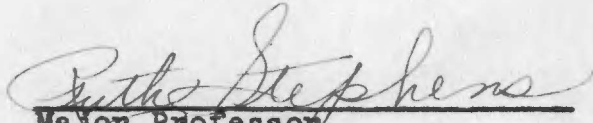


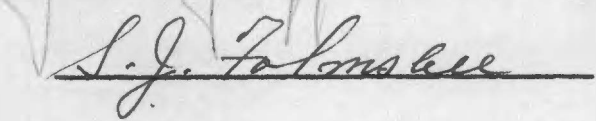
July 25, 1947

To the Committee on Graduate Study:

I am submitting to you a thesis written by Richard Harrison Doughty entitled "The Legal Bases of the Nuremberg Trial of German Leaders." I recommend that it be accepted for nine quarter hours credit in partial fulfillment of the requirements for the degree of Master of Arts, with a major in History.


Major Professor

We have read this thesis
and recommend its acceptance:

Accepted for the Committee


Dean of the Graduate School

THE LEGAL BASES OF THE NUREMBERG TRIAL
OF GERMAN LEADERS

A THESIS

Submitted to
The Committee on Graduate Study
of
The University of Tennessee
in
Partial Fulfillment of the Requirements
for the degree of
Master of Arts

by

Richard Harrison Doughty

August 1947



PREFACE

The purpose of this study is to examine the legal justification for the trial held at Nuremberg, Germany, of the leading German Nazis. The wisdom of the trial, its possible future effects, its fairness or unfairness are not primarily the concern of this thesis. An exhaustive study of these questions would require a much more ambitious effort than this one proposes to be. Here the question is--did there exist before the creation of the Charter of the Tribunal, recognized international law on which each of the counts of the Indictment against the Nazis could properly be based?

Early in my study I gained the impression that adequate, recognized international law existed for the charges of war crimes and crimes against humanity, but I felt that no custom nor convention existed to sustain the counts of conspiracy and crimes against peace. Therefore, I concluded that the first two counts of the Nuremberg Indictment were based on ex post facto law. As my study progressed and I read the opinions of many learned jurists and publicists and considered trends between World War I and World War II, I decided that reasonably sound bases existed for these counts also, if we bear in mind the following things: (1) until a world government is created with an adequate legislature, we must continue to depend upon custom, convention, and the crystallization of international thinking for the creation of international law;

(2) a great many resolutions, a multilateral treaty and the thinking of many publicists combined in condemning aggressive war as an international crime before 1939; and (3) for custom to develop there must be a first precedent and international law must grow in the same manner as did the Anglo-Saxon common law.

Since none of the accused Germans lost his life by being convicted solely on counts one or two, I am convinced that the Nuremberg trial was the fairest manner possible for dealing with the Nazi leaders.

Materials used in this study are of American and British origin and the Judgment and Opinion of the Tribunal which tried the Nazis.

Invaluable assistance has been rendered by Dr. Ruth Stephens of the University of Tennessee History and Political Science Departments. Dr. Stephens suggested the subject and aided in suggestions for collection of materials and organization. The writer is indebted to Dr. J. Wesley Hoffmann, Chairman of the History Department and Dr. S. J. Folmsbee for reading the thesis and suggesting changes.

Richard Harrison Doughty

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CHAPTER I

PRECEDENTS FOR NUREMBERG

There is wide divergence of opinion as to the legality of the trial at Nuremberg of the Nazi leaders. For the first time the leaders of a defeated, aggressor state have been called to the prisoner's dock to answer charges for acts committed in connection with war. History has no precedent for such a trial and it is difficult to deduce from international law as it existed in 1939 principles on which some of the charges can be based.

There are precedents in the history of the United States for the war crimes count of the Nuremberg indictment. During the American Revolution a trial developed from an incident connected with the Battle of Saratoga. A certain Colonel David Henley, the officer in charge of guarding the surrendered troops of General Burgoyne at Cambridge, Massachusetts, was court-martialed for attacking a British soldier, Sergeant Reeves. Colonel Henley had become incensed at some insulting remarks of Reeves and "pinked the breast" of the Britisher.

General Burgoyne demanded that Henley be brought to trial, although there were no well-established precedents or laws of war covering this so-called crime. Henley's only defense was a brief written statement, in which he did not recognize the legality of the charges made by Burgoyne. He

was not "conscious of having failed in his duty to his country under trying circumstances" and was "perfectly willing to accept the decision of the court" so conscious was he of having "acted throughout with humanity." The trial ended with Henley's acquittal. General Heath in charge of the court-martial expressed a wish that this trial would not establish a precedent for the future.¹

Out of the War Between the States, there arose three cases--Coleman v. Tennessee, Dow v. Johnson, and Freeland v. Williams, which were also concerned with war crimes. The first case was concerned with a criminal act, and the other two cases with civil actions.

In Coleman v. Tennessee, a Union soldier, Coleman, was charged with having committed murder in Tennessee, while serving there during the rebellion. By a court-martial he was convicted and sentenced to death. For some reason the sentence never was carried into effect. After Tennessee was restored to statehood, Coleman was indicted and brought to trial for the same offense. To the indictment he pleaded his conviction before the court-martial, but the plea was over-ruled and he was tried, convicted, and sentenced to death. On writ of error the case was brought before the United States Supreme

¹ Samuel C. Williams, "Colonel David Henley," East Tennessee Historical Society's Publications, XVIII, 1946, pp. 4-7.

Court which held, "The State Court had no right to try him for the offense, as he, at the time of the action, was not amenable to its laws."

Thus the United States Supreme Court declared that officers and soldiers of the Army of the United States were not subject to the laws of the enemy, nor amenable to his tribunals for offenses committed by them during the war. They were answerable to their own government, and only by its laws, as enforced by its armies, could they be punished.² National sovereignty was the order of the day and the Supreme Court closely adhered to it. This ruling of our highest court is interesting in view of the numerous post-war trials of German soldiers in countries occupied by Germany during World War II.

The second case, Dow v. Johnson, concerned an officer of the United States army, who was haled before a Louisiana court, for injuries resulting from a military order. This court continued in existence during the military occupation of the state by the forces of the United States. Before it, the plaintiff brought charges against a United States brigadier-general for authorizing a military company to seize certain personal property belonging to the plaintiff. The United States Supreme Court held that the State Court had no jurisdiction, and that its judgment was void.³

² Coleman v. Tennessee, 97 U. S. Reports (Washington: United States Government Printing Office, 1878), pp. 509-10.

³ Dow v. Johnson, 100 U. S. Reports, p. 158.

The third case, Freeland v. Williams, was concerned with a broken contract. Here the Supreme Court decided that civil war did not impair the validity of a contract within the meaning of the Constitution of the United States.⁴

Thus, in two cases, the highest court in the United States upheld the extra-territorial right of a nation over its troops when those troops invaded enemy territory, and in the third, a contract remained a contract regardless of war.

After the victory of the United States over the Confederacy, some felt the Confederate leaders, principally Jefferson Davis and Robert E. Lee, should be brought to trial before United States courts. On order of the United States Government Davis was seized and imprisoned in Fortress Monroe, Virginia. A United States District Court of Virginia indicted him for treason as did a District of Columbia court. The United States Court of Appeals which included Virginia added to the charge of treason that of conspiracy and other high crimes and misdemeanors. Eventually each of the indictments was dismissed and Davis was released on bond of \$100,000. Two of his bondsmen were Horace Greeley and Cornelius Vanderbilt. The general amnesty proclamation of President Johnson in 1869 released Davis from the threat of any further action.⁵ "The Federal government did not wish to try him. It could not run the risk of having its charge of treason turned into a legal vindic-

⁴ Freeland v. Williams, 131 U. S. Reports, pp. 405-6.

⁵ Armistead C. Gordon, Jefferson Davis (New York: Scribner's Sons, 1918), pp. 264-75.

cation of secession; for such would probably have been the issue."⁶ Public opinion also played its part. At first the North regarded Davis as a political offender of the worst possible character, but this attitude changed to a feeling of sympathy as the Northern press circulated the story of the placing of irons on Davis' ankles.⁷

The imprisonment of Davis resembles that of Napoleon Bonaparte in that it was based upon an executive action rather than a judicial process as used against the German leaders at Nuremberg.

The first comprehensive codification of the laws of land warfare came from the Hague Conventions of 1899 and 1907. Thus for the first time the civilized world in peacetime set down and ratified rules which should be binding on belligerents. These principles became the legal basis for the trials which were proposed after World War I, and the war crimes count of the Nuremberg indictment.

The Paris Peace Conference, at its plenary session of January 25, 1919, created a commission to inquire into the responsibility for the outbreak of the war and to suggest appropriate punishment for those found guilty. The commission was composed of fifteen members, two from each of the Great Powers (the United States, the United Kingdom, France, Italy, and Japan) and five elected from among the powers with special

⁶ Allen Tate, Jefferson Davis (New York: Milton, Balch and Company, 1929), p. 300.

⁷ Frank H. Alfriend, The Life of Jefferson Davis (Chicago: Caxton Company, 1868), p. 637.

interests; those chosen being Belgium, Greece, Poland, Roumania, and Serbia.

The Commission was charged to inquire into and report upon the following points:

1. The responsibility of the authors of the war.
2. The facts as to the breaches of the laws and customs of war committed by the forces of the German Empire and their Allies, on land and sea, and in the air during the present war.
3. The degree of responsibility for these offences attaching to particular members of the enemy forces, including members of the General Staff, and other individuals, however highly placed.
4. The constitution and procedure of a tribunal appropriate for the trial of these offences.
5. Any other matters cognate or ancillary to the above which may arise in the course of the enquiry, and which the Commission finds it useful and relevant to take into consideration.⁸

On March 29, 1919, this Commission made its report to the Peace Conference. In Chapter I of the Report, responsibility for the war was placed first on Germany and Austria, and secondly on Turkey and Bulgaria. In arriving at this decision, the Commission went into great detail, ferreting out speeches, memoirs, reports of conferences, mobilization orders, etc. of Germany and Austria, and later Turkey and Bul-

⁸ "Report Presented to the Preliminary Peace Conference by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties," American Journal of International Law, XIV, pp. 95-6.

garia, prior to the actual beginning of hostilities.

The Commission drew these conclusions as to war responsibility:

1. The war was premeditated by the Central Powers together with their Allies, Turkey and Bulgaria, and was the result of acts deliberately committed in order to make it unavoidable.
2. Germany, in agreement with Austria-Hungary, deliberately worked to defeat all the many conciliatory proposals made by the Entente Powers and their repeated efforts to avoid war.⁹

These conclusions suggest that the thinking of the Commission was similar to that of Justice Jackson when he formulated the conspiracy charge for the Nuremberg trial.

Along with this, the violation of the neutrality of Belgium and Luxembourg was stipulated in this conclusion: "The neutrality of Belgium, guaranteed by the treaties of the 19th April, 1839, and that of Luxembourg, guaranteed by the treaty of the 11th May, 1867, were deliberately violated by Germany and Austria-Hungary."¹⁰

Chapter II was concerned with violation of the laws and customs of war by the Central Powers. By means of documents collected from Belgium, Greece, Italy, Serbia, Poland, Roumania,

⁹ Ibid., p. 107.

¹⁰ Ibid., p. 112.

and Armenia, and other states, numerous instances were set down in which the Central Powers waged war by barbarous and illegal methods in violation of the established laws and customs and the elementary laws of humanity, as set down by the Hague Conventions and other international documents.

Some thirty-two different violations of these laws are set down in the Report, among them being the following: murder and massacres, putting hostages to death, torture of civilians, rape, deportation of civilians, pillage, imposition of collective penalties, deliberate bombardment of hospitals, and many others. The Report is very specific in enumerating the exact crimes with which the Central Powers were charged.¹¹

Personal responsibility of German leaders is dealt with in Chapter III. The Commission was of the opinion that there was no reason why rank, whether it be high or low, should in any circumstance protect the holder of it from responsibility when that responsibility had been established before a properly constituted tribunal, going so far as to say that this extended to heads of states. The question of immunity of a sovereign of the state is one of practical expedience in municipal law, and is not fundamental; even though in some countries, a sovereign is exempt from prosecution in a national court of his own country the position from an international point of view is

¹¹ Ibid., pp. 112-5.

quite different. The Report stipulated that the vindication of the laws and customs of war and the laws of humanity which had been violated would be incomplete if the Kaiser and other offenders less highly placed were not brought to trial and punished. In view of this reasoning, the following conclusion was drawn: "All persons belonging to enemy countries, however high their position may have been, without distinction of rank, including Chiefs of States, who have been guilty of offences against the laws and customs of war or the laws of humanity are liable to criminal prosecution."¹²

Chapter IV was concerned with the constitution and procedure of an appropriate tribunal. The Commission presented two classes of culpable acts for adjudication: "(a) Acts which provoked the world war and accompanied its inception, (b) Violations of the laws and customs of war and the laws of humanity." In the first class the Commission considered acts not strictly war crimes, but acts which provoked the war or accompanied its inception, for example, the invasions of Belgium and Luxembourg. A war of aggression was condemned by history and reproved by the conscience of mankind in the wording of this portion of the Report. Further, any inquiry into the authorship of the war should extend over events that had happened during many years in various European countries.¹³ Conclusions drawn from the

¹² Ibid., pp. 116-7.

¹³ Ibid., p. 118.

Chapter on (a) part are as follows:

1. The acts which brought about the war should not be charged against their authors or made the subject of proceedings before a tribunal.
2. On the special head of the breaches of the neutrality of Luxembourg and Belgium, the gravity of these outrages upon the principles of the law of nations and upon international good faith is such that they should be made the subject of a formal condemnation by the Conference.
3. On the whole case, including both the acts which brought about the war and those which accompanied its inception, particularly the violation of the neutrality of Belgium and Luxembourg, it would be right for the Peace Conference, in a matter so unprecedented, to adopt special measures, and even to create a special organ in order to deal as they deserve with the authors of such acts.
4. It is desirable that for the future penal sanctions should be provided for such grave outrages against the elementary principles of international law.¹⁴

The Commission expressly counseled against holding a trial for the so-called authors of the war, and hoped that such specific cases as violations of neutrality would call for special action by the Conference. However, it was thought that such unprecedented acts demanded unprecedented measures, and that a special organ would be helpful in dealing with such outrages for the future, but the implication is there not to use ex post facto legislation for these offenses.

¹⁴ Ibid., p. 120.

Part 4 was very desirable, and if the Peace Conference had followed its suggestions, as well as Parts 1, 2, and 3, the question of the retroactivity of Nuremberg would not have arisen.

Under (b) part of Chapter IV, those outrages against Allied civilians and soldiers by members of the German armed forces, civil or military authorities, without distinction of rank, including the heads of states, should be made the subject of a special inquiry, before a high tribunal composed of the Big Five Powers and Belgium, Greece, Poland, Portugal, Roumania, Serbia, and Czechoslovakia.¹⁵ Chapter IV closed with these conclusions:

The Commission has consequently the honor to recommend:

1. That a high tribunal be constituted as above set out.
2. That it shall be provided by the treaty of peace.
3. That each Allied and Associated Government adopt such legislation as may be necessary to support the jurisdiction of the international court, and to assure the carrying out of its sentence.
4. That the five states represented on the Prosecuting Commission shall jointly approach neutral governments, with a view to obtaining the surrender for trial of persons within their territories who are charged by such states with violations of the laws and customs of war and the laws of humanity.¹⁶

¹⁵ Ibid., pp. 121-2.

¹⁶ Ibid., pp. 123-4. Part 4 was primarily concerned with Kaiser Wilhelm II, who had fled to Holland. The note of the Netherlands' Government with regard to this matter pointed out that Holland had been a refuge for political exiles for centuries, and therefore refused extradition.

Annexed to the Commission Report was documentary evidence termed a "Summary of Examples of Offences Committed by the Authorities or Forces of the Central Empires and Their Allies Against the Laws and Customs of War and the Laws of Humanity." All in all the findings and recommendations of the Commission were just and sane, and should have been fulfilled to the letter, but such was not the case. Parts of the recommendations were accepted, and other parts were relegated to oblivion.

The Treaty of Versailles by Part VII, Articles 227-30, contained provisions for arraigning Wilhelm II and those persons accused of having violated the laws and customs of war. In Article 227 Wilhelm was charged with a "supreme offence against international morality and the sanctity of treaties." A special tribunal was called for, to be composed of representatives of the Big Five Powers. In its decision the tribunal would be "guided by the highest motives of international policy" and its duty would be to fix adequate punishment. Not only was Germany to acquiesce in the trials of her former leaders, but also she was to furnish any documents and information of every kind which the Allies thought necessary to ensure the full knowledge of the incriminating acts.¹⁷

¹⁷ Lawrence Martin, The Treaties of Peace, 1919-1923 (New York: Carnegie Endowment for International Peace, 1924), I, pp. 121-2.

In pursuance of Article 228, lists of accused persons were prepared by the leading Allies, from which a joint list was drawn up and presented to Germany on February 3, 1920. One reservation stipulated that it did not comprise "all the authors of the innumerable crimes committed during the course of the war by the Germans." The list contained approximately nine hundred names.¹⁸

Upon receipt of the list in Germany, the people unanimously denounced it and everywhere it was suggested that the surrender of the war criminals be refused. Even the political parties stood together on this issue, and publicly condemned the Allied list. This reception of the list in Germany so impressed the Allies, that the proposal of Germany to try those accused of war crimes before the Supreme Court of the Reich at Leipzig was accepted.¹⁹

When the Allies accepted this suggestion, it meant they would refrain from participating in the trials in any manner

¹⁸ Sheldon Glueck, War Criminals: Their Prosecution and Punishment (New York: Knopf, 1944), pp. 23-4. France designated 334 persons which included General Stenger, Crown Prince August Wilhelm, Count Bismarck (grandson of the Iron Chancellor), and Marshal von Hindenburg. Great Britain added 97 names, and among these were Grand Admiral von Tirpitz, Vice-Admiral Scheer, and Baron von der Lancken for the shooting of Nurse Edith Cavell. Belgium listed 334 Germans, especially von Bethmann-Hollweg. Poland, Roumania, Italy, and Yugoslavia submitted various names, while the United States submitted none.

¹⁹ Ibid., pp. 25-7.

and leave complete responsibility to the Government of Germany. However, Great Britain was very helpful with suggestions as to the manner for conducting the trials, and took depositions from British witnesses. British witnesses testified before the court.²⁰ The British Solicitor General, Sir Earnest Pollock, even went to Germany for the trials.²¹

Of the forty-five names submitted on the Allied "sample" list to Germany, thirteen were declared to be dead or their whereabouts unknown. The others were in Germany available for trial.²² Throughout the spring of 1921, preparations were made for the trials. The Reichstag on May 4 adopted a bill providing for the trial of the accused named in the list.²³ Finally, on May 23, 1921, the first trial began--that of Corporal Heynen, who was indicted for the mistreatment of British prisoners of war at Herne Camp in Westphalia.²⁴

Corporal (also listed as sergeant) Heynen was a minor official, who at the beginning of October, 1915, was called to the first Munster prisoners' camp, in order to take command of the new prisoners' camp to be organized at Shaft Five of the Frederick the Great mine near Herne. There were placed

²⁰ New York Times, February 13, 1921, p. 9.

²¹ Ibid., May 13, 1921, p. 3.

²² Ibid., February 13, 1921, p. 9.

²³ Ibid., May 5, 1921, p.3.

²⁴ Ibid., May 24, 1921, p. 19. The cases brought by the British Government were to be taken up first, possibly because of the aid given by the British.

under him two hundred and forty prisoners of war, two hundred Englishmen and forty Russians. There was no complaint from the Russians as they were occupied with agricultural work.

The British prisoners were to work in a colliery; a thing which they declared they would not do, because they looked upon such work as helpful to Germany in her conduct of the war.²⁵ Sixteen of the British ex-prisoners gave testimony before the court that the accused consistently ill-treated them, beating them with fists, sticks, and a rifle butt²⁶ as well as using insulting language to some of the prisoners.²⁷

The German prosecuting counsel called a number of German witnesses, who showed considerable reticence about testifying. Little effort was made to refute the great mass of British evidence.²⁸ The defense based its case on the grounds that Heynen was constantly beset with difficulties, due to the hostile attitude of the British prisoners, who were said to have been generally unruly, to have constantly organized mutinies, and to have falsely reported themselves ill.²⁹ When on the witness stand in his own defense, Heynen admitted the truth of most of the charges, and expressed pride in having

²⁵ "Judgment in the Case of Karl Heynen," American Journal of International Law, XVI, pp. 675-6.

²⁶ New York Times, May 25, 1921, p. 4.

²⁷ "Judgment of Heynen," loc. cit., p. 674.

²⁸ New York Times, May 25, 1921, p. 4.

²⁹ Ibid., May 27, 1921, p. 1.

lived up to and exemplified the high standards of Prussian military service.³⁰

In summing up the evidence against Heynen, the prosecuting attorney demanded that the accused be sent to prison for two years. In a review of the testimony, he declared that while prisoners of war "could not be handled with kid gloves" the application of violence and the use of offensive epithets were not warranted. Heynen was shown to have exceeded the requirements of his position as guard in twenty-eight instances.³¹

The court found Heynen guilty on fifteen charges of ill-treating subordinates, and on charges of having treated subordinates contrary to the regulations, and sentenced him to ten months of imprisonment.³²

The penalty was called inadequate in the British House of Commons³³, but Pollock, the British Solicitor General, made the comment that the President of the Court, Dr. Schmidt, showed remarkable fairness in conducting the trial.³⁴

³⁰ Ibid., p. 16.

³¹ Ibid., p. 1.

³² "Judgment of Heynen," loc. cit., p. 674.

³³ New York Times, May 27, 1921, p. 1.

³⁴ Ibid., May 24, 1921, p. 19.

There were various repercussions to the trial in Germany. The Republican press on the whole supported the trial. One Republican newspaper, Vorwarts, said that it was not a subordinate that they would like to see on trial but:

Among those wholesale war criminals, we count those men whose violent minds conceived and issued the orders to destroy whole villages, drown mines, and cut down fruit trees. Not the hands which executed these orders should be made responsible, but the heads which conceived them. Foremost of all, the originators of the Belgian deportations should be placed before the Court of Justice in order that an inextinguishable spot on Germany's honor should not be condoned. It is bad enough that no German public prosecutor has yet had the courage and initiative to put these men in the defendants' box.³⁵

The reactionary press was of the opinion that Heynen was wrongly convicted, because he only obeyed orders inseparable from war.³⁶

Captain Emil Muller was the next German official to be tried at Leipzig. In March, 1918, the accused commanded the II Company of the Gelsenkirchen Landstrum Battalion, and in this capacity, he was, in the beginning of April, placed in command of a camp for English prisoners of war at Flavy-le-Martel prison camp, which was located in the Department of the Aisne, France.³⁷ Muller was charged with ill-treatment

³⁵ Ibid., May 28, 1921, p. 3.

³⁶ Ibid., p. 3.

³⁷ "Judgment in the Case of Emil Muller," American Journal of International Law, XVI, p. 685. On the opening day of the trial, the President of the Court had this to say: "We shall now witness a terrible picture of war excesses and shocking atrocities which has deeply impressed me." Quoted from the New York Times, May 28, 1921, p. 3.

of prisoners, such as striking and kicking them, ordering them to be bound to posts, and mistreating and compelling sick prisoners to work. He was further charged with using insulting language to the prisoners and of tolerating his subordinate officers who mistreated prisoners.³⁸

The Court found Muller guilty of ill-treating subordinates in nine instances; for having tolerated such ill-treatment in one instance; for having dealt with subordinates in four instances contrary to regulations; and for having insulted subordinates in two instances. As a result he was sentenced to six months of imprisonment.³⁹

In giving its reasons for the decision, the Court had this to say of Muller: "It must be emphasized that the accused has not acted dishonorably, that is to say, his honor both as a citizen and as an officer remains untarnished," and in the same paragraph: "His conduct has sometimes been unworthy of a human being."⁴⁰

The British Government was outraged at the lightness of this sentence and the London Daily News said this of the Muller trial:

³⁸ Ibid., pp. 688-92.

³⁹ Ibid., p. 685.

⁴⁰ Ibid., p. 695. His honor remained unsullied, and yet his conduct was unbecoming a human being; a peculiar quirk of the German mentality or concept of honor.

The serious part of the proceedings in the Leipsic court is not that a typical German militarist of high rank should run amuck, but that the tribunal appointed by the German Government to try the case should decide after finding Muller guilty of crimes that would disgrace a Hottentot that justice would be met by sending this fine flower of Kultur to jail for six months--a sentence about equal to that passed upon a sneak thief found guilty of stealing a watch and chain. . . .⁴¹

Nevertheless, Pollock reiterated his faith in the Court, which he declared could be regarded with the fullest confidence.⁴²

The next case tried was that of Robert Neumann, a soldier who was charged with ill-treating prisoners of war at the prisoners' camp at the chemical factory, Pommerensdorf, and also of insults to prisoners, during the period from March 26 to December 24, 1917. In this trial a great deal of evidence was heard. Twenty-five English witnesses, all former prisoners at the Pommerensdorf camp, were examined orally before the Court, and four others at Bow Street Police Court in London. Besides this, fourteen German witnesses, some former sentries and officials at the chemical factory, were examined.

Numerous instances of cruel and inhuman treatment were proved against Neumann, but also evidence was produced to the effect that no prisoner was struck without cause. The refusal

⁴¹ New York Times, May 31, 1921, p. 17.

⁴² Ibid., p. 17.

on the part of some English prisoners to work seems to have been the chief cause of Neumann's offenses.⁴³

The accused was found guilty of ill-treating subordinates in twelve cases, and insulting a subordinate, and was sentenced to six months of imprisonment.⁴⁴ In deciding the case the Court took into consideration that the accused acted from no dishonorable motives in his dealings with the prisoners placed under him, but was actuated solely by a desire to do his duty.⁴⁵

The next trial was particularly significant, and had to do with the doctrine of superior orders. It concerned Commander Karl Neumann of the Submarine U. C. 67. He was charged with having torpedoed the English hospital ship, Dover Castle, without warning and with having sunk her with exceptional brutality on May 26, 1917. When torpedoed, the ship had sick and wounded on board and was on her way to take them from Malta to Gibraltar.

The accused admitted sinking the Dover Castle and as his defense used the plea that he acted under superior orders. The German Government's memoranda of January 29 and March 29, 1917, were submitted on behalf of Neumann. These documents

⁴³ "Judgment in the Case of Robert Neumann," American Journal of International Law, XVI, pp. 696-8. The English witness, Benson, in his examination in London frankly admitted that he never saw anybody struck without cause.

⁴⁴ Ibid., p. 697.

⁴⁵ Ibid., p. 703.

stated that Germany would not entirely repudiate the 10th Hague Convention, which had to do with enemy hospital ships, but was compelled to restrict the navigation of such ships, because she felt that the Allies were using their hospital ships not only to aid wounded, sick, and shipwrecked persons, but also for military purposes, and that they (the Allies) were thereby violating the Convention. In the second memorandum, it was announced that henceforth, as regards the Mediterranean, only such hospital ships would be protected, which fulfilled certain conditions. The hospital ships had to be reported at least six weeks previously, and were to keep to a given course on leaving Greece. After a reasonable period of grace, all other enemy hospital ships in the Mediterranean would be regarded as vessels of war and subsequently attacked.

These orders were communicated to all German submarine commanders in the Mediterranean area, and as such Neumann received knowledge of these memoranda. The Dover Castle did not fulfill the certain conditions set down, and as a result was torpedoed. Enough time was given however, between firing of the two torpedoes, for the wounded to be transferred to a destroyer accompanying the ship. Only six members of the crew died as a result of the sinking.⁴⁶

⁴⁶ "Judgment in the Case of Commander Karl Neumann," loc. cit., XVI, pp. 704-706.

The Court found Neumann innocent of the charges, and based its decision on the following reasoning: It is a military principle that the subordinate is bound to obey the orders of his superiors, and as the German Admiralty was the highest service authority over the accused, he was duty bound to obey its orders in service matters. So far as he did that, he was free from criminal responsibility. Under international law a subordinate may be held responsible, (1) if he has gone beyond the orders given him, and (2) if he acts in conformity with orders when he knows that his superiors have ordered him to do acts which involve a civil or military crime or misdemeanor. In both cases Neumann was shown to have stayed within the law. In the first place, he had not gone beyond his orders because he could not give warning to the ship, as it was escorted by two warships, and no particular brutality was involved in the sinking, as one and one-half hours elapsed between the firing of the first and second torpedoes. In the second place, Neumann knew of the memoranda of the German Government concerning illegal use of hospital ships, and therefore, he regarded his action as a legitimate reprisal. He made no secret of the sinking, not only reporting it to his superiors, but also admitting it at the trial. He would not have done this had he considered that his actions were illegal.⁴⁷

⁴⁷ Ibid., pp. 707-8.

The only German accused by Belgium in the sample list was a certain Max Randohr, who was charged with having ill-treated and imprisoned Belgian children at Grammont in 1917. The Court acquitted him on June 11, 1921.⁴⁸

The first French case to be tried was that of Lieutenant General Karl Stenger, and along with him, Major Benno Crusius, on charges of murdering prisoners of war. General Stenger commanded a brigade of the Fourteenth Army Corps,⁴⁹ and was held responsible for issuing two orders on August 26, 1914, which constituted the main basis for the French charges:

- (a) Beginning with today, no more prisoners will be taken. All prisoners, whether wounded or not, must be destroyed;
- (b) All prisoners are to be killed; the wounded whether armed or not, destroyed; even men captured in large organized units are to be put to death. Behind us no enemy must remain alive.⁵⁰

Major Crusius was brought to trial on the allegation that he carried out the General's orders. This was done on the basis that German law does not exonerate a subordinate from responsibility on the ground of superior orders if he knows the carrying out of such orders involves the committing of a crime.⁵¹

⁴⁸ New York Times, June 12, 1921, p. 3.

⁴⁹ Ibid., June 29, 1921, p. 17.

⁵⁰ Glueck, op. cit., p. 24.

⁵¹ New York Times, June 27, 1921, p. 15.

Fifty-four witnesses were subpoenaed to testify in this trial, among them, several former active generals and well-known military personnel. The charges resulted from the German-French battles around Saarburg in August, 1914. Crusius was charged with having passed down the orders of Stenger to other officers and the troops, and of having carried out the orders by shooting some French prisoners.

The French Government was represented by a Commission at the trial, and also aided in transporting witnesses, such as those who testified from Alsace.⁵² The bombshell that reverberated throughout the trial was Crusius' testimony that Stenger did give the orders mentioned above, saying: "No prisoners, no pardon will be given, none asked." Testifying on behalf of Crusius, a Doctor Sernau said that the Major was sent home a nervous wreck, and had repeatedly told him that "his soul collapse was chiefly due to the ghastly scenes witnessed on the battlefield incident to General Stenger's order to shoot wounded men and prisoners."⁵³

General Neubauer, battalion commander under Stenger, was called to the witness stand, and under oath said that his respect for his old commander was such that it was quite possible he would not be able to tell the truth.⁵⁴

⁵² Ibid., June 29, 1921, p. 17.

⁵³ Cyril Brown, "General Arraigned as War Criminal," New York Times, June 30, 1921, p. 19.

⁵⁴ Ibid., p. 19.

Several former Alsatian soldiers who served under Stenger testified, describing the horrors of the battlefields when sergeants and privates, some against their own wills, had been forced to carry out Stenger's orders. Karl Kleinhaus, former soldier under Stenger, gave the most damning testimony when he said that Stenger not only gave the orders, but was personally responsible for the death of certain prisoners. Eugene Oberdorf, another of Stenger's soldiers, described the murder of three French prisoners behind a barn, to keep the majority of Stenger's officers from witnessing the act.⁵⁵

Crusius was found guilty of manslaughter, and sentenced to two years imprisonment.⁵⁶ Stenger was acquitted. The atmosphere of the Court which made possible the acquittal was partly the result of long years of German military autocracy, and must have been partly due to the "Usages of War," a handbook of the German General Staff for the guidance of German officers, which makes it perfectly clear that while prisoners under the circumstances in which the French were placed "need not be killed, yet one must not strive officiously to keep them alive."⁵⁷ The Court disregarded much of the evidence submitted against

⁵⁵ New York Times, July 2, 1921, p. 3.

⁵⁶ Ibid., July 7, 1921, p. 2.

⁵⁷ Percy S. Bullen, "Stenger's Acquittal," New York Times, July 14, 1921, p. 14.

Stenger on the theory that such orders on the General's part were unbelievable, and that even if they had been given, the subordinates receiving them should never have taken them at face value.⁵⁸

French opinion, both official and unofficial, was outraged at the acquittal of Stenger. As a result the French Commission was recalled.⁵⁹ French observers called the trial a farce, with hearsay evidence, anybody's opinion, third-hand statements, and facts alike presented without protest from the prosecuting or defending attorneys. Stenger and Neubauer frequently interrupted the proceedings, without being recognized by the Court President, inserting their opinions or calling some witness a liar, as was done in the case of one Alsatian. The President of the Court addressed Stenger as "Excellency," and some of the Judges' volunteered remarks about the duties, rights, and habits of officers and soldiers of the German Army were likewise distasteful to the French.⁶⁰

The acquittal of Stenger was followed by those of Generals von Schack and von Kruska, who were charged with having caused through negligence, an epidemic of typhus among war prisoners in the camp at Murderawehren, near Cassel.⁶¹

⁵⁸ "Acquittals that Convict Germany," The Literary Digest, July 23, 1921, p. 11.

⁵⁹ New York Times, July 10, 1921, p. 1.

⁶⁰ Ibid., July 3, 1921, p. 14.

⁶¹ Ibid., July 10, 1921, p. 3. Three thousand French prisoners were said to have died from the disease or from the effects of ill-treatment and brutality.

The last trial of any importance at Leipzig was that of Lieutenants Dithmar and Boldt, charged in conjunction with Captain Patzig (who could not be found) of sinking the British hospital ship, Llandovery Castle, and the machine-gunning of the survivors in life-boats. At the time of sinking, the ship was returning from Halifax to England, after taking wounded Canadian soldiers home. On the return voyage, she had on board a total of two hundred and fifty-eight persons, all medical personnel. There were positively no combatants on board, and in particular, no American aviators or munitions of any kind.⁶²

On the evening of June 27, 1918, the Llandovery Castle was sunk in the Atlantic Ocean, about one hundred and sixteen miles southwest of Ireland, by a torpedo from the U-Boat 86. Of the persons on board only twenty-five were saved. As we have seen earlier, such sinkings were in direct violation of the Tenth Hague Convention. Captain Patzig, acting on suspicion that the ship carried American aviators, decided on torpedoing the ship against the advice of Dithmar and a witness, Popitz. The ship sank in about ten minutes, but a considerable number of life-boats were lowered and manned. Some time after the sinking, the U-Boat surfaced and approached the life-boats, in order to ascertain whether the Llandovery Castle did have airmen or munitions on board.⁶³

⁶² "Judgment in Case of Lieutenants Dithmar and Boldt, American Journal of International Law, XVI, p. 709.

⁶³ Ibid., pp. 710-2.

After giving below deck orders to the crew, Patzig with Dithmar, Boldt, and first boatswain's mate Meisser, who had since died, remained on deck, and fired upon the life-boats. Various witnesses at the trial, former personnel of the submarine and survivors from the sunken ship, testified to the firing on the life-boats. Patzig seemed so worried afterward, that he exacted a pledge from his men not to reveal the happenings of June 27. As a result of this pledge, both Dithmar and Boldt refused to testify, but rather extolled the glories of their former commander.⁶⁴

The Court found Dithmar and Boldt guilty of homicide, and sentenced them to four years imprisonment. Along with this Dithmar was ordered dismissed from the service, and Boldt was forbidden the right to wear an officer's uniform.⁶⁵ The aftermath of this trial was that after Boldt had served about three months in the Hamburg jail, he escaped; the suspicion being that he was aided by the wardens.⁶⁶

The Allied mission sent to the Leipzig trials withdrew in protest at the outcome of the twelve test cases. The French and Belgians, particularly, were indignant at the results,

⁶⁴ Ibid., pp. 714-6.

⁶⁵ Ibid., p. 709.

⁶⁶ New York Times, November 24, 1921, p. 20.

and regarded the trials as a wholesale miscarriage of justice. In January, 1922, a commission of Allied jurists, who had investigated the Leipzig trials unanimously recommended to the Supreme Council of the Allied and Associated Powers that it was useless to let the German Court continue.⁶⁷

Bickerings, a desire to return to normalcy, and other things deterred the Allies from pressing war criminal trials further, and so the whole idea of holding such trials was given up. Various persons in the Allied world looked very differently at the outcome of Leipzig. Briand, French Foreign Minister, called the trials a farce.⁶⁸ A typical British view was expressed by Claud Mullins, an observer at the trials. He respected Dr. Schmidt, President of the Court highly, and thought that the Court was fair. He even went so far as to say that he would be willing to be tried by Dr. Schmidt on any charge, even one which involved his word against that of a German.⁶⁹

American public opinion generally was of the view that the trials were a travesty on justice, and the majority of persons felt that the entire German nation was on trial and

⁶⁷ Glueck, op. cit., p. 32.

⁶⁸ New York Times, July 14, 1921, p. 2.

⁶⁹ Claud Mullins, "The War Criminals' Trials," The Fortnightly Review, CX, p. 420.

not just a sample few. The inconsistencies of the trials were pointed out, especially in comparing the cases of Stenger and Lieutenant Neumann. Neumann was released on the grounds that the guilt lay less with the subordinates than with those who issued the orders--thus this same principle would have condemned Stenger. But instead, Stenger was acquitted, and his subordinate, Crusius, was imprisoned.

Another view was expressed by the Pittsburgh Post when it said: "The trial . . . establishes a valuable precedent and should tend to make army officers in future conflicts a little more cautious about violating the rules of civilized warfare."⁷⁰

The Baltimore American took a sane view of the trials: "An impartial effort by the Germans to fix the guilt of their countrymen is contrary to the laws of nature; the pot cannot sincerely call the kettle black."⁷¹

With the coming of World War II and subsequent German atrocities, a great lesson was learned from Leipzig. The United Nations could not trust any nation to try its own leaders. To a nation its leaders may be heroes, while to the outside world they may be criminals. Too, if trials were

⁷⁰ "Acquittals That Convict Germany," loc. Cit., p. 11.

⁷¹ "German Justice," Literary Digest, XLIX, June 25, 1921, p. 10.

to be held at all, they had to be held quickly, before evidence was lost, witnesses died or disappeared, and public demand for such trials cooled. The Leipzig trials also warned against any procedure except an honest and fair one.

CHAPTER II

PRELUDE TO NUREMBERG

Early in World War II, those governments allied against Hitler, later called the United Nations, began to formulate their war and peace aims. One of the foremost of these aims was the prosecution and punishment of persons charged with war crimes. This movement gained momentum when Hitler overran a large part of Europe.

The earliest statement by an official was the pronouncement concerning such prosecution by President Eduard Benes of the Czechoslovakian Government-in-Exile in April, 1941, in which he declared:

An essential condition of a peace based upon really moral principles will be a determined censuring of the barbarity and criminality of the totalitarian regimes, and an actual, and as far as possible, general, correction of all the injuries which have been done to individuals and nations, and the political punishment of those who are responsible for this war.¹

Perhaps, Benes had in mind the type of punishment administered to Napoleon Bonaparte when he was banished to St. Helena.

In September, 1941, General Wladyslaw Sikorski, the Polish Prime Minister, made the following comment on German outrages in Poland: "The perpetrators of those crimes must

¹ Eduard Benes, "The New Central Europe," Journal of Central European Affairs, I, April, 1941, p. 4.

be punished as they deserve. The day will come when Hitler's hangmen will pay for these crimes."² Leaders of the small states were thus the first to demand that war criminals be brought to justice of some sort.

Even before the entry of the United States into the war, President Roosevelt declared in October, 1941:

The practice of executing scores of innocent hostages in reprisal for isolated attacks on Germans in countries temporarily under the Nazi heel revolts a world already inured to suffering and brutality. . . . These are the acts of desperate men who know in their hearts that they cannot win. Frightfulness can never bring peace to Europe. It only sows the seeds of hatred which will one day bring fearful retribution.³

Winston Churchill echoed this sentiment in the same month when he denounced the Nazi butcheries in France: "These cold-blooded executions of innocent people will only recoil upon the savages who order and execute them. . . . Retribution for these crimes must henceforward take its place among the major purposes of the war."⁴

Support of Great Britain and the United States for the prosecution of war crimes heralded the approach of Nuremberg and assured Europe's oppressed peoples that their oppressors would be held accountable for their acts.

² War and Peace Aims, Special Supplement to No. I to the United Nations Review, January 30, 1943, p. 31. (Hereafter cited as War and Peace Aims.)

³ Ibid., p. 31.

⁴ Ibid., p. 31.



The first Inter-Allied action concerning the prosecution of war criminals came in January, 1942, when representatives of the Government-in-Exile of Belgium, Czechoslovakia, Free France, Greece, Luxembourg, the Netherlands, Norway, Poland, and Yugoslavia met in London and framed the Inter-Allied Resolution on German War Crimes. The Resolution contained among its statements the following:

3. The undersigned representatives . . . place amongst their principal war aims punishment through the channel of organized justice of those guilty and responsible for these (listed before in the text) crimes, whether they have ordered them, perpetrated them or in any way participated in them.
4. The undersigned representatives determine . . . that (a) those guilty and responsible, what ever their nationality, are sought for, handed over to justice and judged; (b) that sentences pronounced are carried out.⁵

Various delegates, commenting on the Resolution, were of one voice in praise of its acceptance. W. Sikorski, the Polish delegate said:

The Declaration resolutely turns international law in a new direction. . . . It expresses the principle of united repression of acts which normally would be considered crimes against the 'common law' if they had been committed in peace time, and which will not rest unpunished on the pretext that they were committed in wartime.⁶

⁵ "Allied Resolution on German War Crimes," Inter-Allied Review, II, January 15, 1942, p. 2.

⁶ Inter-Allied Review, II, February 15, 1942, p. 33.

The words of H. Pierlot, Belgian delegate, emphasized the just character of the Resolution:

They (the Nations signing the Resolution) are entering into a mutual agreement to apply just sanctions to war crimes. No matter how severe the necessities of war may be, civilized nations have nevertheless recognized and proclaimed rules which every belligerent ought to obey. . . .⁷

General de Gaulle, French member of the conference, remembering the Leipzig trials had this to say of the Resolution: "We demonstrate our firm intention to see to it that all the guilty parties . . . should not be allowed to evade their just punishment as did those of the other war."⁸

E. Tsouderos, Greek delegate, thought of the Resolution in terms of the superior orders doctrine: "Henceforth, butchers, gaolers [sic.] and looters of every kind will no longer be allowed to individually elude their responsibilities on the specious pretext that they were acting under orders from above."⁹

The Royal Yugoslav Government-in-Exile set forth its conviction to retain this Resolution as one of its chief war aims: "The culprits should be certain . . . that they will have to expiate all their crimes after the day of victory. . . . We place definitely among our war aims just punishment for these crimes."¹⁰

⁷ Ibid, p. 33.

⁸ Ibid., p. 33.

⁹ Ibid., p. 34.

¹⁰ Ibid., p. 34.

J. Bech, Luxembourg delegate, was the first to suggest using national law as a basis for trying certain war criminals. He thus gave utterance to the implications of others when he said: "The guilty will be liable to the laws of the countries wherein their crime has been committed. . . . The repression of such crime must be organized on an international basis."¹¹

T. Wold, Norwegian delegate, expressed the feeling that unless the Nazis were brought to trial western civilization would perish: "It will be quite impossible to maintain communities based on freedom and respect for law if the Nazi criminals do not meet their doom and receive the punishment they deserve."¹²

The governments of Great Britain, the United States, and the Soviet Union, approved the Resolution and sent representatives to sit in on the negotiations. Much of this Resolution and the statements of the delegates framing it were incorporated in the Moscow Declaration on Atrocities which Britain, the United States, and the Soviet Union proclaimed in November, 1943.

The first official Russian sentiment on punishment for war crimes was expressed in April, 1942, in these words of

¹¹ Ibid., p. 34.

¹² Ibid., p. 35.

Molotov: "The Hitler Government and its accomplices will not escape the stern responsibility and deserved punishment for all their unheard-of crimes committed against the peoples of the Union of Soviet Socialist Republics and against all freedom-loving peoples."¹³

United States officialdom made its voice heard through several prominent commentators on the subject. In May, 1942, Adolf A. Berle, Jr., Assistant Secretary of State, made a speech in which he hinted at trying German organizations: "The individual Gestapo agents, Black Troopers, and others . . . must be held to account." He also advocated the just treatment of those Germans who had treated their conquered peoples with mercy: "Account should also be taken of those occasional instances in which the Germans in occupying countries have behaved with honor and respect. . . . The fate of these men must be determined by their own deeds."¹⁴ Sumner Welles, Under-Secretary of State, voiced his opinion in the same month: "Voices of the men who will make our victory possible will demand that justice be done, inexorable and swiftly to those individuals . . . that can truly be held accountable for the catastrophe into which they have plunged the human race."¹⁵

¹³ War and Peace Aims, I, p. 32.

¹⁴ Ibid., p. 32.

¹⁵ Ibid., p. 32.

New outbursts of Nazi ferocity in Poland invoked the following comments by eminent Poles. Sikorski said: "The perpetrators of these crimes must be brought to account; this principle must become the guiding policy of the Allies,"¹⁶ and on the following day the Polish Minister of Information, Stanislaw Stronski, declared: "It is the inflexible determination of all the world . . . that full retribution must and will be executed for each and every crime committed."¹⁷

Jan Masaryk, a prominent Czech, speaking in June on the anniversary of the German destruction of the town of Lidice, voiced the determination of the Czech people: "Those who were guilty of those crimes shall be punished according to the law of God and man."¹⁸

On July 17, President Roosevelt again voiced his convictions: "The American people not only sympathize with all victims of Nazi crimes, but will hold the perpetrators of these crimes to strict accountability in a day of reckoning which will surely come,"¹⁹ and on the following August 21, he stated the official governmental view of the Nazi war crimes, which was a repetition of the views of Bech of Luxembourg:

¹⁶ Ibid., p. 32.

¹⁷ Ibid., p. 32.

¹⁸ Ibid., p. 32.

¹⁹ Ibid., p. 33.

It is the purpose of the government of the United States . . . to make appropriate use of the information and evidence in respect to these barbaric crimes of the invaders. It seems only fair that they should have this warning that the time will come when they shall have to stand in courts of law in the very countries which they are now oppressing and answer for their acts.²⁰

With the sentiment of the Allied world overwhelmingly in favor of bringing the Nazis to the bar of justice, Great Britain and the United States, together with other governments set up a commission for gathering evidence to be used against the Nazis. Speaking on October 15, 1942, Roosevelt proclaimed to the world:

I now declare it to be the intention of this Government that the successful close of the war shall include provision for the surrender to the United Nations of war criminals. . . . With a view to establishing responsibility of the guilty individuals through the collection and assessment of all available evidence, this Government is prepared to cooperate with the British and other Governments in establishing a United Nations Commission for the Investigation of War Crimes.

The number of persons eventually found guilty will undoubtedly be extremely small compared to the total enemy populations. It is not the intention of this Government or of the Governments associated with us to resort to mass reprisals. It is our intention that just and sure punishment shall be meted out to the ringleaders responsible for the organized murder of thousands of innocent persons and the commission of atrocities which have violated every tenet of the Christian faith.²¹

²⁰ Franklin D. Roosevelt, "Statement by the President," Department of State Bulletin, VII, August 22, 1942, p. 710.

²¹ Inter-Allied Review, II, October 15, 1942, p. 234.

Sir John Simon, Lord Chancellor of Great Britain, signified British adherence to establishing the War Crimes Commission, when he stated in a debate in the House of Lords on October 8:

If, there is going to be, after the victory of the United Nations, due punishment of these abominable war crimes . . . there are two prerequisites without which no tribunal for dealing with war crimes can effectively act. . . . The one is the recording of evidence, and the other is securing the presence of the accused at the trial.

Firstly, then, as to the collection of the necessary evidence. The proposal is to set up with the least possible delay a United Nations Commission for the Investigation of War Crimes. The Commission will investigate war crimes against nationals of the United Nations, recording the testimony available, and the Commission will report from time to time to the governments of those nations cases in which such crimes appear to have been committed, naming and identifying wherever possible the persons responsible. The Commission should direct its attention in particular to organized atrocities . . . whether as ring-leaders or as actual perpetrators, for atrocities.

Our object . . . is not to undertake or encourage mass executions but to fix these horrible crimes upon those enemy individuals who are really responsible, and who ought to be dealt with as criminals in respect to them. . . . It is only the carrying out with complete impartiality of some such system as this that we could contribute to prevent what would otherwise be still further massacres of still more people. . . .²²

With the exception of the Soviet Union, all the European Allies together with the governments of Australia, South Africa, New Zealand, India, China, and the United States were represented

²² Sir John Simon, "Statement by the Lord Chancellor," Inter-Allied Review, II, October 15, 1942, pp. 234-5.

on the Commission. Not only was the Commission interested in gathering evidence and investigating all cases referred to it by any of the United Nations, but also naming, where possible, those whom the Commission considered responsible for atrocities.²³

Roosevelt, speaking again in October, 1942, made it perfectly clear that the United Nations did not contemplate justice en masse against the Germans: "We have made it entirely clear that the United Nations seek no mass reprisals against the populations of Germany. . . . But the ring leaders and their brutal henchmen must be named, and apprehended and tried in accordance with the judicial process of criminal law."²⁴

Molotov reiterated the official Russian view on October 14 when in an official pronouncement he stated the following:

The Soviet Government . . . declares for the whole world to hear . . . that the criminal Hitlerite government and all its accomplices must and shall pay the deserved severe penalty for the crimes committed by them against the peoples of the Soviet Union and against all freedom-loving peoples.

The Soviet Government approves and shares legitimate desire . . . to insure that those guilty of crimes are turned over to justice and that sentences that will be passed be carried into effect. The Soviet Government is prepared to support practical measures towards this aim taken by the Allied and friendly governments.
 . . .

²³ Anthony Eden, "Speech in the House of Commons," War and Peace Aims, VI, October 15, 1945, p. 15.

²⁴ War and Peace Aims, I, p. 34.

The Soviet Government considers it necessary that any one of the leaders of fascist Germany . . . be brought to trial without delay before a special military tribunal and punished with all the severity of criminal law.²⁵

In October, 1942, the Polish Government-in-Exile in London passed a Decree Concerning Punishment of German Crimes, which included these provisions:

1. Criminal responsibility attaches to those persons belonging to the German Reich or to states allied or connected with it . . . for all crimes committed after August 31, 1939.
2. All acts committed in violation of international law . . . will be punished by imprisonment.
3. Punishment inflicted will be increased to life imprisonment or death penalty if such action caused death, etc.
4. Persons giving orders for criminal acts will be equally subject to punishment with the persons performing such acts.²⁶

Thus Poland, the first victim of the war, by legislation placed the trial of German war criminals on the agenda for immediate action at the close of the war. This document sets down those to whom responsibility is attached, and is valuable from this standpoint. Unilateral action by Allied governments in dealing with those perpetrators of crimes on their own soil has been looked upon with favor, not only by laymen, but by the

²⁵ V. Molotov, "Statement on War Crimes," Inter-Allied Review, II, October 15, 1942, p. 236.

²⁶ Polish Decree Concerning Punishment of German Crimes, War and Peace Aims, I, p. 36.

international lawyers and publicists who contend that there is a firm legal basis for this type of trial under existing international law.

The year 1942 was ended with the adoption of the Joint Declaration of the United Nations on Jewish Wrongs. This document was proclaimed on December 17, and in the final paragraph are found these words: "They (the United Nations) reaffirm their solemn resolution to insure that those responsible for these crimes shall not escape retribution, and to press on with the necessary practical measures to this end."²⁷

Showing that the work of the United Nations War Crimes Commission was progressing, H. Pierlot, Prime Minister of the Belgian Government-in-Exile, broadcast the following speech to his nation:

The investigation procedure has begun. The Fact Finding Commission . . . is already drawing up a list of the guilty and setting forth their misdeeds. All attempts on their part to escape punishment will be in vain. Germany will not be big enough to hide them. As for the neutral countries, the new international law will not allow them to refuse extradition, and they will realize, moreover, that it is in their interest as well as ours to cooperate in securing the establishment of a true order in human society, based on law and legality.²⁸

²⁷ Joint Declaration by the United Nations on Jewish Wrongs, United Nations Review, III, January 15, 1943, p. 1.

²⁸ War and Peace Aims, II, December 1, 1943, p. 23.

And so we see that as early as 1943, the neutral countries were being warned that the refuge given by Holland to Kaiser Wilhelm II after World War I must not be extended to Axis leaders. This position was reiterated by President Roosevelt on July 30 when he declared:

I find it difficult to believe that any neutral country would give asylum to or extend protection to any of them. I can only say that the Government of the United States would regard the action by a neutral government in affording asylum to Axis leaders or their tools as inconsistent with the principles for which the United Nations are fighting. . . .²⁹

The first concerted Big Three action toward the prosecution of war criminals came at the Moscow Conference, composed of representatives of the United States, Britain, and the Soviet Union, which sat from October 19 to 30, 1943.³⁰ Out of this Conference came the Moscow Declaration on Atrocities; two important provisions of this Declaration were:

. . . Those German officers and men and members of the Nazi Party who have been responsible for or have taken a consenting part in the above atrocities, massacres, and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free governments which will be erected therein.

The above declaration is without prejudice to the case of German criminals, whose offenses have no particular

²⁹ War and Peace Aims, III, April 30, 1944, p. 26.

³⁰ Ibid., p. 465.

geographical localization and who will be punished by joint decision of the governments of the Allies.³¹

An Anglo-Saxon concept of justice of long standing was incorporated into the declaration--returning the accused for trial to the scene of his crime. The persons charged with crimes in occupied countries would be tried by the local authorities for localized offenses or atrocities against persons, or property, usually of civilians of countries formerly occupied by Germany.³² At the same time this is a denial of a long-established practice of granting armies extra-territorial privileges.

Echoing the sentiment of the declaration, Marshal Stalin made the following statement on November 6 on the anniversary of the October Revolutions: "Our people will not forgive the German fiends for these crimes. We shall make the German criminals answer for all their misdeeds. . . ."³³

Sir John Simon, speaking in the House of Lords on December 7, 1943, admonished the United Nations to be very careful in the trial of war criminals when he said: "Let us strain to do all that we can to punish crime where we find it but, first and

³¹ Statement Signed by President Roosevelt, Prime Minister Churchill, and Premier Stalin Regarding Atrocities, Congressional Record, 78 Congress, 1 Session (Washington: United States Government Printing Office, 1943), V, 89, pp. 8920-1.

³² Department of State, Trial of War Criminals (Washington: United States Government Printing Office, 1945), p. 2.

³³ War and Peace Aims, III, p. 28.

last, let us be sure that the actual individual is proved to be guilty of the crime with which he is charged."³⁴

The year 1944 saw further German atrocities committed, accompanied by more Allied protests and warnings. The Belgian Government-in-Exile in answer to new Nazi outbursts issued the following official statement on January 18 of that year: "This situation compels us once more to warn the German authorities . . . that the brutalities inflicted on Belgians . . . will be the subject of adequate penalties. . . ." ³⁵ The Norwegian Minister of Justice, Terje Wold, as early as January 25, advocated the establishment of an international court to try the Nazis before the final victory was achieved:

Establishment of international courts is indispensable and they must be set up before the armistice, because numerous difficulties which attach to the establishment of such courts will take time to resolve, and we cannot delay the trial of war criminals in anticipating their erection. One of the obstacles to be surmounted is composition of courts. . . . This cannot be done unless representatives of the United Nations, armed with their governments' authority, meet together in order to reach the necessary decisions.³⁶

Thus not only was an international court advocated, but the presence of all United Nations members in its founding was urged. As it developed only the Big Four participated in the Nuremberg trials.

³⁴ Ibid., p. 29.

³⁵ Ibid., IV, p. 18.

³⁶ Ibid., p. 18.

In March, 1944, Roosevelt issued another warning to the Axis when he said:

It is therefore fitting that we should again proclaim our determination that none who participate in these facts of savagery shall go unpunished. . . . That warning applies not only to the leaders but also to the functionaries and subordinates in Germany and in the satellite countries. . . . All who share the guilt shall share the punishment.³⁷

The same month, Anthony Eden made the following speech in the House of Commons: "His Majesty's Government . . . can only repeat their detestation of Germany's crimes and their determination that all those guilty of them shall be brought to justice."³⁸ Roosevelt in his message to Congress on June 12 repeated his determination to punish the guilty: ". . . We have made clear our determination to punish all participants in these acts of savagery (speaking of ill-treatment of minorities)."³⁹

Cordell Hull gave another warning to neutral governments in September, 1944: "The Department is continuing to impress upon those governments whose policy has not yet been clearly stated the importance which it attaches to the taking of adequate measures to insure that Axis war criminals do not find asylum in their countries."⁴⁰

³⁷ Ibid., p. 19.

³⁸ Ibid., p. 19.

³⁹ Ibid., p. 20.

⁴⁰ Ibid., V, p. 14.

The following day, Terje Wold of Norway, declared that the war criminals should not be treated in a manner that had the odor of a victor's revenge: "It is important to bring the war criminals into court and to punish them, not as a victor's act of vengeance against the conquered, but because of those goals and ideals for which we are fighting this war. . . ."41

The statements and sentiments of the Allied world came into fruition in 1945. In summing up the views of Roosevelt, Joseph C. Grew, Under-Secretary of State, made the following remarks:

Officers of the Department of State . . . have worked out proposals for the realization of the objectives stated by the President. . . . They provide for the punishment of German leaders and their associates for their responsibility for the whole-broad criminal enterprise devised and executed with ruthless disregard of the very foundation of law and morality, including offenses wherever committed against the rules of war and against minority elements, . . . and individuals.⁴²

The same day, Johan Nygaardsvold, Norwegian Prime Minister, made the following comment regarding superior orders: "He who issues the order to start war is just as liable to punishment as the one carrying out the orders."⁴³

⁴¹ Ibid., p. 15. Wold does not give the remedy, however, to keep the trials from being acts of vengeance, and as to the goals and ideals of this war, he does not enumerate concretely what they are.

⁴² United Nations Review, V, p. 109.

⁴³ War and Peace Aims, VI, p. 15.

On February 11, the Declaration of Yalta was published, and in it are the following words which reiterated the Moscow Declaration of 1943: "It is our inflexible purpose to . . . bring all war criminals to just and sure punishment."⁴⁴

In May, 1945, the first concrete action was proposed when President Truman, who had succeeded Roosevelt in April, made the following pronouncement:

. . . Justice Robert H. Jackson . . . has accepted designation as Chief of Counsel for the United States in preparing and prosecuting the charges of atrocities and war crimes against such of the leaders of the European Axis Powers . . . as the United States may agree with any of the United Nations to bring to trial before an international military tribunal.

Pursuant to the Moscow Declaration of November 1, 1943, all war criminals, against whom there is sufficient proof of personal participation in specific atrocities, are to be returned to the countries where their crimes were committed, to be judged and punished by these countries themselves. . . .

There are left, however, the cases of other war criminals . . . particularly the major war criminals and their principal agents and accessories, whose offenses have no particular geographical localization.

I hope and expect that an international military tribunal will soon be organized to try this second category of war criminals. It will be Justice Jackson's responsibility to represent the United States in preparing and presenting the case against these criminals before such military tribunal.

It is our objective to establish as soon as possible an international military tribunal; and to provide a trial procedure which will permit no evasion or delay--but one which is in keeping with our tradition of fairness towards those accused of crime.⁴⁵

⁴⁴ Ibid, V, p. 105.

⁴⁵ Ibid., pp. 17-8.

This action showed and emphasized that the international court was to be a military tribunal; however, it was to try civil as well as military personnel.

Developing this declaration, Judge Samuel I. Rosenman, representing President Truman, laid proposals before British, French, and Russian delegates on May 10 at the San Francisco Conference calling for the establishment of an International Military Tribunal. Commenting on Judge Rosenman's mission, the State Department said that the purpose was not only to arrange the trials of major European war criminals but also to adopt procedure. The statement continued that proposals were "to organize a machinery and set up a procedure which will assure a just and expeditious trial to the major individuals and to the organizations accused of atrocities and war crimes in Europe, but one which will permit no evasion, undue delay or dilatory tactics."⁴⁶

The American policy hit a snag when the British Government came out with a statement favoring executive action for such men as Grand Admiral Doenitz and Goering, basing its conclusions on the fact that international law did not deal with heads of state.⁴⁷ To bring the British into line, Jackson,

⁴⁶ New York Times, May 11, 1945, p. 13.

⁴⁷ Ibid., May 17, 1945, p. 1.

accompanied by prominent American jurists, went to London to confer with British government heads and as he said, to complete arrangements "for examination of important witnesses, documents, reports, captured orders, and other evidence that might be used in the trial of the major war criminals before an international military tribunal."⁴⁸

The success of his mission was revealed on May 30, when Prime Minister Churchill announced in the House of Commons the appointment of Attorney General Sir David Maxwell Fyfe as the British representative to work with Jackson. By this appointment the British Government abandoned its earlier desire to deal with the major war criminals by executive decision instead of by trial.⁴⁹ Reporting to President Truman on June 7, Jackson outlined the basic features of the plan of prosecution on which he was preparing the case of the United States. As to the necessity for holding the trial Jackson said this: "The American case is being prepared on the assumption that an inescapable responsibility rests upon this country to conduct an inquiry . . . into the culpability of those whom there is probable cause to accuse of atrocities."⁵⁰

⁴⁸ Ibid., May 23, 1945, p. 13.

⁴⁹ Dana A. Schmidt, "Briton Appointed to War-Crime Body," New York Times, May 30, 1945, p. 12.

⁵⁰ Department of State, op. cit., pp. 2-3.

As to the defendants, Jackson wished not only to accuse a large number of individuals and officials who were in authority in the government, in the military establishment, including the General Staff, and in the financial, industrial, and economic life of Germany, but also proposed to establish the criminal character of several voluntary organizations such as the Gestapo and the Schutzstaffeln.⁵¹ Commenting on the Nazi master plan, Jackson said:

Our case against the major defendants is concerned . . . not with individual barbarities and perversions. The groundwork of our case must be factually authentic and constitute a well-documented history of what we are convinced was a grand, concerted pattern to incite and commit the aggressions and barbarities which have shocked the world.⁵²

The legal charges were set down in three parts, namely:

- (a) Atrocities and offenses against persons or property constituting violations of International Law, including the laws, rules, and customs of land and naval warfare. . . .
- (b) Atrocities and offenses, including atrocities and persecutions on racial or religious grounds, committed since 1933. . . .
- (c) Invasions of other countries and initiation of wars of aggression in violation of International Law or treaties.⁵³

⁵¹ Ibid., p. 4.

⁵² Ibid., p. 5.

⁵³ Ibid., pp. 7-8.

In commenting on the third charge, Jackson gave several international agreements as basis for his theory regarding aggressive war. Foremost was the Briand-Kellogg Pact of 1928 of which Germany was a signatory. Other agreements included the Geneva Protocol of 1924, signed by forty-eight governments which declared that a war of aggression was an international crime, but this never became law because of British rejection; Resolution of the Eighth Assembly of the League of Nations in 1927; and the Resolution of the Sixth Pan-American Conference of 1928, which used the same wording as the Geneva Protocol.⁵⁴

As to the duration of the trial, Jackson desired that the record be made complete and accurate instead of sacrificing justice for speed, saying that it was more important that world opinion support the trials rather than condemn them. Ending his report, Jackson said: "The trial must not be protracted in duration by anything that is obstructive or dilatory, but we must see that it is fair and deliberative and not discredited in times to come by any mob spirit."⁵⁵

Supplementing the cooperation between the British and the Americans, a conference was called at London to incorporate Russian and French sanction to the war trials. Jackson and Maxwell Fyfe constituted the American and British representatives

⁵⁴ Ibid., pp. 9-10.

⁵⁵ Ibid., pp. 11-12.

while the Soviet Union sent I. T. Nikitchenko and France, Robert Folco. Definite limitations were set on the extent to which the accused Nazis would be permitted to summon heads of other governments as witnesses. Ribbentrop, Goering, Hess, and others would not be privileged to demand a parade of heads of other governments, including Allied Governments, before the court to support their claims of extenuating circumstances.⁵⁶

By July 7, the Four Powers were in accord upon three principles: (1) the accused should be entitled to a fair hearing; (2) the accused should have the right to introduce evidence, etc. on their behalf; and (3) the trials should not be subject to dilatory delays through obstructionist tactics on the part of the defendants.⁵⁷

By the middle of the month another obstacle had been overcome. The United States and Britain agreed to the Russian and French systems by which the testimony of a defendant is mandatory. In exchange for this concession, Anglo-American procedure, by which the accused is presumed to be innocent until proved guilty, was accepted by Russia and France.⁵⁸

⁵⁶ New York Times, June 25, 1945, p. 7.

⁵⁷ Ibid., July 7, 1945, p. 5.

⁵⁸ Charles E. Egan, "War Criminals Must Take Stand," New York Times, July 14, 1945, p. 4.

At the end of July, it looked as if the negotiations would never end, and Jackson presented an ultimatum to the Four-Power Committee, stating that unless the deliberations were completed in a week, the United States would withdraw; giving the hint that his country might hold a trial of its own, as the major portion of the high Nazis were in American hands. The main stumbling block was Jackson's own insistence upon the points that aggressive war be designated as a crime and that the code drafted by the Committee define aggressive warfare. Perhaps, Russia was afraid that if this were included, her own aggressive action during the first Russo-Finnish War should be aired in international circles.⁵⁹

In addition to his ultimatum, Jackson visited Potsdam, the seat of a Big Three Conference, to present his views that the war crime negotiations had become too protracted.⁶⁰ The result was a joint statement issued by the Big Three which said:

The three Governments reaffirm their intention to bring these criminals to swift and sure justice. They hope that the negotiations in London will result in speedy agreement being reached for this purpose, and they regard it as a matter of great importance that the trial of those major criminals should begin at the earliest possible date. The first list of defendants will be published before September 1.⁶¹

⁵⁹ Charles E. Egan, "Jackson May Quit Over Lag in Trials," New York Times, July 31, 1945. p. 5.

⁶⁰ Clifton Daniel, "Big Three Aid on Trials Gained by Jackson," New York Times, August 3, 1945, p. 6.

⁶¹ New York Times, August 3, 1945, p. 8.

This declaration, as well as Jackson's ultimatum, speeded up the London negotiations, and the day following the Big Three statement it was announced that Nuremberg was to be the scene of the trial. It was to be held in the former German Palace of Justice, and the war criminals were to be held in the Nuremberg municipal jail during the trial.⁶² This city was selected as the site of the trial not only because it ranks high in the history of the Nazi Party, but more importantly because its court house was situated within a large compound, with tunnel connections between the prison and the scene of the trial.⁶³ Additional reasons arose from the fact that Nuremberg was in the American zone of occupation and many of the Nazi leaders had surrendered to American forces. In answering the queries of newspapermen, Jackson said: "The idea is not to put on a show but to hold a trial."⁶⁴

On August 8, the Agreement for the Establishment of an International Military Tribunal was published, together with the Charter of the International Military Tribunal. "It is no secret that this protocol represented in its major content the proposals put forward by Justice Jackson on behalf of the United States."⁶⁵

⁶² Ibid., August 4, 1945, p. 1.

⁶³ John H. Crider, "Americans Doubt Trials by September 1." New York Times, August 5, 1945, p. 12.

⁶⁴ New York Times, August 21, 1945, p. 11.

⁶⁵ Herbert Weschler, "The Issues of the Nuremberg Trial," Political Science Quarterly, LXII, p. 12.

The Agreement contained the following Articles:

- Article 1--There shall be established after consultation with the Control Council for Germany an International Military Tribunal for the trial of war criminals whose offenses have no particular geographical location whether they be accused individually or in their capacity as members of organizations or groups or in both capacities.
- Article 2--The constitution, jurisdiction and functions of the International Military Tribunal shall be those set out in the Charter annexed to this Agreement, which Charter shall form an integral part of this Agreement.
- Article 3--Each of the signatories shall take the necessary steps to make available for the investigation of the charges and trial the major war criminals detained by them who are to be tried by the International Military Tribunal. The signatories shall also use their best endeavors to make available for investigation of the charges against and the trial before the International Military Tribunal such of the major war criminals as are not in the territories of any of the signatories.
- Article 4--Nothing in this Agreement shall prejudice the provisions established by the Moscow Declaration concerning the return of war criminals to the countries where they committed their crimes.
- Article 5--Any Government of the United Nations may adhere to this Agreement by notice given through the diplomatic channel to the Government of the United Kingdom, who shall inform the other signatory and adhering Governments of each such adherence.
- Article 6--Nothing in this Agreement shall prejudice the jurisdiction or the powers of any national or occupation court established or to be

established in any Allied territory or in Germany for the trial of war criminals.

Article 7--This Agreement shall come into force on the day of signature and shall remain in force for the period of one year and shall continue thereafter, subject to the right of any signatory to give, through the diplomatic channel, one month's notice of intention to terminate it. Such termination shall not prejudice any proceedings already taken or any findings already made in pursuance of this Agreement.⁶⁶

Attached to the Agreement was the Charter of the International Military Tribunal. This Charter is divided into sections as follows:

I. Constitution of the International Military Tribunal

Article 1--. . . There shall be established an International Military Tribunal for the just and prompt trial and punishment of the major war criminals of the European Axis.

Article 2--The Tribunal shall consist of four members, each with an alternate. One member and one alternate shall be appointed by each of the signatories. The alternates shall, so far as they are able, be present at all sessions. . . . In case of illness of any member of the Tribunal or his incapacity for some other reason to fulfill his functions, his alternate shall take his place.

Article 3--Neither the Tribunal, its members or their alternates, can be challenged by the prosecution, or by the defendants or their counsel.

⁶⁶ Department of State, op. cit., p. 14.

Article 4--(a) The presence of all four members of the Tribunal or the alternate for any absent member shall be necessary to constitute the quorum.

(b) The members of the Tribunal shall . . . agree among themselves upon the selection from their number of a President. . . .

(c) . . . The Tribunal shall take decisions by a majority vote and in case the votes are evenly divided, the vote of the President shall be decisive; provided always that convictions and sentences shall only be imposed by affirmative votes of at least three members of the Tribunal.

Article 5--In case of need and depending on the number of the matters to be tried, other tribunals may be set up.

II. Jurisdiction and General Principles

Article 6--The Tribunal . . . shall have the power to try and punish persons who . . . committed any of the following crimes: (a) Crimes against peace. . . . (b) War crimes. . . . (c) Crimes against humanity. . . .

Article 7--The official position of defendants, whether as heads of state or responsible officials in government departments, shall not be considered as freeing them from responsibility or mitigating punishment.

Article 8--The fact that the defendant acted pursuant to order of his government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment. . . .

III. Committee for the Investigation and Prosecution of Major War Criminals

Article 14--Each signatory shall appoint a chief prosecutor. . . . The chief prosecutors shall act as a committee for the following purposes:

- (a) To agree upon a plan of each of the chief prosecutors and his staff,
- (b) To settle the final designation of major war criminals . . . ,
- (c) To approve the indictment . . . ,
- (d) To lodge the indictment . . . with the Tribunal,
- (e) To draw up and recommend to the Tribunal . . . rules of procedure.

Article 15--The chief prosecutors shall . . . also undertake the following duties:

- (a) Investigation, collection and production . . . of all necessary evidence,
 - (c) The preliminary examination of all necessary witnesses and of the defendants,
 - (d) To act as prosecutors at the trial.
- . . .

IV. Fair Trial for Defendants

Article 16--In order to ensure fair trial for the defendants the following procedure shall be followed:

- (a) The indictment shall include full particulars specifying in detail the charges against the defendants. . . .
- (b) During any preliminary examination or trial of a defendant he shall have the right to give any explanation relevant to the charges made against him.
- (c) A preliminary examination of a defendant and his trial shall be conducted in, or translated into, a language which the defendant understands.
- (d) A defendant shall have the right to conduct his own defense before the Tribunal or to have the assistance of counsel.
- (e) A defendant shall have the right through himself or through his counsel to present evidence at the trial in support of his defense, and to cross-examine any witness called by the prosecution.

V. Powers of the Tribunal and Conduct of the Trial

Article 17--The Tribunal shall have the power

- (a) to summon witnesses . . . ,
- (b) to interrogate any defendant,

- (c) To require the production of documents . . . ,
- (d) To administer oaths . . . ,
- (e) To appoint officers for the carrying out of any task. . . .

Article 18--The Tribunal shall

- (a) Confine the trial strictly to an expeditious hearing . . . ,
- (b) Take strict measures to prevent any action which will cause unreasonable delay. . . .

Article 19--The Tribunal shall not be bound by technical rules of evidence. . . .

Article 21--The Tribunal shall not require proof of facts of common knowledge.

Article 22--The permanent seat of the Tribunal shall be in Berlin. . . . The first trial shall be held at Nurnberg. . . .

Article 23--One or more of the chief prosecutors may take part in the prosecution of each trial.
. . .

Article 24--The proceedings at the trial shall take the following course:

- (a) The indictment shall be read in court.
- (b) The Tribunal shall ask each defendant whether he pleads "guilty" or "not guilty."
- (c) The prosecution shall make an opening statement.
- (d) The Tribunal shall ask the prosecution and the defense what evidence they wish to submit to the Tribunal, and the Tribunal shall rule upon the admissibility of any such evidence.
- (e) The witnesses for the prosecution shall be examined and after that the witnesses for the defense. . . .
- (f) The Tribunal may put any question to any witness and to any defendant at any time.
- (g) The prosecution and the defense shall interrogate and may cross-examine any witnesses and any defendant who gives testimony.

- (h) The defense shall address the court.
- (i) The prosecution shall address the court.
- (j) Each defendant may make a statement to the Tribunal.
- (k) The Tribunal shall deliver judgment and pronounce sentence.

Article 25--All official documents shall be produced, and all court proceedings conducted in English, French, and Russian, and in the language of the defendant. . . .

VI. Judgment and Sentence

Article 26--The judgment of the Tribunal as to the guilt or the innocence of any defendant shall give the reasons on which it is based, and shall be final and not subject to review.

Article 27--The Tribunal shall have the right to impose . . . death or such other punishment as shall be determined to be just.

Article 29--In case of guilt, sentence shall be carried out in accordance with the orders of the Control Council for Germany, which may at any time reduce or otherwise alter the sentences, but may not increase the severity. . . .⁶⁷

Thus the greatest obstacles toward trying the so-called war criminals were surmounted. While legal principles might be considered shaky, nevertheless the cooperation among the Big Four marked a great step forward in international collaboration. Speaking on this point, Jackson said that this was the first time that four nations with such different legal systems had tried to knit their ideas for a "just criminal procedure into a cooperative trial." This involved a merger of the

⁶⁷ Ibid., pp. 15-21.

continental and Anglo-American legal systems, but tended to follow more the continental pattern, since this was the one which Germany employed and understood.⁶⁸

Speaking of the right of the Big Four to try the Germans, Jackson said:

Experience has taught that we can hardly expect them to try each other. The scale of their attack leaves no neutrals in the world. We must summon all that we have of dispassionate judgment to the task of patiently and fairly presenting the record of these evil deeds in these trials. It must be made clear to Germans that the wrong for which their fallen leaders are on trial is not that they lost the war, but because they started it.⁶⁹

In the same document, Jackson made the following comment as to the precedent that was to be established:

We have taken an important step forward in this instrument in fixing individual responsibility of war mongering, among whatever peoples, as an international crime. We have taken another in recognizing an international accountability for persecutions, exterminations, and crimes against humanity when associated with attacks on the peace of the international order.⁷⁰

Thus, by the fall of 1945 certain matters had been agreed upon by the Four Powers. From 1939 to the formation of the International Military Tribunal in August, 1945, the trend of thought in the Allied world was overwhelmingly in favor of trying the Nazi leaders. While various Allied leaders had different

⁶⁸ United Nations Review, V, September 15, 1945, p. 224.

⁶⁹ Ibid., p. 224.

⁷⁰ Ibid., p. 224.

viewpoints as to the way in which the Nazis should be dealt with, they were of one voice in condemning Nazi atrocities, and for punishment at some future date. Benes, of Czechoslovakia, later supported by Great Britain, desired political punishment, while others such as Wold of Norway advocated the establishment of an international court for trying the Germans. The latter view became the view which the United States took and pushed vigorously.

It was determined that international law was to be utilized in the trials, as well as national law. This was first voiced by Bech of Luxembourg, then by Roosevelt, and finally in the Moscow Declaration. It was decided that those Nazis who had committed crimes in occupied countries, would be returned to the scene of the crimes and stand trial under the laws of those countries, while those guilty of crimes in no particular geographical location, would be tried by an international court.

As the war drew to a close, Robert H. Jackson was appointed as Chief Prosecutor for the United States, and with this appointment theories became realities. Under him the crimes with which the Nazis were charged were put on paper. He is credited with the first count--crimes against peace--and by this he meant to get at the Nazi master plan, and as such he charged the Nazi hierarchy with a conspiracy to wage a war of aggression in violation of international treaties. In this count a war

of aggression was defined. The British were more interested in the second count--war crimes--while the French and Russians pushed to the third--crimes against humanity.

Jackson's own insistence on the conspiracy charge almost resulted in a break-down of the negotiations, but his presentation of an ultimatum to the other Powers, in which he threatened American withdrawal, brought matters to a head. The reason for which the other three Powers gave in was simple--most of the high-ranking Nazis, as well as a preponderance of the documentary evidence was in American hands--therefore it would have been simple for the United States to hold a trial apart from the others.

The selection of Nuremberg as the seat of the trial was also Jacksonian. Good facilities and ideological associations, combined with the fact that Nuremberg was within American jurisdiction convinced him that this city was ideal as a setting for the trial. The other nations also gave in on this, and the plan came to fruition in August, 1945, when the Agreement Setting up an International Military Tribunal, with the attached Charter of the Tribunal, was proclaimed to the world.

CHAPTER III

THE LEGAL BASES FOR NUREMBERG

In accordance with Article 14 of the Charter of the International Military Tribunal, the four chief prosecutors, Jackson for the United States, Francois de Menthon for France, Sir Hartley Shawcross for Britain, and R. A. Rudenko for the Soviet Union, together with their staffs, met and drew up the Indictment against certain high-placed Germans.

The different attitudes of the Big Four were soon evident in the negotiations drawing up the Indictment--French logic and pettiness, British passion for law and order, Russian inscrutability, and American righteousness.¹ The Russians were vitally interested in the trial of militarists and industrialists. The French urged the trial of leading industrialists. The British were mainly interested in emphasizing broken treaties, while the Americans adhered to their plan of punishing those responsible for conspiracy to wage aggressive war. As a result of these differences, three indictments were drawn--one French, one British, and one American.

The American indictment with modifications was finally adopted. One agreement which made compromise possible was reached with Russia whereby two votes instead of three became

¹ E. O. Hauser, "Backstage Battle at Nuremberg," The Saturday Evening Post, January 19, 1946, p. 18. Sir Hartley Shawcross replaced Sir David Maxwell Fyfe because of the British Labor Party's gaining control of the British Government.

necessary to indict a particular German. The French employed dilatory tactics in the negotiations, throwing stumbling blocks in every path. This was particularly emphasized in the Krupp case, when it was found that Gustav Krupp von Bohlen und Halbach would be unable to stand trial, due to senile softening of the brain. The French suggested that Bertha Krupp, the real head of the family since Gustav took the name when marrying her, be indicted in his place. The Americans and Russians dissuaded the French as such action would probably shock world opinion. The French were satisfied when they obtained Russian and British assurances that a subsequent trial of German industrialists would be held.²

After much wrangling over the list of those to be tried, the chief prosecutors lodged the Indictment with the Tribunal on the 6th of October, 1945:

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

Against

Hermann Wilhelm Goring, Rudolf Hess, Joachim von Ribbentrop, Robert Ley, Wilhelm Keitel, Ernst Kaltenbrunner, Alfred Rosenberg, Hans Frank, Wilhelm Frick, Julius Streicher, Walter Funk, Hjalmar Schacht, Gustav Krupp von Bohlen und Halbach, Karl Doenitz, Erich Raeder, Baldur von Schirach, Fritz Sauckel, Alfred Jodl, Martin Bormann, Franz von Papen, Artur Seyss-Inquart, Albert Speer, Constantin von Neurath, and Hans Fritzsche, Individually and as members of any of

² Ibid., p. 138.

the following groups or Organizations to which They Respectively Belonged, namely: Die Reichsregierung (Reich Cabinet); Das Korps der Politischen Leiter der Nationalsozialistischen Deutschen Arbeiterpartei (Leadership Corps of the Nazi Party); Die Schutzstaffeln der Nationalsozialistischen Deutschen Arbeiterpartei (commonly known as the "SS") and including Die Sicherheitsdienst (commonly known as the "SD"); Die Geheimstaatspolizei (Secret State Police, commonly known as the "Gestapo"); Die Sturmabteilung der N. S. D. A. P. (commonly known as the "SA") and the General Staff and High Command of the German Armed Forces, Defendants.

. . .

So read the opening lines of the Indictment against the leaders and principal organizations of Nazi Germany who were to be tried at Nuremberg for crimes against peace, war crimes, crimes against humanity, and of a common plan or conspiracy to commit those crimes, all as defined in the Charter of the Tribunal.³

Let us now take up the counts of the Indictment one by one and determine if there is to be found in international law, as it existed before World War II, legal bases for these counts. This was not a primary task of the Tribunal for it was bound by the law as defined in the Charter.

Count one was concerned with the formulation or execution of a common plan or conspiracy to commit, or which involved

³ Department of State, Trial of War Criminals, pp. 23-4. In his report to President Truman of June 7, 1945, Jackson said that our (the American) case against the major defendants is concerned with the Nazi master plan, and not with individual barbarities and perversions which occurred independently of any central plan. Thus the conspiracy charge became count one of the Indictment.

the commission of, crimes against peace, war crimes, and crimes against humanity. As members or agencies of the Nazi Party, the defendants and organizations became a part of the conspiracy as the Party was the central core of the common plan.⁴

The carrying out of the master plan was accomplished in the following ways. (1) The acquisition of totalitarian control of Germany, both political and economic, was the first step in the achievement of the wholesale aggressions which came later. Such things as democratic representation in the Reichstag, free political parties, free educational system, freedom of speech and press, were abolished; and to see that they remained so, the Reichstag was reduced to impotence, the educational system was reshaped, the press was muzzled, and the formation of terrorist organizations was accomplished to make sure that Nazi rule was unquestioned. Along with this, anti-Semitism became the order of the day, with extermination of every Jew in Europe the ultimate goal. In order to gain economic ascendancy, labor unions were abolished, German business was mobilized for war, German rearmament was begun, and one defendant, Goering, and later Funk, was given autocratic control over German economy.⁵ (2) The utilization of all German power for foreign aggression then followed. Aggression was initiated by secret rearmament,

⁴ Ibid., pp. 25-6.

⁵ Ibid., pp. 27-31.

taking Germany out of the International Disarmament Conference and the League of Nations, and the remilitarization of the Rhineland, in violation of the Versailles Treaty and the Rhine Pact of Locarno, as well as of a statement of Hitler on May 21, 1935, that Versailles and Locarno would be respected. Then in March, 1938, Austria was invaded and annexed, followed by the seizure of a portion of Czechoslovakia in October, 1938, and the establishment of a Protectorate over the remainder in March, 1939. These aggressions were followed by war against Poland, the United Kingdom, France, Denmark, Norway, Belgium, the Netherlands, Luxembourg, Yugoslavia, and Greece from 1939 to 1941. Then on June 22, 1941, the Soviet Union was invaded in violation of a non-aggression pact, followed by collaboration with Italy and Japan to wage aggressive war against the United States in December, 1941.⁶ (3) The last part of the master plan involved a conspiracy for the accomplishment of crimes against humanity and war crimes in the course of the preparation for war and in the actual prosecution of the war, war crimes being committed not only against the armed forces of their enemies, but also against non-belligerent civilian populations.⁷

Jackson called count one the common plan as well as conspiracy, because under German law, the concept of conspiracy

⁶ Ibid., pp. 31-6.

⁷ Ibid., pp. 36-7.

implies a stealthy meeting in the dead of night, in a secluded hideout, in which a group of felons plot every detail of a specific crime. The Charter forestalls resort to such narrow concepts of conspiracy taken from local law by using the additional and non-technical term, "common plan." Omitting entirely the alternative term of "conspiracy" the Charter reads that "leaders, organizers, instigators, and accomplices participating in the formulation or execution of a common plan to commit" any of the described crimes, "are responsible for all acts performed by any persons in execution of such plan."⁸

A conspiracy may be defined as, "A combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means."⁹

According to Jackson:

The Charter concept of a common plan really represents the conspiracy principle in an international context. A common plan or conspiracy to seize the machinery of a state, to commit crimes against the peace of the world, to blot a race out of existence, to enslave millions, and to subjugate and loot whole nations cannot be thought of in the same terms as the plotting of

⁸ Robert H. Jackson, "Concluding Address," World Report, August 15, 1946, p. 38.

⁹ Walter A. Shumaker and George F. Longsdorf, The Cyclopedic Law Dictionary (Chicago: Callaghan and Company, 1912), p. 194.

petty crimes, although the underlying principles are applicable. Little gangsters may plan which will carry a pistol and which a stiletto, who will approach a victim from the front and who from behind, and where they will waylay him. But in planning a war, the pistol becomes a Wehrmacht, the stiletto a Luftwaffe. Where to strike is not a choice of dark alleys, but a matter of world geography. The operation involves the manipulation of public opinion, the law of the state, the police power, industry, and finance. The baits and bluffs must be translated into a nation's foreign policy.

Likewise, the degree of stealth which points to a guilty purpose in a conspiracy must depend upon its object. . . . But stealth is not an essential ingredient of such planning. Parts of the common plan may be proclaimed from the housetops, as anti-Semitism was, and parts of it kept undercover, as rearmament for a long time was. . . . The forms of this grand type of conspiracy are amorphous, the means are opportunistic, and neither can divert the law from getting at the substance of things.¹⁰

Very little criticism has been given to this first count, and eminent authorities have even supported it. Henry L. Stimson says that this count is the most realistic of them all, for the Nazi crime is in the end indivisible. Each of the numerous transgressions was an interlocking part of the whole gigantic barbarity. Basically, it is the three other counts that must be considered as the conspiracy charge is built upon them.¹¹

However, an opposite view of this charge is taken by Charles E. Wyzanski, Jr., Judge of the United States District

¹⁰ Jackson, op. cit., p. 38.

¹¹ Henry L. Stimson, "The Nuremberg Trial: Landmark in Law," Foreign Affairs, XXV, January, 1947, p. 181.

Court for Massachusetts, who thinks that count one means to establish some additional separate substantive offense of conspiracy, i.e. it asserts that there is in international law a wrong which consists in acting together for an unlawful end, and that he who joins in that action is liable not only for what he planned, or participated in, or could reasonably have foreseen would happen, but is liable for what every one of his fellows did in the course of the conspiracy. He bases this belief on the contention that almost as broad a doctrine of conspiracy exists in national law. But in transcribing it to the international legal picture, where is the treaty, the custom, the academic learning on which it is based? Was this not a type of "crime" first described and defined either in London or Nuremberg in the year 1945? He argues that aside from the fact that the notion is new, it is also fundamentally unjust. The crime of conspiracy was originally developed in England by the Court of Star Chamber on the theory that any unlicensed joint action of private persons was a threat to the public, and so if the action was in any part illegal it was all illegal. The similarities of the national law of conspiracy therefore seem out of place in considering for international purposes the effect of joint political action. In any government, there exists among high officials a working agreement which members of another group or political party could regard as a conspiracy,

and so any member of the party in power could be regarded as a part of the whole so-called "crime."¹²

Count two of the Indictment has been more seriously criticized than all other counts combined. The charge of crimes against peace has been the chief target of the majority of the critics of Nuremberg. All the defendants were charged with participating in the planning, preparation, initiation, and waging of wars of aggression, which were also wars in violation of international treaties, agreements, and assurances.¹³

According to Jackson, the crime of making unjustifiable war was the crime which comprehended all lesser crimes. In this, he refuted the beliefs of the nineteenth and early twentieth centuries which generally taught that war-making was not illegal. Summarized by a standard authority, the attitude was that both parties to war are regarded as being identical as to legal position, and consequently as being possessed of equal rights.¹⁴

This view, however, was rejected by Jackson, who returned to Grotius, the father of international law, for his basis. Grotius taught that there is a distinction between the just and the unjust war--the war of defense as opposed to the war of aggression. Writing in 1625, he said: ". . . Those who

¹² Charles E. Wyzanski, Jr., "Nuremberg--A Fair Trial?" The Atlantic, April, 1946, p. 69.

¹³ Department of State, op. cit., p. 37.

¹⁴ Ibid., p. 8.

join in a war that has been undertaken without cause worthy of approval draw upon themselves the desert of punishment, in a degree proportionate to the injustice which lies in their action."¹⁵

This idea of Grotius was more or less re-adopted after World War I when the thinking of the civilized world condemned war of aggression as criminal, and as a result several international agreements along this line came into being throughout the twenties. The Geneva Protocol of 1924 for the Pacific Settlement of International Disputes, signed by the delegates of forty-eight states but never formally ratified, asserted that "a war of aggression constitutes . . . an international crime."¹⁶ The Eighth Assembly of the League of Nations of 1927, by unanimous resolution of the forty-eight member states, including Germany, declared that a war of aggression constitutes an international crime.¹⁷ At the Sixth Pan-American Conference of 1928, the twenty-one American Republics unanimously adopted a resolution, which stipulated that a "war of aggression constitutes an international crime against the human species."¹⁸

¹⁵ Hugo Grotius, De Jure Belli ac Pacis (Oxford: Clarendon Press, 1925), II, p. 600.

¹⁶ Manley O. Hudson, International Legislation (Washington: Carnegie Endowment for International Peace, 1931), II, p. 1380.

¹⁷ Department of State, op. cit., p. 10.

¹⁸ Ibid., p. 10.

The final culmination of outlawing wars of aggression came in 1928, when representatives of fifteen nations, including Germany, Italy, and Japan, signed the Kellogg-Briand Peace Pact, otherwise known as the Pact of Paris. Ironically enough, Germany was the first state to sign the Pact, which was later adhered to by practically all states of the civilized world, with the exception of the Soviet Union. In the wording of the Pact we find that:

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

The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.¹⁹

The great hue and cry over Nuremberg has arisen because eminent authorities have charged that the Big Four made ex post facto law by the terms of the 1945 London agreement. Ex post facto legislation declares acts criminal which at the time of commission were innocent.²⁰ Such law is prohibited by our Constitution and all democratic constitutions, and therefore legalists abhor applying it to a conquered people. Ex

¹⁹ James Thayer Gerould, The Pact of Paris (New York: Wilson Company, 1929), I, p. 18. The Pact was finally embraced by sixty-three nations.

²⁰ Shumaker and Longsdorf, op. cit., p. 337.

post facto law is retroactive law. The question of the retroactivity of this count of the Indictment is becoming more and more academic, since foremost legal authorities can be found who defend it as being perfectly justified under existing international law, while other equally famous authorities regard it as a farce of legality.

The principal argument against count two is that the Paris Pact was binding, as is international law in general, upon states and not individuals, and therefore to apply its provisions to Goering, Hess, and the others is ridiculous. However to such men as Henry L. Stimson, former Secretary of State of the United States, the trial is a new judicial process, but it is not ex post facto law. It is the enforcement of a moral judgment dating back to the twenties. It represents a growth in the application of law that any student of the English common law should recognize as natural and proper, for it is just in this manner that the common law grew. All case law grows by new decisions, and where those new decisions match the conscience of the community, in this case the world community, they could certainly be considered legal. The charge that aggressive war is an international crime is unsound only if the family of nations does not believe that at the beginning of World War II it was illegal to wage such a war. To Stimson, the judgment of Nuremberg reaches at the very core of international strife, because a penalty is not merely set for the commission

of war crimes, but for the very act of war itself, except in the case of self-defense.²¹

Sheldon Glueck, Professor of Criminal Law and Criminology at Harvard University, goes into the wording of the Paris Pact as a proof that it was binding on individuals. He defines the word "condemn" in Article I as denoting a strong moral judgment of disapprobation, and therefore the application of penal sanctions was perfectly justified. He further points out that the most effective recourse is not at all to be found against recalcitrant states, but rather in the prosecution and punishment of individuals, i. e. parties of a government and heads of armed forces who have caused their states ruthlessly to trample upon all law in their lust of conquest and aggression. We do not agree that when the parties to the treaty agreed to name aggressive war as illegal, it necessarily follows that its violation constitutes an international crime. An international contract cannot be classed as a penal statute and the remedy for breach of said contract does not consist of prosecution and punishment of those guilty, but rather of obtaining recompense for its breach. However, such means had been proved ineffective in dealing with Germany after World War I, and since her actions were so much worse in World War II, some

²¹ Stimson, op. cit., p. 185.

other method would have to be found to assure a just redress of grievances; therefore the suggestion of Glueck to deal with individuals of the state instead of the state itself.²²

The best argument against this count maintains that there was no international criminal code as a basis for bringing the Nazis to trial, or an international criminal court before which to try them.²³ Opponents of count two can certainly argue correctly that the criminal code was drafted and the Tribunal established in 1945, and then individuals were brought before the court for committing acts designated as crimes in the Charter, whose criminality at the time of commission is questionable. As to the makeup of the court, it was composed entirely of victorious enemies of Germany. Not a neutral nor a German judge was among the group, and therefore the whole judicial process has the odor of the ancient rule that vanquished are at the mercy of the victors.

There is even doubt as to the sincerity of the United Nations in holding that all wars of aggression are crimes. Here could be cited the Russian attacks on Finland and Poland in 1939, and the American encouragement given to Russia to break off relations with Japan, and subsequently enter that

²² Sheldon Glueck, The Nuremberg Trial and Aggressive War, (New York: Knopf, 1946), pp. 18-23.

²³ Glueck, War Criminals: Their Prosecution and Punishment, p. 93.

war on our side.

A good proof that the Kellogg Pact was inadequate as a basis for the Nuremberg trial is found in the words of Kellogg himself, who gave his name to the treaty. He did not believe its violation to be criminal as well as illegal; he left to the sovereign state the right to determine its own guilt or innocence when charged with violating the treaty:

There is nothing in the American draft . . . which restricts or impairs in any way the right of self-defense. That right is inherent in every sovereign state and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion, and it alone is competent to decide whether circumstances require recourse to war in self-defense. . . .²⁴

While the claim that Germany waged a war of self-defense was rather dubious, still the right of sovereignty gave to the state an amoral position, in which national honor and vital interests were predominant over a condemnation of aggressive war. Germany could argue that the United States by Lend-Lease aid to Britain prior to December, 1941, was waging an aggressive war against her. So much of the basis of this charge is hypocritical when considering what both sides in the recent conflict have done.

So the question remains--may aggressive war rightly be termed an international crime, and is it wise and legal to

²⁴ Glueck, The Nuremberg Trial and Aggressive War, p. 20.

prosecute members of a state's government when that government makes aggressive war? It is up to the reader to decide for himself.

In Appendix C of the Indictment, in addition to the international agreements aforementioned, there is a list of treaties and agreements to which Germany was a party, and which she was charged with violating, with particulars of violation in each case. Following are a few of the violated agreements: Hague Conventions of 1899 and 1907 for the Pacific Settlement of International Disputes, Treaty of Versailles, Treaty of Berlin of 1921, Locarno Pacts of 1925, Polish-German Non-Aggression Treaty of 1934, agreements between Germany and Austria, Luxembourg, Belgium, the Netherlands, Czechoslovakia, Yugoslavia, from 1935 to 1939, Munich Agreement of 1938, and the German-USSR Treaty of Non-Aggression of 1939.²⁵

Count three was the war crimes charge as set down in Article 6b of the Charter:

Namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.²⁶

²⁵ Department of State, op. cit., pp. 82-9.

²⁶ Ibid., p. 16.

Manfred Lachs of the Polish bar defines a war crime as follows:

A war crime is any act of violence, qualified as crime committed during and in connection with a war under specially favourable conditions created by the war and facilitating its commission; the act being directed against the other belligerent state, or its interests; against its citizens or their interests; against a neutral state, its interests, its citizens, or their interests, as well as against stateless individuals or their interests.²⁷

Taking each of the charges named in the Charter under war crimes separately, the Indictment cites various incidents which were gross violations of the law of war. Under murder and ill-treatment of civilian populations in occupied territory, many specific cases are named, with much documentary evidence to support the charges, which are shocking in the twentieth century. The murders and ill-treatment were carried out by divers means, including shooting, hanging, gassing, starvation, gross-overcrowding in prisons, systematic under-nutrition, brutality, and torture of all kinds. The defendants interfered with religious services, persecuted members of the clergy and monastic orders, and expropriated church property. Deliberate and systematic genocide, i. e. the extermination of certain racial and national groups, was carried out in certain occupied territories, especially among Jews, Poles, and Gypsies.

²⁷ Manfred Lachs, War Crimes (London: Stevens and Sons, 1945), p. 100.

Civilians were systematically subjected to tortures of all kinds, with the object of obtaining information. Many were subjected to "protective arrests" whereby they were seized and imprisoned without a trial and without ordinary protection of the law.

In the concentration camps there were many prisoners who were classified "Nacht und Nebel." These persons were cut off entirely from the outside world; they disappeared without any trace and no announcement of their fate was ever made by German authorities.²⁸

Such murders and ill-treatment were contrary to established international law, particularly Article 46 of Hague Convention IV of 1907, respecting the laws and customs of land warfare: "Family honor and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected."²⁹ Not only this Convention, but the general principles of criminal law as found in all civilized states were violated as well, not to mention the military code books of the various states.³⁰

²⁸ Department of State, op. cit., p. 39.

²⁹ James Brown Scott, Ed., The Hague Conventions and Declarations of 1899 and 1907 (New York: Oxford Press, 1915), p. 123.

³⁰ Department of State, op. cit., p. 39.

Under the deportation for slave labor of civilian populations, the same Article 46 was invoked as a basis for the charge, and numerous instances were cited, of French, Danish, Belgian, Dutch, Russian, Yugoslav, and Czechoslovak persons who were deported from their homes to work in Germany or in defense works, factories, and in other tasks connected with the German war effort.³¹

The next charge was the murder and ill-treatment of prisoners of war, and of other members of the armed forces of the countries with whom Germany was at war, and of persons on the high seas. The defendants were charged with carrying out these crimes by denying the prisoners adequate food, shelter, clothing, and medical care and attention; by forcing them to labor in inhumane conditions; by torturing them and subjecting them to inhuman indignities and by killing them. Members of the armed forces of the countries with which Germany was at war were frequently murdered while in the act of surrendering.³²

These acts were contrary to Articles 4, 5, 6, and 7 of Hague Convention IV, and of Articles 2, 3, 4, and 6 of the Geneva Prisoners of War Convention of 1929.

³¹ Ibid., pp. 46-7.

³² Ibid., p. 48.

Hague Convention IV, Chapter II: Prisoners of War:

Article 4: Prisoners of war are in the power of the hostile Government, but not of the individuals or corps who capture them. They must be humanely treated. All their personal belongings, except arms, horses, and military papers, remain their property.

Article 5: Prisoners of war may be interned in a town, fortress, camp, or other place, and bound not to go beyond certain fixed limits; but they can not be confined except as in indispensable measure of safety and only while the circumstances which necessitate the measures continue to exist.

Article 6: The State may utilize the labor of prisoners of war according to their rank or aptitude, officers excepted. The tasks shall not be excessive and shall have no connection with the operations of the war. (Rather archaic with our "total war" of today)

Article 7: The Government into whose hands prisoners of war have fallen is charged with their maintenance. In the absence of a special agreement between the belligerents, prisoners of war shall be treated as regards board, lodging, and clothing on the same footing as the troops of the Government who captured them.³³

Geneva Convention of 1929:

Article 2: . . . The wounded and sick of an army who fall into the hands of the enemy shall be prisoners of war, and the general provisions of international law concerning prisoners of war shall be applicable to them. . . .

³³ Scott, op. cit., pp. 108-10.

Article 3: After each engagement the occupant of the field of battle shall take measures to search for the wounded and dead, and to protect them against pillage and maltreatment. Whenever circumstances permit, a local armistice or a suspension of fire shall be arranged to permit the removal of the wounded remaining behind the lines.

Article 4: Belligerents shall communicate to each other reciprocally, as soon as possible, the names of the wounded, sick, and dead, collected or discovered, together with any indications which may assist in their identification. They shall establish and transmit to each other the certificates of death. . . .

Article 6: Mobile medical formations, that is to say, those which are intended to accompany armies in the field, and the fixed establishments of the medical service shall be respected and protected by the belligerents.³⁴

Much documentary proof also accompanied these accusations. Americans were particularly interested in these charges since they involved those American prisoners, officers and men, who were murdered in Normandy in the summer of 1944, and in the Ardennes in December 1944, as well as ill-treatment in various German Stalags.³⁵

Throughout the occupied territories the German armed forces adopted and put into effect on a wide scale the practices of taking, and of killing hostages from the civilian populations.

³⁴ Hudson, op. cit., V, pp. 6-7.

³⁵ Department of State, op. cit., p. 49.

These acts were in contravention of Article 50 of Hague Convention IV which stipulated: "No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they can not be regarded as jointly and severally responsible."³⁶

The next charge under the war crimes count was the plunder of public and private property. The Germans, by documentary proof, were shown to have ruthlessly exploited the people and the material resources of the countries they occupied, in order to strengthen the Nazi war machine, depopulate and impoverish the rest of Europe, to enrich themselves and their adherents, and to promote German economic supremacy over Europe.³⁷ These actions violated Articles 46 to 56 inclusive of Hague Convention IV, a brief summary of which follows:

Article 46: . . . Private property must be respected . . . and can not be confiscated.

Article 47: Pillage is formally forbidden.

Article 48: If . . . the occupant collects the taxes, dues, and tolls imposed for the benefit of the State, he shall do so . . . in accordance with the rules of assessment and incidence in force. . . .

Article 49: If, in addition to the taxes . . . the occupant levies other money contributions . . . this shall only be for the needs of the army or administration of the territory in question.

³⁶ Scott, op. cit. p. 124.

³⁷ Department of State, op. cit., p. 50.

- Article 51: No contribution shall be collected except under a written order, and on the responsibility of the commander-in chief. . . .
- Article 52: Requisitions . . . shall not be demanded . . . except for the needs of the army of occupation. . . .
- Article 53: An army of occupation can only take possession of . . . the property of the State . . . and generally, all movable property. . . .
- Article 54: Submarine cables . . . shall not be seized or destroyed except in the case of absolute necessity. . . .
- Article 55: The occupying State shall be regarded only as administrator of State properties . . . and to administer them in accordance with the rules of usufruct.
- Article 56: The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences . . . shall be treated as private property. All seizure of, destruction . . . done to . . . historic monuments, works of art and science, is forbidden. . . .³⁸

Numerous cases of the theft of works of art, the wholesale destruction of historic shrines, especially in the Soviet Union, looting of banks in occupied countries, etc., were set down. The exaction of collective penalties, in violation of Article 50 of the Fourth Hague Convention, especially of a pecuniary nature on the Jews, made up the next charge. Wanton destruction of cities, towns, and villages, not justified by military necessity, and the conscription of civilian labor

³⁸ Scott, op. cit., pp. 123-7.

made up the next two charges under war crimes. Various instances were cited, violations of Articles 46, 50 and 52 of the same Convention, before listed in this paper. Under these charges came the famous example of the destruction of Lidice, Czechoslovakia.³⁹

The last two charges involved the forcing of civilians of occupied territories to swear allegiance to Germany, and the Germanization of such territories. Districts so treated included Alsace-Lorraine, Belgium, Denmark, Holland, Norway, and parts of the Soviet Union. Such actions violated Articles 45 on the first charge, and 43, 46, 55, and 56 of the second. Some of these Articles have before been stated, and following is a summary of those not so treated:

Article 45: It is forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile Power.

Article 43: The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore . . . public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.⁴⁰

Very little, if any opposition has arisen to the count involving war crimes. Existing international law, as well as

³⁹ Department of State, op. cit., pp. 55-7.

⁴⁰ Scott, op. cit., p. 123.

the general principles of criminal law makes these charges legal in the eyes of the world. The only contradiction which might be cited is the fact that Allied persons committing like crimes against the Germans go unpunished.

Count four, fostered by Russia and France, involved the murder and persecution of all who were or were suspected of being hostile to the Nazi Party and all who were or were suspected of being opposed to the common plan referred to in count one.⁴¹ In the Charter, crimes against humanity were defined as being murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population, before or during the war, or persecution on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.⁴² These methods and crimes constituted violations of conventions, of internal penal laws, of the general principles of criminal law as derived from the criminal law of all civilized nations, and were involved in and part of a systematic course of conduct.⁴³

⁴¹ Department of State, op. cit., p. 60.

⁴² Ibid., p. 16.

⁴³ Ibid., p. 60. As in count three, numerous instances of violations are enumerated. Wholesale exterminations of a race, classed as the crime of genocide, are related, such as the killing of 60,000 Jews on the Dvina near Riga, countless other thousands in Russia, the Baltic region, and the west.

The only serious objection to this count arose over the fact that Jackson had in mind, the punishment of the defendants for crimes committed in Germany by Germans against other Germans before the beginning of the war, e. g. the German Jews, etc. Many objected to this broad interpretation, and Richard Law, British Minister of State, made the following comment in the House of Commons on April 18, 1945: "Crimes committed by Germans against other Germans are in a different category of war crimes and cannot be dealt with under the same procedure."⁴⁴ This was the view that many Allied leaders took, and fortunately for the good opinion of the world, the charge of crimes against humanity was limited by the Tribunal to include only activities pursued in connection with the crime of war. The question of the criminal accountability of those responsible for wholesale persecution before the outbreak of war in 1939 was eliminated from the jurisdiction of the Tribunal, the effect being a reduction of the meaning of crimes against humanity to a point where they become practically synonymous with war crimes.⁴⁵

As regards legality of this count, there is adequate legal basis for the prosecution of the defendants by an international tribunal. Murders and other crimes committed were criminal under the law of all civilized states, including the

⁴⁴ United Nations Review: War and Peace Aims, VI, October 15, 1945, p. 17.

⁴⁵ Stimson, op. cit., p. 187.

law of Germany. One writer put it this way, that principles of criminal law generally accepted among the various states are a proper source of international law. As there is no properly constituted German government at present, it is perfectly justifiable under international law that the occupying powers administer the law of the land, and punish violators of that law. These defendants have committed crimes against German law, for which they were not prosecuted prior to the occupation, and are therefore subject to prosecution now.⁴⁶

Count four has come in for very little criticism in this country, perhaps because this charge was not of primary concern to the American prosecutor. The only serious objection to the findings of the Tribunal on this count have been that officials of certain Allied Powers are guilty of the same charges, and therefore the odor of hypocrisy is rank.

Two matters which did not develop into obstacles in the trial were those questions involving the claim of immunity for heads of states and the defense of superior orders. These doctrines had long been established, and probably arose from the doctrine of the divine right of kings. In dealing with the first, Jackson said that we would not accept the paradox that legal responsibility should be the least where power was the greatest, and cited as an example the opinion of Lord Chief

⁴⁶ Herman Phleger, "Nuremberg--A Fair Trial," The Atlantic, April, 1946, pp. 64-5.

Justice Coke who said to King James of England that even a King is still under God and the law.

With the doctrine of the immunity of the head of a state usually is coupled another, that orders from a superior protect those who obey them. The combination of these two doctrines could mean the responsibility of no one.⁴⁷ As a result of this belief, the Charter contained the following provisions:

The official position of defendants, whether as heads of state or responsible officials in government departments, shall not be considered as freeing them from responsibility or mitigating punishment. 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 if the Tribunal determines that justice so requires.⁴⁸

Very little criticism has arisen over this portion of the Charter and after World War I the Commission on Responsibility drew up a very similar conclusion: "All persons belonging to enemy countries, however high their position may have been, without distinction of rank, including Chiefs of States, who have been guilty of offences against the laws and customs of war or the laws of humanity are liable to criminal prosecution."⁴⁹

A queer twist given to this was the fact that in 1919 the American members of the Commission insisted that heads of

⁴⁷ Department of State, op. cit., p. 3.

⁴⁸ Ibid., p. 17.

⁴⁹ American Journal of International Law, XIV, 1920, p. 117.

state exercising sovereign rights are responsible to those alone who have confided such rights to them by either expressed or implied consent.⁵⁰ Thus Jackson refuted the official American position of 1919 and adopted the view set down by the Commission as a whole, which was predominantly European in its origin.

This view has not been seriously challenged by the International lawyers or publicists. Glueck is of the opinion that if a doctrine so contrary to reason and justice has indeed been accepted as unconditionally valid international law, it is high time that such an error were remedied.⁵¹ Quincy Wright is of a like opinion, believing that the act of state contrary to law is not to be considered its acts but acts of the individuals committing them.⁵² This is a clear indication of a desire to renounce the idea of absolute state sovereignty and is a movement in the direction of world government.

Appendix A of the Indictment is a statement of the individual responsibility of each defendant on trial. Goering was charged with all four counts of the Indictment, as were Ribbentrop, Hess, Rosenberg, Frick, Sauckel, Speer, Funk, von Papen, von Neurath, Seyss-Inquart, Keitel, Jodl, and Krupp. The special role of Goering in the economic pattern was emphasized, par-

⁵⁰ Quincy Wright, "War Criminals," American Journal of International Law, XXXIX, April, 1945, pp. 267-8.

⁵¹ Glueck, The Nuremberg Trial and Aggressive War, p. 58.

⁵² Wright, op. cit., p. 269.

ticularly as head of the Hermann Goering Industrial Combine. The main portion of Ribbentrop's responsibility lay in the realm of foreign affairs. The role of Hess was that of a psychological nature, because of his personal influence and his intimate connection with Hitler. Rosenberg's responsibility centered in the fact that he was the father of the entire spiritual and ideological training of the Nazi Party, its philosopher. Frick was hailed particularly for his part in crimes against persons in the occupied territories; Sauckel for forcing inhabitants of occupied countries to work as slave laborers; and Funk for the economic exploitation of the occupied states. The emphasis on Speer, Keitel, and Jodl lay in their actions arising out of the war, particularly counts three and four, involving the ill-treatment of prisoners of war and of the civilian populations of occupied countries. Seyss-Inquart's part in the betrayal of Austria was set down, as were his crimes in the occupied countries, while the part of Krupp was his industrial aid to the Nazis and the abuse of human beings for labor in his plants.

Kaltenbrunner was arraigned on counts one, three, and four, with particular emphasis on his crimes under count four involved in the system of concentration camps. Frank was hailed on counts, one, three, and four, with his part in the administration of the occupied territories playing a predominant part. Bormann, tried in absentia, was also charged under the above

three counts, as was Ley, with emphasis in his case being placed on counts three and four relating to the abuse of human beings for labor. Raeder and Doenitz were charged with counts one, two, and three, with their part for crimes arising out of sea warfare being prominent. The part of Fritzsche, arraigned under counts one, three, and four, was set down particularly as being the Reich Minister of Propaganda and head of DNB, and for anti-Jewish measures and the ruthless exploitations of the occupied territories. Schacht was hailed before the Tribunal on counts one, and two, with emphasis on his part in financially aiding the Nazis. Schirach was charged with counts one and four, particularly anti-Jewish measures under four; and Streicher also on counts one and four, with emphasis being placed on the inditement to persecution of the Jews.⁵³

Appendix B of the Indictment was concerned with the criminality of certain German groups and organizations--the Reich Cabinet, Leadership Corps of the Nazi Party, SS including the SD, Gestapo, SA, and the General Staff and High Command of the German Armed Forces. These organizations were arraigned on all four counts of the Indictment. If the Tribunal found the organizations to be criminal, charges could be brought against individual members, with their subsequent trials.⁵⁴

⁵³ Department of State, op. cit., pp. 65-76.

⁵⁴ Ibid., pp. 78-81.

The defendants at Nuremberg were parties to one of the greatest organized tragedies that the world has ever seen--tragedy from the standpoint of what happened to countless millions of people and waste in material and human resources. There were three different avenues opened to the United Nations when the defendants were captured--release, summary punishment, or trial. The common voice of humanity would have prohibited release. Doubtless wide-spread, popular violence would have been inflicted upon the leading Nazis and many lesser ones had this course been followed. Summary punishment had too much of the odor of the Nazi brand of justice. Executive action such as used in banishing Napoleon Bonaparte to St. Helena, as has been said above, was advocated by certain Englishmen. A trial, such as that held at Nuremberg was a fairer decision from the standpoint of the defendants and can be of use in building law and order in the future.

In this connection a statement of Elliott Roosevelt in As He Saw It has interest. Roosevelt claims that in a toast at Teheran on the subject of the Nazi leaders, Stalin said: "I propose a salute to the swiftest possible justice for all Germany's war criminals--justice before a firing squad. I drink to our unity in dispatching them as fast as we capture them, all of them, and there must be at least fifty thousand of them." According to Roosevelt, Churchill in agitation rose and said: "Any such attitude is wholly contrary to our British sense of justice! The British people will never stand

for such mass murder. I take this opportunity to say that I feel most strongly that no one, Nazi or no, shall be summarily dealt with, before a firing squad, without proper legal trial, no matter what the known facts and proven evidence against him!"⁵⁵

For a trial to be fair and just three things are necessary: (1) the defendant must be charged with a punishable crime; (2) he must have full opportunity for defense; and (3) he must be judged on the evidence by a properly prescribed judicial body. We have shown that law existed to punish war crimes and crimes against humanity. We have summarized the argument that a crystallized world opinion supported the contention that the making of aggressive war is an international crime.

The second requirement is that the defendant must have adequate opportunities for defense. In this, the Tribunal leaned over backwards to be fair. Each defendant was allowed to testify for himself, a right denied by Continental law, hence German law. At the end of the trial, each defendant was allowed to address the Tribunal at length--a thing denied by Anglo-American law. Counsel were paid, fed, sheltered, and transported at the expense of the United Nations, and were furnished office space and clerical assistance. The defense had full access to all documents, with every attempt made to produce desired witnesses when the Tribunal believed their

⁵⁵ Elliott Roosevelt, As He Saw It (New York: Duell, Sloan, and Pearce, 1946), pp. 188-9.

testimony to be relevant. In summing up the case the defense had twenty days and the prosecution three. Thus every effort was made by the Tribunal to be fair.

As regards the third requirement of fair judgment by the evidence produced, the Tribunal found only eight defendants guilty of count one. As regards count two, only in the case of Hess, sentenced to life imprisonment, is the punishment of any defendant based solely on the count of aggressive war. All of those receiving a capital sentence were convicted of war crimes or crimes against humanity, and thus no innocent lives were lost on the charge that aggressive war has not been established as criminal in international law. The fact that there were three acquittals--Schacht, von Papen, and Fritzsche--shows that the Tribunal did not believe in the Russian conception of a trial--merely a sentencing procedure.⁵⁶

Opponents of the Nuremberg trial can advance a strong case also. As regards the first requirement of a just trial, this group argues that Nuremberg was an ill-starred attempt to handle judicially a matter that was essentially non-justiciable.⁵⁷ Charges of making aggressive war and conspiracy were crimes set down at London in 1945, and applied retroactively to the defendants, not by the states of the world in agreement,

⁵⁶ Stimson, op. cit., pp. 179-88.

⁵⁷ "The Nuremberg Confusion," Fortune, December, 1946, p. 120.

but by four victorious allies, imposing their will on a vanquished people. Even the Charter which defined the crimes was not a treaty--the principal source of international law--in the United States, but merely an executive agreement, prescribed to meet an emergency quickly and effectively. As proof of the contention regarding the legality of the trial, this group gave the Moscow Declaration, which said that these men would be punished--not tried, but punished--and the method was to be determined by a joint decision of the governments in the coalition. They argue too, that there is no customary criminal law, as Stimson suggests. True, aggressive warfare was condemned, but never did the statesmen who after World War I so often talked about it provide for the trial of those suspected of conspiracy or the planning of such war, or the punishment of those convicted of waging it, i. e. no international criminal code existed. Aggression, as Jackson admitted, was not previously treated as a crime for which an individual who was the head of a state could be given specified punishment. As regards war crimes and crimes against humanity, the argument is that many things classed as crimes under certain international documents are outmoded because of modern technological developments and the conception of "total war," as Goering maintained in his defense. Stimson, himself, says that America employed unrestricted submarine warfare against the Japanese--the main

reason for our entry into World War I. An argument that the use of the atomic bomb against Japanese civilians was the greatest crime against humanity that has been committed could be sustained.⁵⁸

In the name of count four, the Indictment charged the Germans with exploiting occupied territories and of mistreating the civilian population. But even since the close of World War II the so-called "liberators" of Europe have caused needless distress along economic lines among local populations. The Nuremberg judgment "convicted" the vanquished of deporting civilian populations and employing slave labor, yet one of the victors engages in this hateful practice. The vanquished were charged with keeping political opponents in concentration camps, but in the vast camps of the USSR today, are confined many a former leader of a liberated territory whose only crime was political opposition to Stalin. The vanquished were charged with requisitioning property and of letting their armies live off occupied areas, but in Eastern Europe, one victor proceeds in the same manner. Where is the law? It seems that the Big Four were applying a double standard in dealing with a defeated power. Woe to the Vanquished!

To the claim that the Nazis had adequate means of defense, critics say the Nazi leaders, in the eyes of the United Nations,

⁵⁸ Stimson, op. cit., p. 189.

were already condemned criminals, and therefore nothing said or shown in their defense would have any meaning.

As regards the third step of fair judgment, the defendants must be tried before a properly constituted authority. Antagonists pounce upon this and challenge the competence of the court. The Tribunal was composed of four judges from four states--late enemies of Germany--and there was not a neutral nor a German judge connected in any way with the Tribunal. What ruled in these matters was not international law but international politics, and a victor could dispense anything from mercy to vindictiveness; the only thing that a victor cannot give is justice, as the judge at a fair trial is subject to the same law as the accused. Law can inspire justice but overwhelming power cannot.⁵⁹

What may we safely conclude? One authority argues for the trial and another equally good authority argues against it. Convincing proof is produced for the legality of Nuremberg, while equally convincing proof for the illegal nature of the trial can be brought forth. Who knows what the effect of the Nuremberg trial can mean to the world in general and international law in particular? Will it be the cornerstone of world peace? Will the man who make or plans to make aggressive warfare be

⁵⁹ Fortune, op. cit., p. 256.

regarded as criminal? Will international law always be limited by international politics? Only future history holds the answers to these pressing problems of the present.

CHAPTER IV

NUREMBERG

On November 20, 1945, the Nuremberg Trial began. On October 1, 1946 the Opinion and Judgment of the Tribunal was rendered. The sessions were held in the Palace of Justice, which was largely intact and outside the devastated area of the city of Nuremberg.

The defendants were brought from the Nuremberg jail to the sessions by American military police, and seated in their box. Through a door opening directly on to the bench, the members of the Tribunal entered--the British member, President of the Tribunal, Sir Jeffrey Lawrence, and his alternate, Mr. Justice Birkett; the American member, Mr. Francis Biddle, and his alternate, Judge John J. Parker; the French member, M. Le Professeur Donnedieu de Vabres, and his alternate, M. Le Conseiller R. Falco; and the Russians, Major General I. T. Nikitchenko, and his alternate, Lieutenant Colonel A. F. Volchkov.

The Prosecution Counsel was made up of the following: for the United States, Justice Robert H. Jackson; for the United Kingdom, Attorney-General Sir Hartley Shawcross; for the French Republic, M. Francois de Menthon, and M. Auguste Champetier de Ribes; and for the Soviet Union, General R. A. Rudenko.¹

¹ Nazi Conspiracy and Aggression--Opinion and Judgment (Washington: United States Government Printing Office, 1947), p. v.

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

In accordance with Articles 16 and 23 of the Charter, attorneys were either chosen by the defendants themselves, or at their request were appointed by the Tribunal. In his absence counsel was appointed for Bormann, and lawyers were selected to represent the indicted groups or organizations. The trial was conducted in four languages--English, French, Russian, and German. Pleas of "Not guilty" were made by all the defendants present. The hearing of evidence and the speeches of counsel concluded on August 31, 1946.

Four hundred and three open sessions of the Tribunal were held. Thirty-three witnesses testified orally for the prosecution against the individual defendants, and sixty-one

witnesses, in addition to nineteen of the defendants, testified for the defense. A further one hundred and forty-three witnesses gave depositions for the defense.

The Tribunal appointed commissioners to hear evidence relating to the organizations, and one hundred and one witnesses were heard for the defense before these commissioners, and one thousand eight hundred and nine affidavits from other witnesses were submitted. Six reports were also submitted, summarizing the contents of a great number of further affidavits.

Thirty-eight thousand affidavits, signed by one hundred and fifty-five thousand people, were submitted on behalf of the political leaders, one hundred thirty-six thousand two hundred and thirteen on behalf of the SS, ten thousand on behalf of the SA, seven thousand on behalf of the SD, three thousand on behalf of the General Staff and OKW, and two thousand on behalf of the Gestapo. The Tribunal itself heard twenty-two witnesses for the organizations.

The documents tendered in evidence for the prosecution of the individual defendants and the organizations numbered several thousands. A complete stenographic record of everything said in court was made, as well as an electrical recording of all the proceedings. Copies of all the documents put in evidence by the prosecution were supplied to the defense in the German language. The applications made by the defendants for the production of witnesses and documents raised serious

problems in some instances, on account of the unsettled state of the country.

It was necessary to limit the number of witnesses called, in order to expedite the hearing in accordance with Article 18c of the Charter. The Tribunal, after examination, granted all those applications which in its opinion were relevant to the defense of any defendant or named group or organization, and were not cumulative. Facilities were provided for obtaining those witnesses and documents granted through the office of the General Secretary established by the Tribunal.

Much of the evidence presented to the Tribunal on behalf of the prosecution was of a documentary nature, captured by the Allied armies in German Army headquarters, government buildings, and elsewhere. Some of the documents were found in salt mines, buried in the ground, hidden behind false walls, and in other places which were thought to be safe from finding. The case, therefore, against the defendants rested in large measure on German documents, the authenticity of which was not even challenged except in two cases.²

The opening statement for the prosecution was made by Justice Jackson, who declared that if the defendants were the first war leaders to be prosecuted in the name of law, they were also the first to be given a chance to plead for their

² Ibid., pp. 2-3.

lives in the name of the law. He asked for convictions only when the crime was proved, and not only on the testimony of foes. No count of the indictment that could not be proved by books, records, films, and other proof which the Germans themselves made, was to be considered. He further stated that it was not the purpose of the trial to incriminate the whole German people, as it was realized that the Nazi Party, the central core of the aggressive actions, did not represent a majority of the German people.³

And now let us turn to the findings of the Tribunal as set down in the Judgment and Opinion of that body. The Tribunal declared that Article 6 of the Charter contained the law to be applied in the case.⁴ As to counts one and two, the Judgment stated that it would be convenient to consider the question of the existence of a common plan and the question of aggressive war together. War was declared to be an essentially evil thing, and therefore to initiate a war of aggression was not only an international crime; it was the supreme international crime differing only from other war crimes in that it contained within itself the accumulated evil of the whole.

The first acts of aggression referred to were the seizure of Austria and Czechoslovakia, and the first war of aggression

³ Robert H. Jackson, The Case Against the Nazi War Criminals (New York: Knopf, 1946), pp. 8-9.

⁴ Nazi Conspiracy and Aggression--Judgment and Opinion, op. cit., p. 4.

was the Polish War begun on September 1, 1939. Before examining these charges it was necessary to look at some of the events preceding these acts. The war against Poland did not suddenly come out of a clear sky. The evidence presented made it clear that this, as well as the Austrian and Czech seizures, was premeditated and carefully planned, and was not undertaken until the opportune moment for it to be carried through according to plan. The aggressive designs of Nazi Germany were not accidents arising out of the immediate political situation in Europe and the world--they were an essential part of Nazi foreign policy.

From the beginning, the Nazis had claimed that their object was to unite Germany in the consciousness of its mission and destiny. For this achievement, two things were deemed essential: (1) the disruption of the European order as it had existed since the Versailles Treaty, and (2) the creation of a Greater Germany beyond the frontiers of 1914, which necessarily involved the seizure of foreign territory. In Mein Kampf, this view was made quite clear by Hitler. Over and over, Hitler asserted his belief in force as the only means of solving international questions. The first page of the book asserts that German-Austria must be restored to Germany not on economic grounds, but because people of the same race should be under the same government. As to territory not racially German, Hitler looked toward the east as a means of gaining "Lebensraum,"

and on this, Mein Kampf was quite explicit, stating that only in Russia and the bordering states could Germany's territorial appetite be satisfied.⁵

Evidence from captured documents revealed that Hitler held four secret meetings to which the Tribunal made specific reference because of the light they shed upon the questions of the common plan and aggressive war. These meetings were held on November 5, 1937; May 23, 1939; August 22, 1939; and November 23, 1939. At these meetings important declarations were made by Hitler as to his purposes, which were quite unmistakable. These documents have been subjected to criticism at the hands of the defending counsel; their essential authenticity was not denied, but it was said that they were not verbatim transcripts of the speeches they purported to record. Making the fullest allowance for criticism of this kind, the Tribunal was of the opinion that the documents were of the highest value, and that their authenticity and substantial truth were established. The documents were concerned with plans for action against Austria, Czechoslovakia, and Poland, and showed premeditated preparation, the only questions were as to the opportune times. The meeting of November 5, 1937, was attended by Lieutenant Colonel Hossbach, Hitler's personal adjutant, who compiled a long list of the proceedings, which

⁵ Ibid., pp. 16-7.

he dated November 10, 1937, and signed. This document showed plainly the intention to seize Austria and Czechoslovakia.

The meeting of May 23, 1939, was concerned with Hitler's decision to attack Poland in violation of the Arbitration Treaty of 1925 and the Non-Aggression Treaty of 1934, and repeated assurances of friendship by Hitler and other Germans. Among the persons present at this conference were Goering, Raeder, and Keitel. The adjutant on duty that day was Lieutenant Colonel Schmundt, and he made a record of what happened, certifying it with his signature. In this document, Hitler said: "There is therefore no question of sparing Poland, and we are left with the decision to attack Poland at the first suitable opportunity. We cannot expect repetition of the Czech affair. There will be war. Our task is to isolate Poland. The success of the isolation will be decisive. . . . The isolation of Poland is a matter of skillful politics."

The two documents of August 22, 1939, further showed the planning for aggressive war. One is called "The Fuehrer's Speech to the Commanders in Chief on the 22nd August 1939 . . ." and was for the purpose of announcing the decision to make war on Poland at once. The other document is headed, "Second Speech by the Fuehrer on the 22nd August 1939," and it was in the form of notes on the main points made by Hitler. In spite of its being described as a second speech, there is enough similarity between the two to make it appear very probable

that this was an account of the first speech. Both these documents were unsigned, and closely resembled one of the documents put in evidence on behalf of the defendant Raeder. This latter document consisted of a summary of the same speech, compiled on the day it was made by one Admiral Boehm, from notes he had taken during the meeting. In substance it said that the time had come to settle the Polish dispute by military invasion.

The document relating to November 23, 1939, contained a review of past events. Hitler informed his commanders that the purpose of the conference was to give them an idea of the world of his thoughts, and to tell them his decisions. He reviewed his political task since 1919, and referred to the secession of Germany from the League of Nations, the denunciation of the Disarmament Conference, the order for rearmament, the reintroduction of compulsory military service, the Rhineland occupation, the seizure of Austria and Czechoslovakia. He declared:

One year later, Austria came. . . .It brought about a considerable reinforcement of the Reich. The next step was Bohemia, Moravia, and Poland. . . .It was not possible to reach the goal in one effort. It was clear to me from the first moment that I could not be satisfied with the Sudeten German territory. That was only a partial solution. The decision to march into Bohemia was made. Then followed the erection of the Protectorate and with that the basis for the action against Poland was laid, but I wasn't quite clear at that time whether I should start first against the east and then in the west or vice versa. . . .Basically I did not organize the armed forces in order not to strike. The decision to strike was always

in me. Earlier or later I wanted to solve the problem. Under pressure it was decided that the east was to be attacked first.

This address, which reviewed past events and reaffirmed the aggressive intentions present from the beginning, together with the above mentioned documents, placed beyond any question of doubt the character of the actions against Austria and Czechoslovakia, and the war against Poland, for they had all been accomplished according to plan.⁶

In the opinion of the Tribunal, the events of the days immediately preceding September 1, 1939, demonstrated the determination of Hitler and his associates to carry out the declared intention of invading Poland at all costs. With the ever increasing evidence before him that this intention would lead to war with Great Britain and France as well, Hitler was resolved not to depart from the course he had set for himself. The Tribunal was fully satisfied by the evidence that the war initiated by Germany against Poland on September 1, 1939, was most plainly an aggressive war, which was to develop in due course into a war that embraced almost the whole world, and resulted in the commission of countless crimes, both against the laws and customs of war and against humanity.

The aggressive war against Poland was merely the beginning. The next two countries to suffer were Denmark and Norway,

⁶Ibid., pp. 18-34.

in violation of non-aggression pacts and solemn assurances. The idea of this attack seems to have originated with Raeder and Rosenberg as early as October 3, 1939. Conspiring with Vidkun Quisling, a Norwegian Nazi, Raeder and Rosenberg, together with the naval staff, and with Keitel and Jodl, showed Hitler the advisability of securing bases in Norway as a "precautionary measure." As a result, Hitler issued a directive on March 1, 1940, for the attack on Denmark and Norway, stating that the operation "should prevent British encroachment on Scandinavia and the Baltic," since there was ample cause to believe that England would occupy Norway with the tacit consent of the Norwegian Government. The German Embassy in Oslo refuted this as being unfounded. The defense argued that Germany alone could decide, in accordance with the reservations made by many of the Signatory Powers at the time of the conclusion of the Kellogg-Briand Pact, whether preventive action was a necessity, and that in making her decision her action was conclusive. But whether action taken under the claim of self-defense was in fact aggressive or defensive must ultimately be subject to investigation and adjudication in international law is ever to be enforced. No suggestion was made by the defendants that there was any plan of any belligerent, other than Germany, to occupy Denmark, in contrast to the case of Norway. No excuse for that aggression was offered. On this action against Norway and Denmark, the Tribunal declared that in the light of all available evidence, it was impossible to accept the contention

that these invasions were defensive, and in its opinion, they were acts of aggressive war.⁷

The plan to seize Belgium and the Netherlands was considered in August, 1938, with particular emphasis being placed on the use of these countries as air bases in case of war with England and France. In May, 1939, Hitler told his military commanders that in event of a war with the west that "Dutch and Belgian air bases must be occupied. . . . Declarations of neutrality must be ignored." Later in the year he declared his belief that England and France would respect the integrity of the Low Countries, thus giving Germany no earthly excuse for acting as she did. No evidence was presented before the Tribunal to justify the contention that these invasions were justified. They were carried out in pursuance of policies long considered and prepared, and were plainly acts of aggression. The resolve to invade was made without any other consideration that the advancement of Germany's aggressive policies.⁸

In the spring of 1941, German forces invaded Yugoslavia and Greece in violation of repeated assurances. As early as August 12, 1939 this plan was contemplated, for on that date, Hitler, in conversing with Count Ciano of Italy and von Ribbentrop, suggested this. It was clear, therefore,

⁷ Ibid., pp. 34-35.

⁸ Ibid., pp. 39-40.

that aggressive war against these two states had long been planned. On this charge, Germany pleaded that Great Britain had come to the aid of the Greeks, and might be in a position to inflict great damage upon German interests--the old doctrine of preventive action again.⁹

On June 22, 1941, Germany invaded the Soviet Union in violation of the Non-Aggression Pact of August 23, 1939. "Case Barbarossa," as this operation was called, was planned as early as September, 1940. No evidence was introduced to uphold the contention of the defendants that the attack on the USSR was justified because the Soviet Union was contemplating an attack on Germany. As late as June 6, 1941, the German Ambassador in Moscow informed his Government that the Soviet Union would go to war only if attacked by Germany. Thus the Tribunal called this action a case of plain aggression.¹⁰

The last aggressive war of which the Tribunal found the Nazis to be guilty was that against the United States. Through conspiring with Japan and Italy, Germany declared war on the United States four days after Pearl Harbor. Although it was true that Hitler and his colleagues originally did not consider that a war with the United States would be beneficial, it is apparent that in the course of 1941 that view was reversed,

⁹Ibid., pp. 40-~~3~~.

¹⁰Ibid., pp. 43-5..

and Japan was given every encouragement to adopt a policy which would almost certainly bring the United States into the war.¹¹

The next matters which the Tribunal considered were the violations of international treaties. The Charter defined as a crime the planning or waging of war that is a war of aggression or a war in violation of international treaties. The Tribunal decided that certain of the defendants planned and waged aggressive wars against ten nations, and were therefore guilty of this series of crimes. According to the Tribunal this made it unnecessary to consider the subject in further detail, or even to consider at any length the extent to which these aggressive wars were also "wars in violation of international treaties, agreements, or assurances." These treaties are set down in Appendix C of the Indictment, and the principal ones are listed in the previous chapter.¹²

The Tribunal passed on the law of the Charter, and reached this conclusion concerning the legality of the trial. The making of the Charter was the exercise of the sovereign legislative power of the countries to which the Third Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied countries had been recognized by the civilized world. The Charter was not the result of an arbitrary exercise of power on the part of the

¹¹ Ibid., pp. 45-6.

¹² Ibid., pp. 46.

victorious nations, but in the view of the Tribunal, it was the expression of international law existing at the time of its creation. The Signatory Powers, in creating the Tribunal, defined the law it was to administer and made regulations for the trial to be properly conducted. In so doing, they did together what one could have done singly; for it was not to be doubted that any nation has the right to set up special courts to administer law. In regard to the constitution or the court, it was held all that the defendants were entitled to ask was to receive a fair trial on the facts and the law.¹³

It was urged on behalf of the defendants that a fundamental principle of all law--international as well as domestic--is that there can be no punishment of an act as a crime without preexisting law so defining it. It was argued that ex post facto punishment is abhorrent to the law of all civilized nations, and that no sovereign state had made aggressive war a crime at the time the alleged criminal acts were committed, that no statute had defined aggressive war, that no penalty had been fixed for its commission, and no court had been created to try and punish offenders.

The Tribunal answered that it must be seen that nullem crimen sine lege is not a limitation on sovereignty, but is in general, a principle of justice. To hold that it is unjust

¹³ Ibid., pp. 48.

to punish those who have defied treaties and attacked neighboring states without warning is false, for in such cases the aggressor must know that he is doing wrong, and therefore it would be unjust if this wrong went unpunished. Occupying the positions in the government of Germany, the defendants must have known that they were acting in contravention of international law when in complete deliberation they carried out their designs of invasion and aggression. On this view of the case alone, it seemed to the Tribunal that this principle of justice had no application to the matter under consideration.

The legal meaning of the Pact of Paris was then discussed with this conclusion. Since the nations adhering to the Pact condemned war as an instrument of national policy, the Tribunal was of the opinion that such a war is illegal in international law; and that those who plan and wage such a war are committing a crime in so doing. War for the solution of international controversies undertaken as an instrument of national policy certainly includes a war of aggression, and such a war is therefore outlawed by the Pact.

The defense argued, however, that the Pact does not expressly say that such wars are crimes or set up courts to try those who make such war. But this fact was also true of the Hague Convention with regard to the laws of war, since nowhere in the Convention are violators called criminal, nor is any sentence prescribed, nor any mention made of a court

to try and punish offenders. In the opinion of the Tribunal, those who wage aggressive war are doing that which is equally illegal, and of much greater moment than a breach of one of the Hague Convention regulations. In interpreting the words of the Pact, it should be borne in mind that international law is not made by an international legislature, and that such treaties as the Paris Pact deal only with general principles of law, and not with administrative matters of procedure.

The view which the Tribunal took as to the interpretation of the Pact was supported by other movements which preceded it. Such agreements as the 1923 Treaty of Mutual Assistance, the Geneva Protocol, Resolution of the Eighth League Assembly of 1927, Resolution of the Sixth Pan-American Conference were all expressions of opinion reinforcing the construction which was placed on the Pact of Paris, that resort to a war of aggression is not merely illegal, it is criminal.¹⁴

It was also important to remember that Article 227 of the Versailles Treaty provided for the constitution of a special tribunal to try the former German Kaiser "for a supreme offence against international morality and the sanctity of treaties." The purpose of this trial was expressed to be "to vindicate the solemn obligations of international undertakings, and the validity of international morality." In Article 228, the government of Germany expressly recognized the right of the Allied Powers

¹⁴ Ibid., pp. 49-52.

"to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war." Thus the provisions of this Article illustrate the view of individual responsibility. The principle of international law, which under certain circumstances protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment. In other words, he who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action goes beyond its competence under international law. However, the Charter was generous in that while not freeing a defendant from responsibility arising out of superior orders, such a fact might be considered in mitigation of punishment.¹⁵

In the previous recital of the facts relating to aggressive war, it was clear that planning and preparation had been carried out in the most systematic way at every stage. Planning and preparation are necessary elements of waging war. In the opinion of the Tribunal aggressive war is a crime under international law. The Indictment followed the definition set down in the Charter. Count one charged the common plan or conspiracy,

¹⁵ Ibid., pp. 52-3.

count two charged the planning and waging of war. The same evidence was introduced to support both counts, and so both counts were discussed together, as they were in substance the same.

In the opinion of the Tribunal the evidence established the common planning to prepare and wage war by certain of the defendants. The argument that such common planning is impossible under dictatorship was held to be unsound. A plan in the execution of which a number of persons participate is still a plan, even though conceived by only one of them; and those who execute the plan do not avoid responsibility by showing that they acted under the direction of the one who conceived it. Hitler could not make aggressive war by himself. He had to have the cooperation of statesmen, military leaders, diplomats, and businessmen. When they, with knowledge of his aims, gave him their cooperation, they made themselves parties to the plan he had initiated. They are not to be deemed innocent because Hitler made use of them, if they knew what they were doing. That they were assigned to their tasks by a dictator does not absolve them from responsibility for their acts. The relation of leader to follower does not preclude responsibility here any more than it does in the comparable tyranny of organized domestic crime.

Count one charged not only conspiracy to commit aggressive war, but also to commit war crimes against humanity. But the

Charter did not define as a separate crime any conspiracy except the one to commit acts of aggressive war. The Tribunal therefore disregarded the charges in count one that the defendants conspired to commit war crimes and crimes against humanity, and only considered the common plan to prepare, initiate, and wage aggressive war.¹⁶

As to the counts on war crimes and crimes against humanity the Tribunal declared that the evidence relating to these crimes was overwhelming in volume and detail. War crimes were committed on a vast scale, being perpetrated in all countries occupied by Germany and on the high seas, and were attended by every conceivable circumstance of cruelty and horror. The majority of them arose from the Nazi conception of "total war," for in this conception, the moral ideas underlying the conventions which seek to make war more humane are no longer regarded as having force or validity. Rules and regulations have no import, and freed from the restraining influence of international law, aggressive war was conducted by the Nazis in the most barbaric way.¹⁷

The Tribunal, bound by the Charter in its definition of war crimes and crimes against humanity, declared that the provisions of Articles 46, 50, 52, and 56 of the Hague Convention

¹⁶ Ibid., pp. 54-5.

¹⁷ Ibid., p. 56.

of 1907, and Articles 2, 3, 4, 46, and 51 of the Geneva Convention of 1929 were in effect, and that violations of these provisions constituted crimes for which the guilty individuals were punishable. However, it was argued by the defense that the Hague Convention did not apply in this case, because of the "general participation" clause in Article II of the Hague Convention of 1907, as several of the belligerents in the late war were not parties to this convention. In the opinion of the Tribunal it was unnecessary to decide this question, for the Convention stated that it was an attempt "to revise the general laws and customs of war," which it thus recognized to be then existing. By 1939 these rules were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war. A further defense was made that Germany was no longer bound by these rules, because many of the territories in which the crimes were committed had been completely conquered and incorporated within the German Reich, a fact which gave Germany authority to deal with the occupied territories as if they were integral parts of Germany. The Tribunal declared that it was unnecessary to decide whether the doctrine of subjugation had any application where it was the result of a crime of aggressive war. This doctrine was never considered applicable as long as there was an army in the field attempting to restore the occupied countries to their true owners, and in this case the doctrine could not apply to any state occupied after September 1, 1939. As to war crimes

committed in Bohemia-Moravia, it was sufficient to say that these territories were never added to Germany, with a mere protectorate being established over them.

As regards crimes against humanity, the Tribunal held that there was no doubt whatever that political opponents were murdered in Germany before the war, and that many of them were kept in concentration camps under conditions of great cruelty and horror. The policy of terror was carried out on a vast scale, systematic and organized. The persecution of the Jews in this period was established beyond question. To constitute crimes against humanity, the acts relied on before the outbreak of war must have been in execution or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal was of the opinion that revolting and horrible as many of these crimes were, it was not satisfactorily proved that they were done in execution of, or in connection with, any such crime. The Tribunal therefore made 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.¹⁸

¹⁸ Ibid., pp. 83-4.

The Charter provided for the trial of Nazi organizations, and as a result, the Indictment arraigned the following: the Leadership Corps of the Nazi Party, the Gestapo, the Sicherheitsdienst, Schutzstaffeln, Sturmabteilungen, the Reich Cabinet, and the General Staff and High Command of the German Armed Forces. In effect, therefore, a member of an organization which the Tribunal declared to be criminal could be subsequently convicted of the crime of membership and be punished for that crime by death. This was not to assume that military or international courts which try these individuals, however, would not exercise appropriate standards of justice. Article 9 of the Charter used the words, "The Tribunal may declare" the organizations criminal, so that the Tribunal could use its discretion as to whether it would do so. This discretion was a judicial one, and did not permit arbitrary action, but was to be exercised in accord with legal principles, a foremost one being that guilt is personal, and mass punishment should be avoided.

The Tribunal held that a criminal organization was analogous to a criminal conspiracy in that the purpose of both is cooperation for criminal purposes. Since declarations of criminality which the Tribunal made would be used by other courts in the trial of individuals on account of their membership in the organizations found to be criminal, the Tribunal made 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 as 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. 10¹⁹. . .leaves punishment entirely in the discretion of the trial court even to the extent of inflicting the death penalty. . . .
3. The Tribunal recommends to the Control Council that Law No. 10 be amended to prescribe limitations of the punishment which may be imposed for membership in a criminal group or organization so that such punishment shall not exceed the punishment prescribed by the de-Nazification law.²⁰

The Leadership Corps of the Nazi Party

The Indictment named this body as an organization which should be declared criminal. The Corps consisted, in effect,

¹⁹ Law No. 10 of the Control Council of Germany contained the following provisions: Each of the following acts is recognized as a crime: . . . (d) Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal. . . .

(3) Any person found guilty of any of the crimes above mentioned may upon conviction be punished as shall be determined by the Tribunal to be just. Such punishment may consist of one or more of the following: (a) Death. (b) Imprisonment for life or a term of years, with or without hard labor. (c) Fine, and imprisonment with or without hard labor, in lieu thereof.

²⁰ Ibid., pp.84-86. The de-Nazification law mentioned was that of March 5, 1946, passed for Bavaria, Greater-Hesse, and Wuerttemberg-Baden, which provided definite sentences for punishment in each type of offense.

of the official organization of the Nazi Party, with Hitler as Fuehrer at its head. The actual work of running this group was carried out by the chief of the Party Chancellery, Hess later succeeded by Bormann, assisted by the Reichsleitung or Reich Directorate, which was composed of the Reichsleiters, the heads of the functional organizations of the Party, as well as the heads of the various main departments and offices which were attached to the Party Reich Directorate. Under the Chief of the Party Chancellery was a hierarchy of officials of five different ranks. Membership in the Leadership Corps was wholly voluntary, and this group consisted of six hundred thousand persons.

The primary purpose of the Leadership Corps was to assist the Nazis in obtaining and in retaining control of Germany. The machinery of the Corps was used for the widespread dissemination of Nazi propaganda, and to keep a detailed check on the political attitudes of the German people. As to criminal activities, the Corps played its part in the Jewish persecutions, in the administration of the slave labor program under the directions of Sauckel, and was directly concerned with prisoners of war. The machinery of the Corps was also used in attempts made to deprive Allied airmen of the protection to which they were entitled under the Geneva Convention. With all these decisions, overwhelming evidence was produced to show that the charges were well-founded.

The Tribunal found that the Leadership Corps was used for purposes which were criminal under the Charter, and involved the Germanization of incorporated territory as well as the other criminal activities mentioned above. The defendants, Sauckel and Bormann, who were members of this organization, were among those who used it for said purposes. The various grades of officials participated, in one way or another, in these criminal activities. The Reichsleitung as the staff organization of the Party was also held responsible for these criminal programs, as well as the heads of the various staff organizations of the Gauleiters and Kreisleiters. The decision of the Tribunal on these staff organizations included only the Amtsleiters who were heads of offices on the staffs of the Reichsleitung, Gauleitung, and Kreisleitung. With regard to other staff officers and party organizations attached to the Leadership Corps other than the Amtsleiters referred to above, the Tribunal excluded them from the declaration.

The Tribunal declared to be criminal within the meaning of the Charter the group composed of those members of the Leadership Corps holding the positions mentioned above who became or remained members of the organization with knowledge that it was being used for the commission of acts declared criminal by Article 6 of the Charter, or who were personally implicated as members of the organization in the commission of such crimes. The basis of this finding was the participation of the organization in war crimes and crimes against humanity connected

with the war. The group declared criminal could not include persons who had ceased to hold any of the positions mentioned above prior to September 1, 1939.²¹

Gestapo and SD

The prosecution named Die Geheime Staatspolizei (Gestapo) and Die Sicherheitsdienst des Reichsfuehrer SS (SD) as organizations which should be declared criminal. The prosecution presented the cases against them together, stating that this was necessary because of the close working relationship between them. The Tribunal permitted the SD to present its defense separately because of a claim of conflicting interests, but after examining the evidence, decided to consider their cases together. The Gestapo and the SD were first linked together on June 26, 1936, by the appointment of Reinhardt Heydrich, who was chief of the SD, to the position of chief of the security police, which was defined to include both the Gestapo and criminal police. Before that time, the SD had been an intelligence agency, first of the SS, and after June 4, 1934, of the entire Nazi Party. The Gestapo had been composed of the various political police forces of the various German Federal States which had been unified under the personal leadership of Himmler with the aid of Goering. This consolidation under the leadership of Heydrich of the police and the SD was formalized

²¹ Ibid., pp. 87-91.

by a decree of September, 1939. During the period with which the Tribunal was primarily concerned, applicants for positions in the security police and the SD received training in all its component parts--the Gestapo, criminal police, and SD. These groups were both voluntary organizations.

The Gestapo and the 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 the occupied countries, the administration of the slave labor program, and the ill-treatment and murder of prisoners of war. In dealing with the Gestapo the Tribunal included all executive and administrative officials of Amt IV, the head office of the Gestapo, or concerned with Gestapo administration in other departments of the RSHA (Reichs Security Head Amt or office) 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. At the suggestion of the prosecution the Tribunal did not include persons employed by the Gestapo for purely unofficial routine tasks such as clerical work. In dealing with the SD the Tribunal included Amten III, head office for SD activities within Germany; VI, head office for SD activities outside Germany; and VII, the office for ideological research; of the RSHA and all other members of the SD.

The Tribunal declared to be criminal within the meaning of the Charter the group composed of those members holding the positions mentioned above who became or remained members of the organizations with knowledge that they were being used for the commission of criminal acts, or who were personally implicated as members of the organizations in the commission of such crimes. The basis for this finding was the participation of the organizations in war crimes and crimes against humanity in connection with the war. The group declared criminal could not include those members who had ceased to hold the positions mentioned before September 1, 1939.²²

The SS

The prosecution named Die Schutzstaffeln Der National-socialistischen Deutschen Arbeiterpartei, commonly called the SS, as an organization that should be declared criminal. The part of the Indictment dealing with the SS also included the SD, but this organization later became an important part of the security police, and was dealt with in connection with the Gestapo.

The SS was originally established by Hitler in 1925 as an elite section of the SA for political purposes of protecting speakers at public meetings of the Nazi Party. After

²² Ibid., pp. 91-7.

the Nazis had gained power the SS was used to maintain order and control audiences at mass meetings and was given the added duty of "internal security" by an Hitlerian decree. The SS played an important part in the Roehm purge of 1934, and as a reward, was soon made an independent unit of the Nazi Party. Until 1940 the SS was a purely voluntary organization. After the formation of the Waffen SS, organized as an armed unit to be used with the army in case of mobilization, there was a gradually increasing number of conscripted men taken into this group. It seemed that about one-third of the total number of men joining the Waffen SS were conscripted, the number being higher at the end of the war than at the beginning, but there continued to be a high proportion of volunteers until the end of the war.

SS units were active participants in the steps leading up to aggressive war. They were used in the occupation of the Sudetenland, of Bohemia-Moravia, and of Mamel. But this organization was even more a general participant in the commission of war crimes and crimes against humanity. There was evidence that the shooting of unarmed prisoners of war was a general practice in some Waffen SS divisions. The race and settlement office of the SS was active in carrying out schemes for Germanization of occupied territories. These units were also involved in the wide-spread murder and ill-treatment of the civilian populations of occupied countries. Under the ruse

of fighting partisan units, the SS exterminated Jews and other peoples thought politically undesirable, and their reports record the execution of countless numbers of people. Waffen SS divisions were responsible for many massacres and atrocities in occupied countries, such as Oradour and Lidice.

The Tribunal found that knowledge of these criminal activities was sufficiently general to justify declaring that the SS was a criminal organization and that those members of the organization who became or remained members with knowledge that it was being used for the commission of acts declared criminal by Article 6 of the Charter, or who were personally implicated as members of the organization in the commission of such crimes, were criminals. Those were excluded from responsibility 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. War crimes and crimes against humanity were the basis of these findings, and those persons who had ceased to hold membership in the organization by September 1, 1939, were not held responsible.²³

The SA

Another organization which the prosecution wished to be named criminal was Die Sturmabteilungen der Nationalsocial-

²³ Ibid., pp. 97-102.

istischen Deutschen Arbeiterpartei, commonly known as the SA. This organization was founded in 1921 for political purposes, and was organized along military lines. Until 1933 the membership was purely voluntary, but in that year civil servants were put under certain political and economic pressure to join the SA. At the beginning of the war, the SA was composed of one and one-half million men, a great decrease since the famous Roehm purge of 1934.

After the Nazi advent to power in 1933, the SA played an important role in establishing a Nazi reign of terror. According to the decision of the Tribunal, until the 1934 purge the SA was a group composed in large part of ruffians and bullies who participated in the Nazi outrages of that period. It was not shown however, that these atrocities were part of a specific plan to wage aggressive war, and the Tribunal therefore could not hold that these activities were criminal under the Charter. After the purge, the SA was reduced to the status of a group of un-important 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 could not be held that all its members participated in or even knew of the criminal acts. For these reasons, the Tribunal did not declare the SA to be a criminal organization.²⁴

²⁴ Ibid., pp. 102-4.

The Reich Cabinet

Die Reichsregierung or the Reich Cabinet was another organization which the Tribunal was asked to adjudge criminal. It consisted of members of the ordinary cabinet after January 30, 1933, members of the council of ministers for the defense of the Reich and members of the secret cabinet council. The Tribunal was of the opinion that no declaration of criminality should be made, for two reasons: (1) because it was not shown that after 1937 it ever really acted as a group or organization, and (2) because the group of persons here charged 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.

It was estimated that there had been forty-eight members of this group. Eight of these were dead, and seventeen on trial before this Tribunal, leaving only twenty-three to whom the declaration of criminality could have any importance. Where an organization with a large membership was used for criminal purposes, a declaration of criminality saves much time and trouble as to the necessity of inquiring into every individual case, but in the case of a small group such as the Reich Cabinet there was no such advantage to be gained, and therefore the Tribunal decided that nothing would be accomplished by such a declaration.²⁵

²⁵ Ibid., pp. 104-5.

General Staff and High Command

In dealing with this group, the Tribunal decided that no declaration of criminality should be made. The number of persons charged, while larger than that of the Reich Cabinet, was still so small that individual trials of these officers would accomplish the sought purpose better than a declaration would do. But a more compelling reason in the opinion of the Tribunal was that the General Staff and High Command, sometimes referred to as the OKW, was neither an "organization" nor a "group" within the meaning of those terms as set down by the Charter.

According to the evidence, the planning of this group at staff level, conferences, and operational technique in the field and at headquarters was similar to that of the armed forces of other countries. The over-all effort of OKW at coordinating and directing, could be compared to the Anglo-American Combined Chiefs of Staff. On such basis, the top commanders of every other nation could be put in the same category--an association rather than an aggregation of military men.

Many of these military leaders it was held were a disgrace to the profession of arms, and where the facts warranted it, they should be brought to trial for crimes in which they actively participated, or passively acquiesced. But the Tribunal did not consider this body as a group to be a criminal organization.²⁶

²⁶ Ibid., pp. 105-7.

The Accused Individuals

Article 20 of the Charter provided that the judgment of the Tribunal as to the guilt or innocence of any defendant must give the reasons on which it was based.

Goering

Hermann Goering was indicted on all four counts. The evidence showed that after Hitler he was the most prominent man in the Nazi hierarchy. From the moment he joined the Party in 1922 and took command of the SA, Goering was the adviser and active agent of Hitler. He was largely instrumental in bringing the Nazis to power in 1933, and was responsible for consolidating this power by strengthening the German armed forces, creating the first concentration camps and the Gestapo, conducting the Roehm purge, and becoming virtually the economic dictator of Germany.

Goering was one of the five important leaders present at the Hossbach Conference (that conference at which Hossbach, Hitler's adjutant took notes) of November 5, 1937, and he attended all the other important conferences already discussed. In the seizures of Austria, the Sudetenland, and Bohemia-Moravia, he was a prime ringleader, as he admitted in his own testimony.

He commanded the Luftwaffe in the attack on Poland and throughout the aggressive wars which followed. Even if he opposed Hitler's plans against Norway and the Soviet Union,

as he alleged, it was clear that this was only for strategic reasons. Once Hitler had decided on a course of action, Goering followed without hesitation. He was active in preparing and executing the Yugoslavian and Greek aggressions, and testified that "Plan Marita," the attack on Greece, had been prepared long beforehand. His only objection to the war against the Soviet Union was its timing; he wished for strategic reasons to postpone this war until Great Britain fell. He testified that this point of view was decided by political and military reasons only, believing that the USSR was the "most threatening menace to Germany."

After his own admissions to the Tribunal, little doubt remained that Goering was the moving force for aggressive war second only to Hitler. He was the planner and prime figure in the diplomatic and military preparations which the Third Reich made for aggressive war.

As to war crimes and crimes against humanity, Goering by his testimony admitted his complicity in the use of slave labor, in the spoilation of conquered territory, and in persecution of the Jews, particularly after the November, 1938, riots. On some specific points there was conflict of testimony, but in general his own admissions were more than sufficiently wide to be conclusive of his guilt, which has been held "unique in its enormity." The record disclosed no excuses for Goering, and as a result the Tribunal found him guilty on

all four counts of the Indictment.²⁷

Hess

Rudolf Hess was indicted under all four counts. He joined the Nazi Party in 1920, and participated in the Munich Putsch on November 9, 1923. He became Hitler's closest personal confidant, a relationship which lasted until his flight to Britain in 1941. As Deputy Fuehrer, Hess was the head of the Nazi Party with responsibility for handling all party matters, and authority to make decisions in Hitler's name on all questions of party leadership. As Reichs Minister without Portfolio he had the authority to approve all legislation suggested by the different Reichs Ministers before it could be enacted into law. In these positions Hess was an active supporter of preparations for war. He was an informed and willing participant in German aggression against Austria, Czechoslovakia, and Poland. He was in touch with Austrian National Socialists throughout the entire period between the murder of Chancellor Dollfuss and the Anschluss, and gave instructions to it during that period. In the summer of 1938 Hess was in active touch with Konrad Henlein, chief of the Sudeten Germans, and at the time of the Munich crisis of 1938, he arranged with Keitel to carry out the instructions of Hitler to make the machinery of the Nazi Party available for a secret mobilization. After

²⁷ Ibid., pp. 108-10.

the Polish invasion Hess signed decrees incorporating Danzig and certain Polish territories into the Reich, and setting up the Government General.

As to war crimes and crimes against humanity, there was evidence showing the participation of the Party Chancellery, under Hess, in the distribution of orders connected with the commission of war crimes; that Hess may have had knowledge of, even if he did not participate in the crimes that were being committed in the east, and of proposed laws discriminating against Jews and Poles; and that he signed decrees forcing certain groups of Poles to accept German citizenship. The Tribunal, however, did not find sufficient evidence to connect Hess with these crimes to sustain a finding of guilt.

He was found guilty on counts one and two, and not guilty on counts three and four.²⁸

Von Ribbentrop

Joachim von Ribbentrop was indicted under all four counts. While not present at the Hossback Conference, he sent a memorandum on January 2, 1938, while still Ambassador to England, indicating his opinion that a change in the status quo in the east could only be carried out by force and suggested methods to prevent England and France from intervening in a

²⁸ Ibid., pp. 111-3.

European war fought to bring about such a change. Von Ribbentrop attended conferences at which aggressive action was planned against Austria, Czechoslovakia, and Poland, and was advised in advance of the attack on Norway, Denmark, and the Low Countries, preparing the official Foreign Office memoranda attempting to justify these aggressions. He further participated in plots of aggression against Greece, Yugoslavia, and the USSR.

Under counts three and four, Ribbentrop participated in a meeting of June 6, 1944, at which it was agreed that Allied aviators carrying out machine-gun attacks on civilian population should be lynched. He also played an important part in Hitler's "final solution" i. e. total extermination of the Jews. In September, 1942, he ordered the German diplomats to the various Axis satellites to hasten the deportation of the Jews to the east.

Von Ribbentrop's defense was that Hitler made all the important decisions and that he was such a great admirer and faithful follower of Hitler that he never questioned Hitler's repeated assertions that he wanted peace, or the truth of the reasons Hitler gave in explaining aggressive actions. The Tribunal did not consider this explanation to be true, and found him guilty on all four counts of the Indictment.²⁹

²⁹ Ibid., pp. 113-6.

Keitel

Wilhelm Keitel was indicted on all four counts. He attended the Schuschnigg conference in February, 1938, and together with Kitzler put pressure on Austria with false rumors, broadcasts, and troop maneuvers. Keitel also participated in the rape of Czechoslovakia, and was present on May 23, 1939, when Hitler announced his decision to attack Poland. He was in charge of the Norway and Denmark invasions, and played an important part in the actions involving Greece, Yugoslavia, and the Soviet Union. He testified that he opposed the invasion of Russia for military reasons, and also because it constituted a violation of the Non-Aggression Pact, but nevertheless he initialed "Case Barbarossa," the Russian invasion plan, signed by Hitler as early as December 18, 1940. He issued his timetable for the invasion on June 6, 1941, and was present at the briefing of June 14, when the generals gave their final reports before attack.

Under counts three and four, Keitel was charged with the following. He issued a directive that paratroopers were to be turned over to the SD. After the landing in Normandy, he reaffirmed it, and later extended it to Allied missions fighting with partisans. He admitted that he did not believe the order was legal, but claimed he could not stop Hitler from ordering it.

Keitel was further charged with playing a leading role

in the ill-treatment and extermination of Jews, Soviet prisoners of war, and the Polish intelligentsia and nobility. The so-called "Nacht und Nebel" decree, with Keitel's signature, provided that in occupied territories civilians who had been accused of crimes of resistance against the army of occupation would be tried only if a death sentence were likely; otherwise they would be handed over to the Gestapo for transportation to Germany.

In the face of the evidence Keitel did not deny his connection with these acts. Rather, his defense relied on the claim that he was a soldier, and on the doctrine of "superior orders," prohibited by Article 8 of the Charter as a defense. There was nothing offered in mitigation. Superior orders, even to a soldier, could not be considered where crimes as shocking and extensive were committed consciously, ruthlessly, and without military excuse or justification, and so the Tribunal found him guilty on all counts of the Indictment.³⁰

Kaltenbrunner

Ernst Kaltenbrunner was indicted under counts one, three, and four. He joined the Austrian Nazi Party and the SS in 1932, and as a leader of the SS in Austria, he was active in Nazi intrigue against the Schuschnigg Government. But no evidence was produced connecting him with plans to wage

³⁰ Ibid., pp. 116-9.

aggressive war on any other front. While it was true that the Anschluss was an aggressive act, it was not charged as an aggressive war, and the evidence against him under count one did not, in the opinion of the Tribunal, show his direct participation in any plan to wage such a war.

As to war crimes and crimes against humanity, his part as chief of the security police and SD, and head of the RSHA, was brought forth. Kaltenbrunner thus took charge of an organization which included the main offices of the Gestapo, SD, and the criminal police. As chief of the RSHA, he had authority to order protective custody and release from concentration camps. He was undoubtedly aware, therefore, of the conditions in such camps, and witnesses testified that he had seen prisoners killed by the various methods of execution, hanging, shooting in the back of the neck, and gassing, as part of a demonstration. Kaltenbrunner, himself, ordered the execution of prisoners in those camps, and his office was used to transmit to the camps orders of execution which originated in Himmler's office. At the end of the war he participated in arrangements for the evacuation of inmates of concentration camps, and the liquidation of many of them to prevent their liberation by the Allied armies.

Kaltenbrunner claimed that, when he took office as chief of the police forces and head of the RSHA, he did so pursuant to an understanding with Himmler under which he was

to confine his activities to matters involving foreign intelligence, and not to assume over-all control over the activities of the RSHA. The Tribunal acknowledged that he showed a special interest in matters involving foreign intelligence, but maintained that he also exercised control over the activities of the RSHA, was aware of the crimes it was committing, and was an active participant in many of them. And so, while declared innocent of count one, Kaltenbrunner was found guilty on counts three and four.³¹

Rosenberg

Alfred Rosenberg, termed the ideologist of the Nazi Party, was indicted on all four counts. As head of the APA, (the office of foreign affairs of the Nazi Party) he was in charge of an organization whose agents were active in Nazi intrigue throughout the world. His part in bringing Roumania into the war, and the attack on Norway were shown by his own reports. He also bore a major responsibility for the formulation and execution of occupation policies in the occupied eastern territories after July 17, 1941.

As regards counts three and four, Rosenberg was held responsible for a system of organized plunder of both public and private property throughout the invaded countries of Europe. He organized the "Einsatzstab Rosenberg," which plundered

³¹ Ibid., pp. 119-21.

museums and libraries, and pillaged private houses. As head of the eastern territories, Rosenberg helped to formulate the policies of Germanization, exploitation, forced labor, and the extermination of Jews and opponents of Nazi rule. He was found guilty on all four counts.³²

Frank

Hans Frank was indicted under counts one, three, and four. He joined the Nazi Party in 1927, but as to his guilt under count one, the Tribunal was not satisfied with the evidence that he was sufficiently connected with the common plan to allow his conviction on this charge.

As to the other charges, Frank's role in the occupation of Poland was portrayed. On October 12, 1939, he was made Governor General of the occupied Polish territory, and carried out a policy which led to the economic exploitation of that land in a way which led to the death by starvation of a large number of people; in the deportation to Germany as slave laborers of over a million Poles; and in a program that involved the murder of at least three million Jews. He was found guilty on counts three and four.³³

Frick

Wilhelm Frick, recognized as the chief Nazi administrative

³² Ibid., pp. 121-3.

³³ Ibid., pp. 123-6.

specialist and bureaucrat, was indicted on all four counts. An avid Nazi, he was largely responsible for bringing the German Nation under the complete control of the Party. Before the date of the Anschluss, Frick was concerned only with domestic administration within the Reich. The evidence did not show that he participated in any of the conferences at which Hitler outlined his aggressive intentions. Consequently, the Tribunal took the view that Frick was not a member of the common plan as defined in the judgment of the Tribunal.

As to crimes against peace, Frick signed many laws which incorporated many occupied territories into the Reich. As head of the central offices for Bohemia-Moravia, the Government General (Poland), and Norway, he was charged with obtaining close cooperation between the German officials in these occupied territories, and the supreme authorities of Germany.

As to war crimes and crimes against humanity, Frick was always a rabid anti-Semite, and played a large role in the extermination of Jews both before and after 1939. He was also in charge of the Germanization policy in certain occupied territories, and during the war, his control was extended to nursing homes, hospitals, and asylums in which euthanasia was practiced. He was found guilty on counts two, three, and four.³⁴

³⁴ Ibid., pp. 126-9.

Streicher

This Jew-baiter was indicted on counts one and four. One of the earliest members of the Nazi Party, Streicher was a staunch supporter of Hitler's main policies. But there was no evidence to show that he was ever within Hitler's inner circle of advisers; nor during his career was he closely connected with the formulation of the policies which led to war. In the opinion of the Tribunal, the evidence failed to establish his connection with the common plan or conspiracy to wage aggressive war, and so was declared innocent on this charge.

On count four, Streicher's part in Jewish persecutions was emphasized. His incitement to murder and extermination at the time when Jews in the east were being killed under the most horrible conditions clearly constituted persecution on political and racial grounds in connection with war crimes as defined by the Charter, and constituted a crime against humanity. He was found guilty on count four.³⁵

Funk

Walter Funk, one of Hitler's closest economic advisers, was indicted under all four counts. He became active in the economic field after the Nazi plan to wage aggressive war had been clearly defined. For this reason, he was found innocent on count one. After the beginning of war, Funk took an active

³⁵ Ibid., pp. 129-31.

part in the economic aspect of the conflict. He participated in the economic preparation for the wars against Poland and the Soviet Union, and made plans for the economic exploitation of the "vast territories of the Soviet Union" which were to be used as a source of raw materials for Europe.

As to counts three and four, Funk actively participated in the anti-Jewish program, and advocated their complete elimination from economic as well as political life. He also participated in the exploitation of the occupied countries and in the slave labor program. In spite of the fact that he occupied certain important official positions, Funk was never a dominant figure in the various programs in which he participated, and this was a mitigating factor of which the Tribunal took notice. He was found guilty under counts two, three, and four.³⁶

Schacht

Hjalmar Schacht was indicted under counts one and two. He served as Commissioner of Currency and president of the Reichsbank, and was an active supporter of the Nazi Party before its accession to power, and supported the appointment of Hitler to the post of Chancellor. After this he played an important role in the vigorous rearmament program which was adopted, using the facilities of the Reichsbank to the fullest extent in the German rearmament effort.

³⁶ Ibid., pp. 131-4.

As Minister of Economics and Plenipotentiary General for War Economics he was active in organizing the German economy for war. But by April, 1936, he began to lose his influence as the central figure in German rearmament, when Goering was appointed Coordinator for Raw Materials and Foreign Exchange.

While it was clear that Schacht was an important leader of German rearmament, rearmament itself was not criminal under the Charter. To be a crime against peace it had to be shown that he carried out this policy as part of the Nazi plans to wage aggressive war. As early as 1936, he began to advocate a limitation of the rearmament program for financial reasons. Had the policies advocated by him been put into effect, Germany would not have prepared for a general European war. As a result of this, he was dismissed from all positions of economic significance in Germany.

He was not involved in the planning of any of the aggressive wars in count two. His participation in the occupation of Austria and the Sudetenland--neither of which was classed as aggressive war--was so limited that it did not amount to participation in the common plan charge in count one. As a result of this evidence produced, Schacht was found not guilty of all charges made against him, and the Tribunal ordered his discharge.³⁷

³⁷ Ibid., pp. 134-7.

Doenitz

Karl Doenitz, who on January 30, 1943, was commander in chief of the German Navy, was indicted on counts, one, two, and three. Although he built and trained the German U-boat arm, the evidence did not show that he was a part of the conspiracy to wage aggressive wars or that he prepared or initiated such wars, thus not guilty on count one. Doenitz was no mere army or division commander, however; the U-boat was the principal arm of the German fleet, and Doenitz was its leader. The High Seas Fleet made a few minor raids during the early years of the war, but the real damage was done almost exclusively by his submarines. Doenitz was solely in charge of this warfare. His importance to the German war effort was so eloquently proved that Raeder recommended him as his successor. In the view of the Tribunal, the evidence showed that Doenitz was active in waging aggressive war; thus guilty on count two.

As to war crimes, Doenitz was charged with waging unrestricted submarine warfare contrary to the Naval Protocol of 1936 to which Germany was a party, and which reaffirmed the rules of submarine warfare laid down in the London Naval Agreement of 1930. The defense proved, however, that in the case of British armed merchant ships, Doenitz was not guilty of unrestricted sinkings, because of the instructions of the British Admiralty to ram U-boats if possible. This was the view to which the Tribunal held.

However, the order of Doenitz proclaiming operational zones and the sinking of neutral ships without warning when found within these zones were violations of the Protocol in the opinion of the Tribunal.

The Tribunal was of the belief that Doenitz kept Germany from denouncing the Geneva Convention, and proof was produced that British naval prisoners of war in camps under his jurisdiction were treated strictly according to this Convention; this was regarded as a mitigating circumstance in his behalf.

He was found guilty on counts two and three of the Indictment.³⁸

Raeder

Erich Raeder was indicted on counts one, two, and three. He was a member of the Reich Defense Council, appointed Grand Admiral in 1939, and in January, 1943, he was replaced by Doenitz at his own request.

In the fifteen years that he commanded it, Raeder built and directed the German Navy; in that period he accepted full responsibility for it. He admitted that the building of the German Navy was in violation of the Treaty of Versailles, and insisted that it was "a matter of honor for every man" to do so. Raeder was one of the few present at both the Hossbach Conference of November 5, 1937, and the conferences of May 23, and August 22, 1939.

³⁸ Ibid., pp. 137-41.

The conception of the invasion of Norway was Raeder's and not Hitler's. The desirability of naval bases there was pointed out to Hitler by Raeder, who justified this action by saying it was a move to forestall the British. 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."

From the evidence the Tribunal determined that Raeder was guilty on counts one and two.

Raeder was charged with war crimes on the high seas. The Athenia was given as an example of this, but the most serious charge against him was that he carried out unrestricted submarine warfare, including sinking of unarmed merchant ships of neutrals, nonrescue and machine-gunning of survivors, contrary to the London Protocol. The Tribunal made the same finding on Raeder as it did on Doenitz as to this charge, and he was declared to be guilty of count three.³⁹

Von Schirach

Baldur von Schirach was indicted under counts one and four. He joined the Nazi Party and the SA in 1925, and in 1931 he was placed in control of all Nazi youth organizations. After the Nazis had come to power von-Schirach, using both physical violence and official pressure, either drove out of

³⁹ Ibid., pp. 142-4.

existence or took over all youth groups which competed with the Hitler Jugend. He used this organization to educate German youth "in the spirit of National Socialism," and also for pre-military training. The Hitler Jugend placed particular emphasis on the military spirit, and its training program stressed the importance of return of the colonies, the necessity for Lebensraum, and the noble destiny of German youth to die for Hitler. But despite the warlike nature of the activities of the Hitler Jugend, it did not seem that von Schirach was involved in the development of Hitler's plan for territorial expansion through aggressive war, or that he participated in the planning or preparation of any of the wars of aggression.

As to count four, in July, 1940, von Schirach was appointed Gauleiter of Vienna, and at the same time Reich Governor for Vienna and Reich Defense Commissioner for Military District 17, including the Gaue of Vienna, Upper and Lower Danube, and after November 17, 1942, for the Gaue of Vienna alone. Von Schirach was not charged with the commission of war crimes in Vienna, but only with the commission of crimes against humanity. As Austria was occupied pursuant to a common plan of aggression, its occupation was therefore a "crime within the jurisdiction of the Tribunal" as that term was set down in Article 6c of the Charter. As a result, "murder, extermination, enslavement, deportation, and other inhumane acts" and "persecutions on political, racial, or religious grounds," in connection with this occupation constituted a crime against humanity

under this Article.

When von Schirach became Gauleiter of Vienna the deportation of the Jews had already begun, and only sixty thousand, out of Vienna's original one hundred and ninety thousand, Jews remained. On October 2, 1940, he attended a conference in Hitler's office and told Frank that he had fifty thousand Jews in Vienna which the Government General would have to take over from him. The Tribunal found that von Schirach, while he did not originate the policy of deporting Jews from Vienna, participated in this deportation after he became Gauleiter of Vienna. He knew that the best the Jews could hope for was a miserable existence in the ghettos of the east, as bulletins describing the Jewish extermination were in his office.

He was found innocent on count one, but guilty on count four.⁴⁰

Sauckel

Fritz Sauckel was indicted under all four counts. He joined the Nazi Party in 1923, and became Gauleiter of Thuringia in 1927. He held a high position in both the SA and the SS. The evidence did not satisfy the Tribunal that Sauckel was sufficiently connected with the common plan or involved in the planning or waging of the aggressive wars to convict him on counts one and two.

⁴⁰ Ibid., pp. 144-6.

His part in war crimes and crimes against humanity was shown, with special reference to his labor policies. On March 21, 1942, Hitler appointed him Plenipotentiary General for the Utilization of Labor, with authority to put under uniform control "the utilization of all available manpower, including that of workers recruited abroad and of prisoners of war."

By virtue of his position, Sauckel set up a program for the mobilization of the labor resources available to the Reich. One of the important parts of this mobilization was the systematic exploitation, by force, of the labor resources of the occupied territories. He described so called "voluntary recruiting" as nothing more than shanghaiing, and made the statement on March 1, 1944, that "out of 5,000,000 foreign workers who arrived in Germany not even 200,00 came voluntarily." The Tribunal decided that Sauckel had over-all responsibility for the slave labor program. His regulations provided that his commissioners should have authority for obtaining labor, and he was constantly in the field supervising the steps which were being taken. He was aware of ruthless methods being taken to obtain laborers, and vigorously supported them on the ground that they were necessary to fill the quotas. He was found guilty on the last two counts.⁴¹

Jodl

Alfred Jodl was indicted on all four counts. From

⁴¹ Ibid., pp. 146-8.

1935 to 1938 he was chief of the National Defense Section in the High Command. After a year in command of troops, in August, 1939, he became chief of the Operations Staff of the High Command of the Armed Forces. Although Keitel was his immediate superior, he reported directly to Hitler on operational matters. In the strict military sense, Jodl was the actual planner of the war and responsible in large measure for the strategy and conduct of operations.

His defense was that he was a soldier sworn to obedience, and not a politician; and that his staff and planning work left him no time for other matters. Though he claimed that as a soldier he had to obey Hitler, he said that he often tried to obstruct certain measures by delay.

Entries in Jodl's diary, the Schmundt notes, etc., showed that Jodl was active in the Austrian and Czech aggressions. He also participated in the aggressions against Denmark, Norway, and the Low Countries, and was active in the planning against Greece and Yugoslavia. Many of the orders for these invasions were signed by Jodl, who was present at various conferences with Hitler, when these invasions were planned. Jodl testified that Hitler feared an attack by Russia and so attacked first. This preparation began almost a year before the invasion. Jodl initialed "Case Barbarossa" and other directives concerned with the Russian invasion.

As to counts three and four, Jodl was active in the

Hitler order to treat commandos as spies. Early drafts of the order were made by Jodl's staff with his knowledge. Jodl testified that he was strongly opposed on moral and legal grounds, but could not refuse to pass on it. Also a plan to eliminate Soviet Commissars was in the directive for "Case Barbarossa." The decision whether they should be killed without trial was to be made by an officer, and a draft containing Jodl's handwriting suggesting that this should be handled as retaliation was produced as evidence.

There was little evidence to connect Jodl with the slave labor program, but in his speech of November 7, 1943, to the Gauleiters he said it was necessary to act "with remorseless vigor and resolution" in Denmark, France, and the Low Countries to compel work on the Atlantic Wall.

Jodl's part in the evacuation of all persons in northern Norway, and the burning of their houses, as well as the order that Moscow and Leningrad were to be completely destroyed, was brought out. His defense, in brief was the same as that used for Keitel, that of "superior orders." Nothing could be said in mitigation for Jodl, and he was found guilty on all four counts.⁴²

Von Papen

⁴² Ibid., pp. 148-51.

Franz von Papen was indicted under counts one and two. He was active in 1932 and 1933 in preparing the way for Hitler and aided him in forming his coalition cabinet. As Vice Chancellor in that cabinet he participated in the Nazi consolidation of control in 1933. On June 16, 1934, however, von Papen made a speech at Marburg which contained a denunciation of the Nazi attempts to suppress the free press and the church, of the existence of a reign of terror, and of "150 percent Nazis" who were mistaking "brutality for vitality." In the Roehm purge, he was taken into custody by the SS on June 30, 1934, but was released on July 3, 1934; his associates in office were murdered.

Regardless of this, von Papen accepted the position of Minister to Austria on July 26, 1934, the day after the Dollfuss murder. The evidence left no doubt that his primary purpose in this capacity was to undermine the Schuschnigg regime and strengthen the Austrian Nazis for the purpose of bringing about Anschluss, but the Charter did not consider this criminal. There was no evidence that he was a party in the plan under which the occupation of Austria was a step in the direction of further aggressive action, or that he participated in plans to occupy Austria by aggressive war if necessary. Since it was not established beyond a reasonable doubt that this was the purpose of his activity, therefore the Tribunal could not hold that he was a party to the common plan charged in count one

or participated in the planning of the aggressive wars under count two.

Von Papen was found not guilty under the Indictment.⁴³

Seyss-Inquart

Arthur Seyss-Inquart was indicted under all four counts. He had been associated with the Austrian Nazi Party since 1931, but had often had difficulties with it, and did not actually join the Party until March 13, 1938. He participated in the last stages of the Nazi intrigue which preceded German occupation of Austria, and became Reichs Governor of Austria after the Anschluss. In this capacity he began a program of confiscating Jewish property, and subjecting Jews to persecution.

In September, 1939, Seyss-Inquart was appointed Chief of Civil Administration of South Poland, and later Deputy Governor General. The following year he was appointed Reich Commissioner for the occupied Netherlands. In these positions he assumed responsibility for governing territory which had been occupied by aggressive wars and the administration of which was vital in the aggressive war then being waged by Germany. In these positions to which he was appointed, Seyss-Inquart was a supporter of harsh occupation policies which were put into effect. He advocated the persecution of both Polish and Dutch Jews, and was informed of the action which involved the

⁴³ Ibid., pp. 151-3.

murder of many Polish intellectuals.

Seyss-Inquart carried out the economic administration of the Netherlands without regard for rules of the Hague Convention which he described as obsolete. There was widespread pillage of public and private property under his direction, with small regard paid to the effect on the Dutch people. He was active in sending forced labor to Germany, and during his occupation over 500,000 were sent from the Netherlands to Germany for this purpose.

The Tribunal found him guilty on counts two, three, and four, but innocent on count one.⁴⁴

Speer

Albert Speer was indicted under all four counts. He joined the Nazi Party in 1932, and held positions of importance in the German Labor Front and in the armaments program. But as to counts one and two, the Tribunal was of the opinion that Speer's activities did not amount to initiating or planning wars of aggression, or of conspiring to that end. He became the head of the armaments industry well after all the wars had been commenced and were under way. His activities in charge of German armament production were in aid of the war effort in the same way that other productive enterprises aid in waging war; but the Tribunal was not prepared to find that such acti-

⁴⁴ Ibid., pp. 153-6.

vities involved engaging in the common plan as charged under count one, or waging aggressive war as charged under count two.

As to counts three and four, the evidence introduced against Speer related entirely to his participation in the slave labor program. Speer himself had no direct administrative responsibility for this program. As Reich Minister of Armaments and Munitions, he had extensive authority over production, and as the dominant member of the Central Planning Board, Speer took the position that the Board had authority to instruct Sauckel to provide laborers for industries under its control. Speer knew that when he made his demands on Sauckel that they would be supplied by foreign laborers serving under compulsion, as Sauckel continually informed him that foreign laborers were being obtained by force. He was also involved in the use of prisoners of war in armament industries, but contended that he utilized Soviet prisoners of war only in industries permitted by the Geneva Convention.

Speer's position was such that he was not directly responsible for the cruelty in the administration of the slave labor program, although he knew of its existence. In mitigation, the Tribunal recognized the fact that Speer's establishment of "blocked industries" did keep many laborers 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 took steps to prevent the senseless destruction of production facilities, both in occupied territories and in Germany.

He was found guilty on counts three and four, but innocent on counts one and two.⁴⁵

Von Neurath

Konstantin von Neurath was indicted under all four counts. He was a career diplomat, who held important posts, culminating in the position of Reichs Protector of Bohemia-Moravia, and served in this capacity until September 27, 1941.

As Minister of Foreign Affairs, von Neurath advised Hitler in connection with German withdrawal from the Disarmament Conference and the League of Nations; the institution of rearmament; the passage of laws concerning universal military training and the secret Reich Defense Law. He played an important part in the reoccupation of the Rhineland, and was present at the Hossbach Conference of November 5, 1937. Shortly after that, he resigned, but with knowledge of Hitler's aggressive policies. He retained a formal relationship with the Nazi regime as Reich Minister without Portfolio, President of the Secret Cabinet Council, and a member of the Reich Defense Council. At the time of the Anschluss, von Neurath was in charge of the foreign office, and assured the Czech Minister

⁴⁵ Ibid., pp. 156-9.

that Germany intended to abide by its arbitration convention with Czechoslovakia. He participated in the last phase of the negotiations preceding Munich, but he contended that he entered these discussions only to urge Hitler to settle the issues peacefully.

As Reich Protector of Bohemia-Moravia, von Neurath instituted an administration there similar to that in effect in Germany. As the chief German official in the Protectorate when the administration of that territory played an important part in Germany's aggressive wars in the east, von Neurath knew that war crimes and crimes against humanity were being committed under his authority.

In mitigation it was shown that von Neurath intervened with the security police and the SD for the release of many of the Czechoslovaks who were arrested on September 1, 1939, and for students arrested later that same autumn. On September 23, 1941, he was summoned before Hitler and told that he was too lenient, and as a result Heydrich was being sent to the Protectorate to combat Czech resistance groups. Von Neurath tried in vain to dissuade Hitler from sending Heydrich, and when he was unsuccessful, offered to resign. When his resignation was not accepted, he went on leave on September 27, 1941, and refused to act as Protector after that date.

He was found guilty on all four counts.⁴⁶

⁴⁶ Ibid., pp. 159-61.

Fritzsche

Hans Fritzsche was indicted on counts one, three, and four. He was best known as a radio commentator, becoming in November, 1942, head of the Radio Division of the Propaganda Ministry and Plenipotentiary for the Political Organization of the Greater German Radio, and earlier he was head of the Home Press Division of the Ministry, and later Ministerial Director.

As head of the Home Press Division, Fritzsche supervised the German press of twenty-three hundred daily newspapers. In pursuance of this function, he held daily press conferences to deliver the directives of the Propaganda Ministry to these papers. He was, however, subordinate to Dietrich, the Reich press chief, who was in turn, subordinate to Goebbels. It was Dietrich who received the directives for the press from Goebbels and other Reich Ministers, and prepared them as instructions, which he then handed to Fritzsche, who dispersed them. Never did Fritzsche achieve sufficient stature to attend the planning conferences which led to aggressive war; indeed according to his own uncontradicted testimony he never even had a conversation with Hitler. Nor was there any showing that he was informed of the decisions taken at these conferences. His activities could not be said to be those that fell within the definition of the common plan to wage aggressive war.

Counts three and four were concerned primarily with the

charge that he incited and encouraged the German people through the press, to commit atrocities on conquered peoples, especially the Jews. The Tribunal held, though, that his aim through propaganda was to popularize Hitler and the German war effort, rather than to stir up hatred of other peoples. In his broadcasts, Fritzsche sometimes spread false news, but it was not proved that he knew it to be false, as in the case of the Athenia, when he reported that at the time of sinking, no German U-boats were in the vicinity. He received this report from the German Navy, and had no reason to believe it untrue.

He was found innocent of all charges.⁴⁷

Bormann

Martin Bormann was indicted on counts one, three, and four. He joined the Nazi Party in 1925 and rose to positions of importance. After Hess' flight to Britain, he became head of the Party Chancellery. On April 12, 1943, he became Hitler's secretary, and was political and organizational head of the Volkssturm and a general in the SS.

In the beginning, Bormann was a minor Nazi, and the evidence did not show that he knew of Hitler's plans for aggressive war. He attended none of the important conferences when these plans for aggression were revealed. Since he came into positions of importance only after 1941, the Tribunal was of the opinion that there was not sufficient evidence to bring him within the scope of count one.

⁴⁷ Ibid., pp. 161-3.

As to counts three and four, Bormann, after the departure of Hess, was responsible for both the offices and powers held by Hess, and later he was given control over all laws and directives issued by Hitler. The charges proved against him were the following: he controlled the ruthless exploitation of the subjected populace; he was extremely active in the persecution of the Jews; he was prominent in the slave labor program; he issued orders calling for harsh treatment of prisoners of war; he was responsible for the lynching of Allied airmen.

His counsel, laboring under difficulties because of Bormann's absence, was unable to refute this evidence. But in the face of the documents presented it would have been difficult to see how he could have done so had the defendant been present. The Tribunal decreed that if Bormann is not dead and later apprehended, the Control Council for Germany may, under Article 29 of the Charter, consider any facts in mitigation, and alter or reduce the sentence, if it sees fit.

Bormann was found guilty on counts three and four.⁴⁸

The Sentences

In accordance with Article 27 of the Charter, the President of the International Military Tribunal, at its concluding

⁴⁸ Ibid., pp. 164-6.

session on October 1, 1946, pronounced sentence on the defendants convicted on the Indictment.

- Goering, von Ribbentrop, Keitel, Kaltenbrunner, Rosenberg, Frank, Frick, Streicher, Sauckel, Jodl, Seyss-Inquart, and Bormann were sentenced to death by hanging. Hess, Funk, and Raeder were sentenced for imprisonment for life. Von Schirach and Speer received a sentence of twenty years imprisonment, while von Neurath drew fifteen years, and Doenitz ten years imprisonment.⁴⁹

Dissenting Opinion

The Soviet judge, I. T. Nikitchenko, gave a dissenting opinion with regard to the acquittals of Schacht, von Papen, and Fritzsche; the sentence on Rudolf Hess; and the non-declaration of criminality of the Reich Cabinet, General Staff and OKW.

As to Schacht, the Soviet judge stated that the following points were indisputably established: (1) Schacht actively assisted in the Nazi seizure of power, (2) for twelve years he closely collaborated with Hitler, (3) he provided the economic and financial basis for the creation of Hitler's military machine, (4) he prepared Germany's economy for waging aggressive war, (5) he participated in persecuting the Jews

⁴⁹ Ibid., pp. 189-90.

and plundering territories occupied by Germany. "Therefore, Schacht's leading part in the preparation and execution of the common criminal plan is proved," and Nikitchenko thought that the decision to acquit him was in obvious contradiction to the existing evidence.

As to von Papen, he gave the following points as established evidence; (1) von Papen actively aided the Nazis in their seizure of power, (2) he used both his efforts and his connections to solidify and strengthen Hitler's terror regime in Germany, (3) he actively participated in Nazi aggression against Austria, (5) he faithfully served Hitler up to the very end (referring to his post as German Ambassador to Turkey), aiding both with his ability and his diplomatic skill. It therefore, followed, to Nikitchenko, that von Papen bore considerable responsibility for the crime of the Hitler regime, and he could not consent to this acquittal, using the above points as his basis.

The acquittal of Fritzsche, on the basis that he had not reached the official position making him responsible for the criminal actions of the Hitler regime, did not to Nikitchenko agree with the facts of the case. He pointed out that the verdict did not take into consideration that it was Fritzsche who until 1942 was the director de facto of the Reich press and that, according to his own admission, subsequent to 1942 he became the "commander in chief of the German radio."

As Fritzsche was the political director of the German radio, it therefore stood to reason, or so thought Nikitchenko, that he bore responsibility for the false and provocative broadcasts during the war years. For these reasons, Nikitchenko considered Fritzsche's responsibility fully proved, and his acquittal highly out of order.

As regards the sentence of Rudolf Hess, the Soviet judge thought that because of the importance of Hess' official position as Hitler's deputy, life imprisonment was too light, and death should have been the sentence justified by his actions. As the third Nazi in importance, Hess played a predominant role, not only in questions of party leadership but as co-creator with Himmler of the SS which afterwards committed horrible crimes against humanity. The role of Hess in the occupation of Poland, in which he gave Frank the power of dictator, to Nikitchenko meant that he was partly responsible for the crimes committed there.

The verdict of the Tribunal in rejecting criminality on the part of the Reich Cabinet was also a point which Nikitchenko challenged. He thought it untenable and rationally incorrect that this group, the directing organ of the State with a direct and active role in the working out of the criminal enterprises, should not be declared criminal. The members of this directing staff had great power, each heading an appropriate government agency and each participating in preparing

and realizing the Nazi program. He argued that certainly Hitler had an unusual measure of power, but this in no way freed the members of his cabinet who were his convinced followers and the actual executors of the Nazi plans from responsibility.

As to the General Staff and OKW, Nikitchenko gave these arguments for a declaration of criminality; (1) The leading representatives of the General Staff and OKW were called upon by the conspirators to participate in the development and 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 police, was guilty of the most brutal police actions in occupied territories, and (4) the representatives of the High Command acted in all the echelons of the army as members of a criminal group.⁵⁰

⁵⁰Ibid., pp. 172-88

CHAPTER V

CONCLUSIONS DRAWN FROM NUREMBERG

"The defendants at Nuremberg were leaders of the most highly organized and extensive wickedness in history. It was not a trick of the law which brought them to the bar; it was the 'massed angered forces of common humanity.'"¹ The record of Nuremberg will prevent Germany from whitewashing her leaders with the defense that atrocity stories were so much Allied propaganda, invented in the hour of total victory. The evidence dealing with war crimes and crimes against humanity was overwhelming. Captured German documents prove beyond the shadow of a doubt that as Stimson said, the Nazis were leaders of the greatest wickedness in history. "All our standards of international ethics would have crumbled, if scientifically planned mass murder of civilians, enslaving of millions of foreign workingmen, cruel mistreatment of war prisoners, and boastful looting on a grand scale could have gone unharmed in the long run."² In Jackson's words: "We have documented from German sources that Nazi aggressions, persecutions, and atrocities with such authenticity and in such detail that there can be no responsible denial of these crimes in the future. . . ."³

¹ Henry L. Stimson, "The Nuremberg Trial: Landmark in Law," Foreign Affairs, XXV, January, 1947, p. 179.

² F. E. Hirsch, "Lessons of Nuremberg," Current History, XI, October, 1946, p. 316.

³ Robert H. Jackson, "Prosecution of Major Nazi War Criminals," Department of State Bulletin, XV, October 27, 1946, p. 772.

In dealing with the Nazis, the Big Four Powers--Russia, France, the United Kingdom, and the United States--showed their various frames of mind. The Russian point of view was exemplified by Stalin when he said that punishment in the form of execution should be meted out to at least fifty thousand Germans. All through the negotiations leading up to Nuremberg and even in the final judgment the Russians displayed a great desire for vengeance. Punishment not justice was their concern.

The French interest in the trial of German industrialists is easily understood when one considers that twice within twenty-five years, France has been subjected to the attacks on her cities and people of products of German industry. It was the French who were instrumental in the indictment against Krupp. When he was unable to stand trial, the United States proposed to try Alfried Krupp in the place of the elder Krupp, and several other industrialists and cartel officials as well. This proposal was defeated by the unanimous vote of the other Powers. Later the Russians and French joined in a motion to include Alfried Krupp, but it was denied by the Tribunal. A future trial of industrialists seems very unlikely because of the acquittals of Schacht and von Papen. Careful analysis is being made to determine what effect the acquittals of these two will have upon the plan of prosecution of industrialists and financiers who would be subject to trial on such specific charges as the use of slave labor.⁴ Since the Tribunal made the ruling

⁴ Ibid., p. 773.

that it did in these cases, what point is there in trying other German industrial leaders?

The British judge, Sir Jeffrey Lawrence, who was also president of the Tribunal, exemplified in his conduct the British balance, dignity and passion for law and order.

Nuremberg was largely an American show. The trial was held in the American occupation zone, the count of conspiracy to wage aggressive war was wholly American in origin, Jackson made the opening speech for the prosecution, and had it not been for American perseverance, it is likely the trial would not have been held. It was Jackson who secured Big Four adherence to promulgation of the Charter, and by compromise, of framing the Indictment.

The Staffs of all nations, the press, and visitors were provided for by the United States Army. . . .The Army provided air and rail transportation, operated a motor pool for local transportation, set up local and long distance communications service for all delegations and the press, and billeted all engaged in the work. It operated messes and furnished food for all. . . . The United States also provided security for prisoners, judges, and prosecution, furnished administrative services, and provided such facilities as photostat, mimeograph, and sound recording. . . .The Army also met indirect requirements such as dispensary and hospital, shipping, postal, post exchange, and other servicing. . . .⁵

In spite of the diligent efforts of Justice Jackson, we conclude that his was not the most brilliant legal mind in the Nuremberg courtroom. Quincy Wright and Herbert Weschler,

⁵ Ibid., p. 772.

members of the American staff, have in various articles shown much keener insight into the legal issues involved and demonstrated greater powers for elucidating them. If newspaper reports are to be accepted, Goering gave Jackson two bad days when Jackson attempted to cross-examine him. The editor of Fortune in the December, 1946 issue felt that Goering played with Jackson as a fiend with a mouse. In the United States, former Secretary of State Henry L. Stimson has presented a much better case for the legality of the count termed wars against the peace or aggressive wars. Jackson did not concern himself too much with denying the charge that ex post facto law had been used to convict those charged with making aggressive war. At times he was almost flippant in regard to legal issues.

The trial had to be fair for any lasting good to come of it. As we have said above, the Tribunal bent over backwards in dealing with the defendants. If American leaders are guilty of making aggressive war in the future they should be punished as the Germans were. If they are wrongly charged with such a crime, we only hope they will be given as fair a trial as we think Nuremberg was. As to the composition of the Tribunal, it is deplorable that neutral judges, judges from small states, or even anti-Nazi German judges could not have been added to the judges of the four Great Powers. For four powerful, victorious nations to sit in judgment over the

leaders of a defeated state has the aroma of victors wreaking vengeance upon vanquished. If judges from neutral states, or even Germany itself had been included, history would probably deal more kindly with the trial than otherwise.

The trial has yet a chance of becoming the cornerstone of world peace. It is a step in the direction of a real world government, as it shows that a limitation on sovereignty is necessary and proper if law is ever to be substituted for force in settling international disputes. Goering was right when he said that the Hague Conventions were outmoded in the waging of "total" war. The problem is not the humanization of warfare--how can mass murder ever be humanized--but the elimination of the causes of war itself, and the discovery of some suitable means for peaceful change in which states and individuals of states can appeal to international judicial bodies for settling their differences without recourse to war. The defendant Speer rose to the occasion when he said in his final plea that his personal fate was of little import contrasted with the terrible catastrophes to mankind which modern technological inventions might bring: "Should there arise yet another state which will use a modern technique to support a dictatorship and conquest, then the world must go under: This trial should therefore serve as a means of finding a method for cooperation between human beings."⁶

⁶ Hirsch, op. cit., p. 318.

The impact of the trial on the German mentality is interesting. The proceedings were channeled to Germans through every medium of information; the press, radio, newsreels were used. Selected Germans such as teachers and clergymen were invited to attend the sessions of the trial. One of the invited was Pastor Niemoeller. There came a flow of letters to Nuremberg from all zones. Several thousands were directed to Jackson and others to the Tribunal in general. Naturally, since Germany was defeated and occupied, seventy-five per cent of the letters favored the trial. It is of interest that German criticism of the trial paralleled almost exactly American criticism. There were the same charges: (1) There existed in 1939 no international law which made a war of aggression an international crime; (2) victors are not qualified to judge the vanquished; (3) the Russian government also made aggressive war and committed numerous war crimes.

According to Robert M. W. Kempner, a member of the American prosecuting staff, the trial will have a lasting effect on the German people as being full, fair, and well documented:

I had further personal opportunities to observe German reactions when invited to lecture on the trial at the Universities of Heidelberg, Frankfurt, and Erlangen. Somewhat to my surprise, the majority of German law students agreed with the prosecution's conviction: that the defendants had conspired to wage aggressive war. I found professors lecturing on the legal aspects of the trial in their courses and groups formed among

university and high school students to discuss it.⁷

Germans who had been loath to admit it have been forced to acknowledge that atrocities were committed by the leaders of their country. Such Germans have been filled with horror that these things by which they feel that they, too, were victimized, should have been done in their name; with disgust and revulsion not only against the individuals who committed, but against the system that permitted these things.⁸

Of course there remain large bodies of Germans on whom the trial will have no effect whatsoever, but the above quotation shows that a number of Germans, especially the thinking, articulate Germans showed a keen interest in the outcome of the trial and its underlying philosophy. In this connection we might mention that many Americans seem so concerned that the German people fail to show a sense of guilt and responsibility for German atrocities. Regardless of the justice or injustice of the cause, when did any people ever, after making the supreme effort, have a sense of collective guilt when the cause for which they had sacrificed failed? To expect the German people to feel guilty is to ask a higher ethical standard of them than has ever been shown by any other nation.

As to the holding of future trials, Jackson expressed the opinion that the type held at Nuremberg was the slowest and most costly method of procedure, and for the sake of speed

⁷ R. M. W. Kempner, "Impact of Nuremberg on the German Mind," New York Times Magazine, October 6, 1946, p. 8.

⁸ Ibid., p. 66.

he advocated each occupying power to assume the responsibility for other trials within its own zone. "Most of these defendants can be charged with single and specific crimes which will not involve a repetition of the whole history of the Nazi conspiracy," according to Jackson.⁹

"The Nazi leaders are not the only ones who have renounced and denied the principles of western civilization. They are unique only in the degree and violence of their offenses."¹⁰ If the claim were made that only these leaders were guilty, then Nuremberg would have no earthly meaning. The four prosecuting nations, and the nineteen others subscribing to the Charter of the International Military Tribunal have firmly bound themselves to the principle that aggressive war is a personal and punishable crime. Henceforward, the leaders of the United States, or those of any other country that make aggressive war may be called to the prisoner's dock to answer charges. We cannot go backward. The only course is to find the solution of the central problem, which is war. In the atomic age, if this problem is not solved, then western civilization as we know it, with its primary concept of the dignity of the individual, may perish from the face of the earth.

⁹ Jackson, op. cit., p. 773.

¹⁰ Stimson, op. cit., p. 188.

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