus have become the concern of International Law. The authoritative character of the crimes alleged by the Yugoslav National Office, has been established particularly by the speech delivered by Mussolini, quoted in Doc.III/59, and referred to in paragraph XIV of this paper. In this speech, the then Dictator of Italy not only clearly admitted, but even boasted that all the crimes, not only against the life and liberty of Italian citizens of Yugoslav race, but also against their property, which would be committed, had been ordered and instigated by him as the then supreme representative of the Italian executive power.



XVII. The International Military Tribunal at Nuremberg, in its judgment against the major German war criminals, stated on page 16927 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. "

The International Military Tribunal, in making a distinction between crimes committed before 1st September 1939 and crimes committed after that date, applied to the defendants who were before it the provision of Art. 6(c) of the Charter of the International Military Tribunal, according to which a crime to be a crime against humanity within the meaning of Art. 6(c) of the Charter, i.e., a crime against humanity committed by one of the major war criminals, must be "in execution of, or in connection with, any crime within the jurisdiction of the Tribunal".

For the purpose of deciding whether the particular crimes committed by Italians which are the subject of this report, fall under the notion of crimes against humanity, it is, in the present circumstances, not necessary for Committee III to express an opinion on the question whether this distinction between crimes committed before 1st September 1939 and crimes committed after that date, applies also to crimes committed by other persons than the major criminals of the European Axis. Committee III mentions, however, that in its statement, Doc.C.236, and in para.XXVII of the paper C.237, the circulation of which it has arranged, the reasoned opinion has been expressed that this differentiation is restricted to major criminals of the European Axis, judged under the particular positive provisions of the Charter of the International Military Tribunal, and does not apply to other alleged perpetrators of inhumane acts.

In the present case, however, it is clear that the alleged crimes 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 the crimes described in the foregoing paragraphs of this paper would fall within the notion of crimes against humanity even if the restrictive provisions of the Charter of the International Military Tribunal were to be applied to the case.

XVIII The statement contained in the preceding paragraphs refer, of course, only to the charges and Counts which are discussed in this paper, and do not refer to those which have been adjourned.

In addition to those charges and counts which have been adjourned, the Committee does not include in its classification as crimes against humanity the allegations which charged individual officers or men with pillage. Here the Committee is of the opinion that the authoritative character of the crime of pillage has not been established and that the crimes in question lack one of the qualifications, which, in the opinion of the Committee, are necessary for the classification of a crime as a crime against humanity.

III/74.  
2nd December, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

Giving Information as a War Crime.

In accordance with the decision by Committee III taken in its meeting held on 28th November 1946, the Secretary to Committee III herewith circulates a translation of Section 11 of the Czechoslovak Retribution Decree, No.16 of 1945.

GIVING INFORMATION.

Section 11.

Any person who, during the period of heightened danger to the Republic, acting in the service or for the benefit of the enemy, or taking advantage of the situation brought about by enemy occupation, gave information against another person concerning the latter's actual or alleged activities, shall be deemed to have committed a crime and shall be punished by forced labour for a term of not less than five and not exceeding ten years.

If the informer, by giving the information, has caused loss of liberty on the part of a Czechoslovak national, he shall be punished by forced labour for a term of not less than ten and not exceeding twenty years.

If the information had, as its direct or indirect result, the loss of liberty by a larger number of persons or serious injury to health, it shall be punishable by forced labour for life, and if it lead to the death of any person, it shall be punishable by death.



III/75.  
7th December, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

Giving Information as a War Crime.

Draft Resolution (x)

(Preliminarily agreed to in the meeting of Committee III  
on 5th December, 1946.)

Where giving information leads to the commission of a war crime,  
such giving information falls, in the opinion of the Committee,  
within the notion of complicity in the commission of a war crime,  
provided the general conditions relevant to complicity are fulfilled.

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(x) A Draft Report, embodying the result of the discussion  
in Committee will be circulated as soon as possible.

III/76.  
10th December, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

Giving Information as a War Crime.

Draft Report by Committee III.

In connection with the Czechoslovak Charge No.4210, accusing a certain Leopold Klima of complicity in deportation, committed by having served as an informer to the Gestapo, Committee I asked Committee III for its opinion as to what extent and for what reasons giving information (denunciation) should be regarded as a war crime in International Law.

The relevant information is contained in Docs. III/69, III/71 and III/74. The question was examined by Committee III in its meetings held on 5th December 1946 (Minutes No.26/46) and 11th December 1946, (Minutes No.27/46).

In the latter meeting, Committee III adopted the following

REPORT.

- I. The problem whether and to what extent giving information (denunciation; denouncing) is a crime in general, and in particular a war crime in International Law, has become of considerable practical importance during the Second World War in view of the activities of certain criminal organisations of the Axis Powers, particularly the Gestapo and the S.D. The importance attached to the question may be gathered from the fact that several nations have introduced into their municipal criminal law positive provisions dealing with the question. Examples of such provisions are:

the Belgian Law-Decree of 17th December 1942, "Moniteur Belge",  
29 December 1942, Article 4;  
the Czechoslovak Retribution Decree No.16 of 1945 (Section 11);  
the Yugoslav Law of 25th August, 1945, (Section 3); and  
the Austrian War Crimes Law of 26th June 1945, (Section 7).(\*)

- II. The only reference in conventional International Law to giving information (denunciation; denouncing) is contained in Article 44 of the 4th Hague Convention of 1907, (a provision which has not been accepted by Germany, Japan and Russia). It reads as follows:

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(\*) The Secretary to Committee III is indebted to Commander MOUTON for having drawn his attention to the Belgian and Austrian provisions referred to in the text. The Austrian enactment was circulated as No.23 of the Document Series of the Research Office; the Yugoslav Act as Doc. Misc.No. 60.



" Article 44. A belligerent is forbidden to compel the inhabitants of territory occupied by it to furnish information about the army of the other belligerent, or about its means of defence. "

The provision prohibits the use of compulsion in order to extract information from the inhabitants of occupied territory by the occupying authorities. The provision deals only with information regarding the army of the other belligerent or its means of defence; it is not addressed to the persons giving the information, whether members of the occupying forces and authorities, or inhabitants of occupied territory.

III. In the opinion of the Committee, there is, therefore, no particular war crime of giving information as such in International Law. A person acting as an informer commits a crime only if by giving information he becomes a party to an independent war crime recognized as such in International Law, e.g., murder and massacre, torture of civilians, internment of civilians under inhumane conditions, forced labour of civilians, compulsory enlistment of soldiers in the armed forces of the occupying Power, etc.

IV. Participation of a person in a crime committed by others, may take different forms in different municipal legal orders, and also in International Law. The Charter of the International Military Tribunal describes the different participants of a crime or of a common plan or conspiracy to commit a crime, inter alia, as instigators and accomplices (Art. 6. of the Charter of the International Military Tribunal). English law knows four different ways of taking part in a felony: (1) a principal in the first degree, (2) a principal in the second degree, (3) an accessory before the fact, (4) an accessory after the fact.

The same categories are, in the main, known also to the Continental criminal codes, which distinguish between the immediate perpetrators and co-perpetrators, instigators, and aiders and abettors, dividing the last named category into those who give aid and comfort before the fact and those who do so after the fact.

Giving information can be considered a war crime only if, on the facts of each individual case, (a) a war crime has been committed, and (b) the informer falls within one of the categories of accomplices to this war crime.

V. It is very difficult to lay down general rules as to the circumstances which make an individual case fall under this category because every case will have to be judged on its own merits. It will always be necessary to examine:

- (a) the act of which the person who has been informed against, is accused;
- (b) the action of the occupying authorities which is reasonably to be expected as a consequence of the information.

With regard to (a): Giving information regarding common law crimes, will, in general, not be considered a war crime even if the consequences for the person informed against be very grave. The same may be said of information regarding the violation of enactments which the occupying Power was entitled, under International Law, to promulgate e.g., regulations respecting the safety of the occupying forces, food regulations in occupied territory, etc.

Giving information regarding the violation of such occupation ordinances as are obviously illegal and even criminal, will, on the other hand, often be a reason for holding that the informer may be guilty of complicity in a war crime. Such obviously illegal enactments by the occupation authorities are, e.g., provisions ordering the rounding up and deportation of Jews and other inhabitants of occupied territory, provisions introducing compulsory military service of inhabitants of occupied territory in the armed forces of the occupant, or provisions imposing slave labour on the inhabitants of occupied territory.

The test is, however, in the opinion of the Committee, not infallible. There might be circumstances in particular cases, where a denunciation of a person for having violated even a common law or an unimpeachable occupation ordinance, will amount to complicity in a war crime subsequently committed. This will, e.g., be the case when there were left in existence police authorities of the occupied State during the occupation, which would be able to deal with such information, and the informer nevertheless addresses his information to the occupying authority, (e.g. Gestapo, S.D.) with the intention of causing particularly grievous harm (deportation to a concentration camp) or excessive punishment (death sentence for petty offences) to be inflicted upon the person informed against.

With regard to (b): The action of the occupying authorities of which the information was one of the causes, must, in itself, be criminal, (inhumane treatment of all kinds, e.g. deportation to concentration camps, extermination; punishment for violation of provisions, the enactment of which in itself was criminal; excessive sentences for petty offences).

- VI. To fasten responsibility on the informer for the war crime subsequently committed, it will always be necessary to establish the mens rea or dolus malus of the informer, i.e. his knowledge that his action would lead to the commission of a war crime and his intention to bring about this effect, or his reckless indifference with regard to this effect.

In deciding the question whether this mental element of complicity in the crime is, or is not, established in particular cases, the personality of the accused and of the person informed against will have to be considered. The general situation in the place concerned will be most relevant. It will be possible to assume the informer's guilty knowledge if it was quite clear in the circumstances of the case what reaction was to be expected on the part of the occupying authorities, particularly if from the reaction of the occupying authority in similar cases a well known pattern has emerged. The informer will, on the other hand, not be responsible for the subsequent actions by the occupying authority if he had reason to believe that the person informed against would be fairly treated or fairly tried.

The responsibility of the informer will, of course, be apparent in cases where he has acted as an agent provocateur or where he knowingly accused a person of acts which the person had not committed.

- VII. As a rule, the information will have had to be furnished voluntarily in order to make the informer an accomplice in the subsequent war crime. If the informer acted under superior orders, the general rules regarding this plea, now well established, will apply to the case. The fact that the defendant acted pursuant to order of his government or of a superior, shall not free him from responsibility, but may be considered in mitigation of punishment (Art.8 of the Charter of the International Military Tribunal). The true test is not the existence of the order but whether moral choice was, in fact, possible. (Nuremberg Judgment, Cmd.6964, p.42).



If the pressure brought upon the person giving information was so strong that he could not resist it, then the defence that his will was overborne by compulsion (duress, necessity), would be available to him. This would particularly apply to information given on the part of a person who himself was being tortured or very gravely threatened.

VIII. The war crime subsequently committed need not necessarily be a direct result of the information given. A person may also become criminally responsible for a subsequent war crime if it is an indirect result of his action, provided his mens rea is established.

IX. The United Nations War Crimes Commission when listing a person, is neither in a position, nor called upon, to examine closely the mental element of a crime with which the person has been charged. It is only the task of the Commission to examine whether a prima facie case has been established. Committee III would like to point out, however, that in dealing with charges of war crimes allegedly committed by giving information, something more than the mere fact of giving the information and the subsequent action by the occupying authority should be proved in order even to establish a prima facie case and that a charge, in order to lead to the listing of a person, should contain precise indications both as to the criminality of the subsequent proceedings by the occupying authority, and of the mental element from which alone the guilt of the person giving the information can possibly be derived.

A cautious attitude will recommend itself in view of the fact that the Prosecution in the trial against the major war criminals also proceeded cautiously with regard to informers.

In the Judgment of the International Military Tribunal, as pronounced on 30th September, 1946, it was stated that the declaration regarding the Gestapo and the S.D. included all local representatives and agents, honorary or otherwise (p.16949 of the official English transcript; p.75 of the Command Paper, Cmd.6964.) On the following day, the Tribunal declared that its attention had been drawn to the fact that the Prosecution expressly excluded the honorary informers who were not members of the S.S. In view of that exclusion by the Prosecution, the Tribunal also excluded those persons from the S.D. which was declared criminal. (p.16969 of the official English transcript; p.83 of the Command Paper, Cmd.6964).

This part of the Judgment was not, of course, concerned with the guilt of the individual informers but with the question whether honorary informers were, as such, to be included in the criminal group. The incident shows nevertheless that the Prosecution was reluctant to consider giving information as such an activity constituting complicity in a war crime.

X. Where giving information leads to the commission of a war crime, such giving information falls, in the opinion of the Committee, within the notion of complicity in the commission of a war crime provided the general conditions relevant to complicity are fulfilled.

III/77.  
10th February, 1947.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

Request from the  
Far Eastern and Pacific Sub-Commission  
concerning the war crime of  
"deliberate bombardment of undefended places."

The following letter, dated Nanking, 24th December 1946, has been received from the Acting Chairman of the Far Eastern and Pacific Sub-Commission.

United Nations War Crimes Commission  
Far Eastern & Pacific Sub-Commission.

Nanking, December 24, 1946.

The Acting Chairman of the Far Eastern and Pacific Sub-Commission of the United Nations War Crimes Commission has the honour to present his compliments to the Chairman of the United Nations War Crimes Commission and to inquire about the following:

The Sub-Commission here is faced with a number of cases on "deliberate bombardment of undefended places" in China by Japanese planes. The Sub-Commission wishes to learn from the Main Commission (a) What constitutes deliberate bombardment and on whom rests the burden of proof? (b) What constitutes an undefended place and what evidence is required to establish the fact of undefendedness? (c) What procedure has been followed in similar cases in Europe by the Main Commission?

(sgd) Delvaux de Fenffe,  
(Belgian Ambassador to China)



III/78.  
19th February, 1947.

UNITED NATIONS WAR CRIMES COMMISSION.

DELIBERATE BOMBARDMENT OF UNDEFENDED PLACES.

Preliminary Report by Egon Schwelb, Legal Officer.

C O N T E N T S.

- I. The request from the Far Eastern and Pacific Sub-Commission.
- II. The term "Deliberate Bombardment of Undefended Places".
- III. Different rules for bombardment in land warfare, naval bombardment and aerial bombardment.
- IV. Bombardment in land warfare.
- V. Naval Bombardment.
- VI. Aerial Bombardment.
- VII. Attempts at developing the law between 1919 and 1939.
- VIII. International Adjudication on the subject between the two World Wars.
- IX. The attitude of the belligerents at the beginning of the Second World War.
- X. The practice during the Second World War.
- XI. The Charter of the International Military Tribunal, the Indictment and the Nuremberg Judgment.
- XII. Reference to the attitude of the International Military Tribunal to submarine warfare.
- XIII. Tentative Proposals.

I. The Request from the Far Eastern and Pacific Sub-Commission.

The request by the Far Eastern and Pacific Sub-Commission concerning the war crime of "deliberate bombardment of undefended places" (Doc. III/77), puts to the Main Commission three questions:

- (a) What constitutes deliberate bombardment and on whom rests the burden of proof?
- (b) What constitutes an undefended place and what evidence is required to establish the fact of undefendedness?
- (c) What procedure has been followed in similar cases in Europe by the Main Commission?

The purpose of the present paper is to submit to the members of Committee III such material as can be collected in the short time, pertaining to the questions mentioned under (a) and (b).

The material relating to the question sub (c) will be circulated in a special paper by Dr. J. Litawski, Secretary to Committee I.

No final solution of the question is attempted at the present stage, pending the examination of the problem by Committee III.

II. The term "Deliberate Bombardment of Undefended Places".

The term "deliberate bombardment of undefended places" appears in the list drawn up by the Commission of Responsibilities 1919, containing the headings under which charges of war crimes can be collected and classified.

This list, including as its item 19 the alleged crime of deliberate bombardment of undefended places, was adopted by this Commission on 2nd December 1943, as a working list (Doc.C.I.). In adopting the list as a working list, the Commission pointed out that "there is no list of war crimes which is authoritative in the sense that international law forbids any act outside the list being treated as a war crime, and obliges every state which recognises the obligatory nature of international law to treat as a war crime every act which figures in the list". (para.4. *ibid*). The Commission also pointed out that "it will be necessary to add to this list one or two items which seem to be inadequately covered by the language employed in framing the list; just as it may be necessary to disregard certain items - such as No.21 - as these refer to acts which in the present war the forces of the United Nations have themselves been obliged to commit" (para.10 *ibid*). As one of the reasons for adopting this list as a working list, the fact was mentioned that of the present chief Axis Powers, Italy and Japan were parties to its preparation. (para.12, *ibid*).

The report by the Commission of Responsibilities, 1919, states in its Chapter II, which contains the list of 32 items, that by way of illustration, a certain number of examples have been collected in Annex I. This Annex I has not been printed in the accessible publications of the report, Carnegie Endowment for International Peace, Division of International Law, Pamphlet No.32, and American Journal of International Law, 1920. An English translation of the respective item taken from the publication: "Conférence de la Paix 1919-1920. Recueil des Actes de la Conférence. Partie IV Commissions de la Conférence (Procès-verbaux, Rapports et Documents). B. Questions Générales (2) Commission des Responsabilités des auteurs de la guerre et sanctions", is therefore annexed to this paper.

It will be seen from the annexed text that the Belgian and Serbian charges did not elaborate at all the questions of the deliberate character of the bombardment and of the qualification that the bombarded



places were undefended. In some of the British charges, dealt with by the 1919 Commission, the clearness of the weather, the favourable visibility, the clearness of the night, the fact that there was a full moon, was stressed, probably as indicating the deliberate character of the bombardment. As far as the objects bombarded were concerned, the British report stressed the fact that there was no opposition, that the districts attacked were occupied exclusively by civilian inhabitants, and that the main attack on Edinburgh was on the city itself.

In the case of the naval bombardment of Scarborough, it was pointed out that it was a bombardment of the whole town, from one end to the other, without cause and completely without discrimination. The indiscriminate character of the bombardment is also stressed in the case of the attack on West Hartlepool. It appears therefore that also the British charges relating to the 1914-1919 war appear to fall short of establishing even a prima facie case of both the intention of the responsible enemy personnel and the character of the objects as undefended places.

### III. Different rules for bombardment in land warfare, naval bombardment and aerial bombardment.

For reasons of the development of the relevant rules, it is necessary to deal separately with the question of the bombardment of undefended places (a) in land warfare, (b) in sea warfare, and (c) in air warfare. This is necessary in spite of the fact that the subject of the enquiry from Nanking is probably bombardment from the air because although there exists written law on bombardment in land warfare and sea warfare, there are practically no conventional rules as to bombardment (bombing) from the air.

### IV. Bombardment in land warfare.

According to Oppenheim-Lauterpacht (II, p.326), bombardment by land forces was not generally considered prior to the first World War, except in connection with assault or siege. But the experiences of the first World War and in particular the new uses of aircraft and long range guns have raised the question how far bombardment is lawful when it is solely for destructive purposes, and is not intended to be a prelude to occupation by armed forces.

The Hague Rules of Land Warfare (Annex to Convention IV of 1907) contain the following provisions:

#### "Article 25:

The attack or bombardment, by any means whatever, of undefended towns, villages, dwellings, or buildings, is forbidden.

#### Article 26:

The officer in command of an attacking force must do all in his power to warn the authorities before commencing a bombardment, except in cases of assault.

#### Article 27.

In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to public worship, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.

It is the duty of the besieged to indicate such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand. "

Respecting the above mentioned text of Art.25, it should be noted that its binding force was deemed controversial and that it differed from Art.25 of the Hague Convention of 1899 by the words "by whatever means", which words were designed to cover bombardment by aircraft.

Neither the Convention of 1899 nor the Convention of 1907 contain a definition of the notion "undefended places". Respecting Art.27, attention is drawn to the words "as far as possible".

#### V. Naval Bombardment.

The Hague Convention IX of 1907 respecting Bombardment by Naval Forces in Time of War, contains the following provisions:

##### " Chapter I.

##### Bombardment of Undefended Ports, Towns, Villages, Dwellings or Buildings.

##### Article 1.

The bombardment by naval forces of undefended ports, towns, villages, dwellings, or buildings is forbidden.

A place may not be bombarded solely on the ground that automatic submarine contact mines are anchored off the harbour.

##### Article 2.

Military works, military or naval establishments, depôts of arms or war material, workshops or plant which could be utilized for the needs of the hostile fleet or army, and ships of war in the harbour, are not, however, included in this prohibition. The commander of a naval force may destroy them with artillery, after a summons followed by a reasonable interval of time, if all other means are impossible, and when the local authorities have not themselves destroyed them within the time fixed.

The Commander incurs no responsibility for any unavoidable damage which may be caused by a bombardment under such circumstances.

If for military reasons immediate action is necessary, and no delay can be allowed to the enemy, it is nevertheless understood that the prohibition to bombard the undefended town holds good, as in the case given in the first paragraph, and that the commander shall take all due measures in order that the town may suffer as little harm as possible.

##### Article 3.

After due notice has been given, the bombardment of undefended ports, towns, villages, dwellings, or buildings may be commenced, if the local authorities, on a formal summons being made to them, decline to comply with requisitions for provisions or supplies necessary for the immediate use of the naval force before the place in question.

Such requisitions shall be proportional to the resources of the place. They shall only be demanded in the name of the commander of the said naval force, and they shall, as far as possible, be paid for in ready money; if not, receipts shall be given.

##### Article 4.

The bombardment of undefended ports, towns, villages, dwellings or buildings, on account of failure to pay money contributions, is forbidden.



Chapter II.

General Provisions.

Article 5.

In bombardments by naval forces all necessary steps must be taken by the commander to spare as far as possible buildings dedicated to public worship, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick or wounded are collected, provided that they are not used at the time for military purposes.

It is the duty of the inhabitants to indicate such monuments, edifices, or places by visible signs, which shall consist of large stiff rectangular panels divided diagonally into two painted triangular portions, the upper portion black, the lower portion white.

Article 6.

Unless military exigencies render it impossible, the officer in command of an attacking naval force must, before commencing the bombardment, do all in his power to warn the authorities. "

Great Britain, France, Germany and Japan entered a reservation against Article 1, paragraph 2, since, in the opinion of Oppenheim-Lauterpacht, they correctly considered places where automatic submarine contact mines were anchored off the harbour, to be defended. (ibid, p.402).

The fundamental difference between the rules of Convention IV (supra IV) and the rules of Convention IX with which I am dealing in this paragraph, will be noticed.

While under the Rules of Land Warfare the decisive distinction is whether the bombarded place is defended or undefended, in naval warfare also undefended places may legitimately be bombarded, if they contain what has been called "military objectives" (Article 2 of Hague Convention IX).

During the first World War, the Hague Convention IX was not, or may not have been, in strict law binding, since not all the belligerents were parties to it. However this may be, as is stressed by Oppenheim-Lauterpacht, the German bombardment of Scarborough, West Hartlepool, Whitby (\*) Whitehaven and other English coast towns ignored the spirit of the Convention, for these raids had no military purpose whatever, unless it was a legitimate military purpose to attempt to frighten and terrorise the civil population of the enemy - a condition which neither the fundamental principles of the law of war, nor considerations of humanity permit to accept (Oppenheim-Lauterpacht, ibid, p.404).

VI. Aerial Bombardment.

It has already been mentioned that by inserting the words "by whatever means" into Article 25 of the Hague Regulations (Convention IV), the Parties intended to cover bombardment by aircraft. The insertion of these words in Art.25 appears to be the only written law on aerial bombardment.

The first Hague Conference adopted on 29th July 1899, a declaration forbidding the launching of projectiles or explosives from balloons or air vessels for a term of five years. At the time of the second Hague Conference the 1899 Declaration had expired. A new declaration was made, on 18th October, 1907, by the Second Hague Conference by which the Contracting Powers agreed "to prohibit, for a period extending to the Third Peace Conference, the discharge of projectiles and explosives from balloons or by other new methods of a similar nature". It was provided

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(\*) See annex to this paper.

that the declaration "shall cease to be binding from the moment when, in a war between the Contracting Powers, one of the belligerents is joined by a non-Contracting Power." Out of 27 States which signed the 1907 Declaration only a few (among them Great Britain and the United States of America) had ratified it before the first World War, and Germany, France, Italy, Japan and Russia did not even sign it. When the first World War broke out, not one of the Central Powers had ratified the declaration; its provisions were not binding and were not observed. (Oppenheim-Lauterpacht, II, p.277).

#### VII. Attempts at developing the law between 1919 and 1939.

Between the two World Wars, attempts at codification of the rules of air warfare were made; in 1923, a Commission of Jurists, appointed at the Washington Conference of 1922, produced the "Hague Air Warfare Rules".

The Hague Air Warfare Rules have not been ratified but according to Oppenheim-Lauterpacht, (II, p.410), their Article 62, which lays down that "aircraft personnel engaged in hostilities come under the laws of war and neutrality applicable to land troops", indicates correctly that air warfare, while calling for rules of its own regulating in detail the specific situations to which it gives rise, is subject to the general principles of a customary or conventional character which underlie alike the law of war on land and at sea. These include for instance, in addition to humanitarian principles of unchallenged applicability, the fundamental prohibition of direct attack upon non-combatants. Whenever a departure from this principle is alleged to be necessary, its cogency must be proved by reference either to express agreement or to the peculiar conditions of aerial warfare.

The principal provisions of the unratified Hague Air Warfare Rules of 1923 regarding aerial bombardment are as follows:

##### "Article 22.

Aerial bombardment for the purpose of terrorising the civilian population, of destroying or damaging private property not of a military character, or of injuring non-combatants, is prohibited.

##### Article 23.

Aerial bombardment for the purpose of enforcing compliance with requisitions in kind or payment of contributions in money is prohibited.

##### Article 24.

(1) Aerial bombardment is legitimate only when directed at a military objective - that is to say, an object of which the destruction or injury would constitute a distinct military advantage to the belligerent.

(2) Such bombardment is legitimate only when directed exclusively at the following objectives: military forces; military works; military establishments or depôts; factories constituting important and well-known centres engaged in the manufacture of arms, ammunition, or distinctively military supplies; lines of communication or transportation used for military purposes.

(3) The bombardment of cities, towns, villages, dwellings, or buildings not in the immediate neighbourhood of the operations of land forces is prohibited. In cases where the objectives specified in paragraph (2) are so situated that they cannot be bombed without the indiscriminate bombardment of the civilian population, the aircraft must abstain from bombardment.



(4) In the immediate neighbourhood of the operations of land forces, the bombardment of cities, towns, villages, dwellings or buildings is legitimate provided that there exists a reasonable presumption that the military concentration is sufficiently important to justify such bombardment, having regard to the danger thus caused to the civilian population.

(5) A belligerent State is liable to pay compensation for injuries to person or to property caused by the violation by any of its officers or forces of the provisions of this article. "

Commenting on these clauses, Oppenheim-Lauterpacht explain that they discard the obsolete and unworkable test of liability to bombardment which rests on the distinction between "defended" and "undefended" places, and are inspired mainly by the doctrine that bombardment should be confined to military objectives. (ibid, II, pp.412-413.)

In July 1932, in a Resolution adopted by the General Commission of the Disarmament Conference, it was laid down that "air attack against the civilian population shall be absolutely prohibited." Oppenheim-Lauterpacht add that the fact that neither this Resolution nor the Hague Air Warfare Rules of 1923 have become part of International Law ought not to be interpreted as meaning that the matter is not governed by existing principles of law. The immunity of non-combatants from direct attack is one of the fundamental rules of the International Law of War. It is a rule which applies with absolute cogency alike to war on land, at sea and in the air. This is not a question of the application, by analogy, to air warfare, of the rules obtaining in warfare on land and at sea. (As has been shown, in the matter of the bombardment the Hague Conventions adopted different rules for the bombardment of towns in land warfare, where the law has adopted the test of "defence", and in naval warfare, where the test of "military objective" has been adopted.) It is a question of the subjection of a particular sphere of war to rules generally recognised to be the basis of the law of war. The immunity of non-combatants from direct attack is a principle of this nature.

#### VIII. International Adjudication on the subject between the two World Wars.

The Greco-German Mixed Arbitral Tribunal has held in two cases, decided in 1927 and 1930 respectively, that the principle of respect for the life and property of the civilian population was of overriding application. In both cases, which were concerned with a claim for damages on account of the bombardment of Salonica by German aircraft in 1916, the Tribunal held that the duty of previous notification clearly recognised in respect of land and naval bombardment, applied by analogy to bombardment from the air. (Annual Digest, 1927-1928, case No.389; ibid 1929-1930, case No.301.)

#### IX. The attitude of the belligerents at the beginning of the Second World War.

At the beginning of the Second World War, in reply to an appeal by the President of the United States, a joint Anglo-French Declaration was issued on 2nd September 1939, affirming the intention of the two Governments, in the event of war, to conduct hostilities with a firm desire to spare the civilian population. On 17th September 1939, Germany took note of that declaration and announced her intention to adhere to the same policy subject to reciprocity. The German campaign in Poland in September 1939, was, of course, conducted in disregard of this declaration.

When, in May 1940, Germany initiated on a wide scale the use of the aerial weapon for the purpose of bombardment, the British Government announced on 10th May 1940 with reference to the declaration