CASE No. 73

TRIAL OF ULRICH GREIFELT AND OTHERS

UNITED STATES MILITARY TRIBUNAL, NUREMBERG,
10TH OCTOBER, 1947—10TH MARCH, 1948

Criminal nature of racial persecutions—Genocide—Membership of Criminal Organisations—Plea concerning annexed territory.

Ulrich Greifelt and the other accused in this trial were involved in various capacities in the carrying out of the Nazi racial policy in countries occupied by Germany, mainly in East and South-East European countries. They were leading members of four organisations to which racial tasks were assigned : the Main Staff Office (Stabshauptamt) of the Reichs Commissioner for the Strengthening of Germanism (*Reichskommissar fuer die Festigung des Deutschen Volkstums*), commonly known as " RKFDV " ; the SS. Main Race and Settlement Office (*Rasse-und Siedlungshauptamt*) commonly known as " RUSHA " ; the Repatriation Office for Ethnic Germans (*Volksdeutsche Mittelstelle*), commonly known as " VOMI " and the Well of Life Society (*Lebensborn*).

The accused were charged with committing, in pursuance of a systematic programme of genocide, crimes against humanity and also war crimes between September, 1939, and April, 1945, as individual perpetrators. All of them, but one, were also charged with membership of criminal organisations, as defined in the Judgment of the Nuremberg International Military Tribunal.

One accused was found not guilty and acquitted, and the remaining thirteen were held guilty of crimes against humanity, war crimes, membership of criminal organisations, or of one or more of the foregoing three counts. Sentences pronounced ranged from 25 years' down to several periods of less than 3 years' imprisonment.

The essence of the charges and convictions was that the above crimes were committed in furtherance of and as an integral part of the Nazi racial ideology and policy. The

trial therefore dealt with the main body of racial persecutions which distinguished so conspicuously the Nazi régime inside the Third Reich and in all countries invaded and occupied by Germany, during the war of 1939-1945. It is of the utmost importance both as a record of events and facts of an unparalleled nature in modern history and as a piece of jurisprudence applying the ever developing rules of international penal law.

A. OUTLINE OF THE PROCEEDINGS

1. THE INDICTMENT

The accused named in the Indictment were the following : Ulrich Greifelt, Rudolf Creutz, Konrad Meyer-Hetling, Otto Schwarzenberger, Herbert Huebner, Werner Lorenz, Heinz Brueckner, Otto Hofmann, Richard Hildebrandt, Fritz Schwalm, Max Sollmann, Gregor Ebner, Guenther Tesch and Inge Viemetz. Their official positions are described elsewhere.

The Indictment submitted against them contained three counts. The first two charged the commission of crimes against humanity and war crimes respectively, as defined in Law No. 10 of the Allied Control Council for Germany,[1] including " murders, brutalities, cruelties, tortures, atrocities, deportation, enslavement, plunder of property, persecutions and other inhumane acts." The third count charged membership of criminal organisations under the terms of the same law and in consequence of the declarations made by the Nuremberg International Military Tribunal.

Count One charged the commission of Crimes against Humanity in respect of " civilian populations, including German civilians and nationals of other countries, and against prisoners of war." It was couched in the following terms :

> " 1. Between September, 1939, and April, 1945, all the defendants herein committed Crimes against Humanity as defined by Control Council Law No. 10, in that they were principals in, accessories to, ordered, abetted, took a consenting part in, were connected with plans and enterprises involving, and were members of organisations or groups connected with : atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, persecutions on political, racial and religious grounds, and other inhumane and criminal acts against civilian populations, including German civilians and nationals of other countries, and against prisoners of war.
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> " 2. The acts, conduct, plans and enterprises charged in Paragraph 1 of this Count were carried out as part of a systematic program of genocide, aimed at the destruction of foreign nations and ethnic groups, in part by murderous extermination, and in part by elimination and suppression of national characteristics. The object of this program was to strengthen the German nation and the so-called ' Aryan ' race at the expense of

[1] Regarding this Law and other rules relating to United States Military Tribunals, see Vol. III of this series, pp. 113-120.

such other nations and groups by imposing Nazi and German characteristics upon individuals selected therefrom (such imposition being hereinafter called ' Germanization ') ; and by the extermination of ' undesirable ' racial elements. This program was carried out in part by

(*a*) Kidnapping the children of foreign nationals in order to select for Germanization those who were considered of ' racial value ' ;

(*b*) Encouraging and compelling abortions on Eastern workers for the purposes of preserving their working capacity as slave labour and weakening Eastern nations ;

(*c*) Taking away, for the purpose of exterminating or Germanization, infants born to Eastern workers in Germany ;

(*d*) Executing, imprisoning in concentration camps, or Germanizing Eastern workers and prisoners of war who had had sexual intercourse with Germans, and imprisoning the Germans involved ;

(*e*) Preventing marriages and hampering reproduction of enemy nationals ;

(*f*) Evacuating enemy populations from their native lands by force and resettling so-called ' ethnic Germans ' (Volksdeutsche) on such lands ;

(*g*) Compelling nationals of other countries to perform work in Germany, to become members of the German community, to accept German citizenship, and to join the German Armed Forces, the Waffen-SS, the Reich Labour Service and similar organisations.

(*h*) Plundering public and private property in Germany and in the incorporated and occupied territories, *e.g.*, taking church property, real estate, hospital apartments, goods of all kinds, and even personal effects of concentration camp inmates, and

(*i*) Participating in the persecution and extermination of Jews."

Count Two dealt with War Crimes committed against " prisoners of war and civilian populations of countries and territories under the belligerent occupation of, or otherwise controlled by, Germany." It reads :

" Between September 1939 and April 1945, all the defendants herein committed War Crimes, as defined by Control Council Law No. 10, in that they were principals in, accessories to, ordered, abetted, took a consenting part in, were connected with plans and enterprises involving, and were members of organisations or groups connected with : atrocities and offenses against persons and property constituting violations of the laws and customs of war, including but not limited to, plunder of public and private property, murder, extermination, enslavement, deportation, imprisonment, torture, and ill-treatment of and other inhumane acts against thousands of persons. These crimes embraced, but were not limited to, the particulars set out in Paragraphs 11-21, inclusive, of this Indictment, which are incorporated herein by reference, and were committed against prisoners of war and civilian populations of countries and territories under the belligerent occupation of, or otherwise controlled by, Germany.

" The acts and conduct of the defendants set forth in this Count were committed unlawfully, wilfully, and knowingly, and constitute violations of international conventions, including the Articles of the Hague Regulations, 1907, and of the Prisoner of War Convention (Geneva, 1929), enumerated in Paragraph 23 of this Indictment, of the laws and customs of war, of the general principles of criminal law as derived from the criminal laws of all civilised nations, of the internal penal laws of the countries in which such crimes were committed, and of Article II of Control Council Law No. 10."

Count Three charged the accused with membership of criminal organisations in the following terms :

" All the defendants herein except defendant Viermetz, are charged with membership, subsequent to September 1, 1939, in the Schutzstaffeln der Nationalsozialistischen Deutschen Arbeiterpartei (commonly known as the ' SS '), declared to be criminal by the International Military Tribunal and Paragraph 1 (*d*) of Article II of Control Council Law No. 10."

2. THE EVIDENCE BEFORE THE TRIBUNAL

(i) *Organisations Involved and Official Positions of the accused*

The evidence brought before the Tribunal showed that all the accused were officials of the four organisations described in the Indictment, and that the offences proved against them were committed by them in the above capacities.

The Main Staff Office of the Reichscommissioner for the Strengthening of Germanism was the relevant directing body. It operated under the supervision of Heinrich Himmler, Reichsfuehrer of the S.S. and Chief of the Nazi Police. It was responsible for, among other things, bringing " ethnic Germans " into Germany, evacuating non-Germans from desirable areas in foreign lands, and establishing new settlements of Germans and " ethnic Germans " in such areas. These activities involved transfer of populations, Germanisation of citizens of other countries, deportation of Eastern workers, deportation to slave labour of members of other countries eligible for Germanization, kidnapping of so-called " racially valuable " children for Germanization, participation in the performance of abortions on Eastern workers, murder and plunder of property. The chief defendant, Greifelt, was head of the Main Staff Office and in personal charge of one of its branches, Amstgruppe B. The latter consisted of offices for economy, agriculture and finance. He held the ranks of Obergruppenfuhrer of the S.S. and of Lt.-General of the Police. The other accused who held high positions in the Main Staff Office as heads of various branches, were : Crauz, Oberfuehrer S.S. (Senior Colonel), Deputy to Greifelt, chief of Amstgruppe A, which consisted of the Central Office and the offices for resettlement of folkdom and labour and in personal charge of Amt Z (Central Office) ; Meyer-Hetling, Oberfuehrer S.S., Chief of Amstgruppe C, which consisted of the Central Land Office and the offices for planning and construction, in personal charge of Amt VI (Planning) ; Schwarzenberger, Oberfuehrer S.S., Chief of Amt V (Finance) ; Huelman, Standartenfuehrer S.S. (Colonel), Chief of the Branch Office at Posen.

The leading position of the Main Staff Office was established by the Tribunal in the following terms : " The Main Staff Office was actually the directing head of the whole Germanization program, co-ordinating the activities of the other organizations. Before the end of the war, the activities of the Main Staff Office involved, among other things, the expulsion and deportation of whole populations ; the Germanization of foreign nationals ; the deportation of foreigners to Germany as slave labor ; the kidnapping of children ; and the plundering and confiscation of property of enemy nations."

The office for Repatriation of Ethnic Germans (VOMI) was responsible for, among other things, the selection of " ethnic Germans," their evacuation from their native country, their transportation into " VOMI " camps, their care in these camps including temporary employment as well as ideological training, and their indoctrination after final employment or resettlement. It took large amounts of personal effects of concentration camp inmates and of real estate, for the use of resettlers. It also played a leading part in the compulsory conscription of enemy nationals into the Armed Forces, Waffen-SS, Police and similar organisations. In addition, it participated in the compulsory Germanization of " ethnic Germans " and people of German descent, in the forcing into slave labour of individuals considered eligible for Germanization, and in the kidnapping of foreign children. Werner Lorenz was the Chief of VOMI ; and Heinz Brueckner was Chief of Amt VI (Safeguarding of German Folkdom in the Reich-Reichsicherung deutschen Volkstums in Reich).

The S.S. Main Race and Settlement Office (RUSHA) was responsible for racial examinations. It was an advisory and executive office for all questions of racial selection. Racial examinations were carried out by RUS leaders (Rasse und Siedlungs Fuehrers) or their staff members, called racial examiners (Eignungspruefer), in connection with : cases where sexual intercourse between workers and prisoners of war of the Eastern nations and Germans had occurred ; pregnancy of Eastern workers ; children born to Eastern workers ; classification of people of German descent ; selection of enemy nationals, particularly Poles and Slovenes, for slave labour and Germanization ; kidnapping of children eligible for Germanization ; transfers of populations ; and persecution and extermination of Jews. Otto Hofmann was the Chief of RUSHA from 1940 to 1943 ; Richard Hildebrandt was the Chief of RUSHA from 1943 to 1945 ; Fritz Schwalm was Chief of Staff of RUSHA ; and Herbert Huebner was the RUS leader for the Warthegau, Poland.

The " Lebensborn " Society existed long before the war and was primarily concerned with running a maternity home. It was contended by the prosecution that, within the racial scheme for annihilating nations under German rule, it was responsible for kidnapping of foreign children for the purpose of Germanization. Max Sollmann was the Chief of Lebensborn and in personal charge of Main Department A, which consisted of offices for reception into homes, guardianship, foster homes and adoptions, statistics, and registration ; Gregor Ebner was the Chief of the Main Health Department ; Guenther Tesch was the Chief of the Main Legal Department ; and Inge Viermetz was Deputy Chief of Main Department A.

In regard to these organizations and their leading officials, the Tribunal made the following finding : " Each organization had certain well-defined tasks, which after 1939 were modified or expanded as the recent war progressed. The organizations worked in close harmony and co-operation, as will later be shown in this judgment, for one primary purpose in effecting the ideology and program of Hitler, which may be summed up in one phrase : The twofold objective of weakening and eventually destroying other nations while at the same time strengthening Germany, territorially and biologically, at the expense of conquered nations."

The same objective was stressed by the Prosecution in the following terms :

> " The fundamental purpose of the four organisations . . . was to proclaim . . . and safeguard the supposed superiority of ' Nordic ' blood, and to exterminate and suppress all sources which might ' dilute ' or ' taint ' it. The underlying objective was to assure Nazi dominance over Germany and German domination over Europe in perpetuity."

(ii) *The Master Scheme : Genocide*

As already mentioned, in the Indictment the prosecution had charged that crimes against humanity perpetrated by the accused were carried out as part of a " systematic programme of genocide," that is of the " destruction of foreign nations and ethnic groups."

The evidence produced showed that this programme had been devised by the top ranking Nazi leaders in pursuance of their racial policy of establishing the German nation as a master race and to this end exterminate or otherwise uproot the population of other nations. The programme was laid down in a series of documents.

As early as a few days after the aggression against Poland, on 7th October, 1939, Hitler issued a Decree appointing Himmler as head of the above-described racial policy, in which the following general directives were laid down :

> " The consequences which Versailles had on Europe have been removed. As a result, the Greater German Reich is able to accept and settle within its space German people, who up to the present had to live in foreign lands, and to arrange the settlement of national groups within its spheres of interest in such a way that better dividing lines between them are attained. I commission the Reichsfuehrer-SS with the Execution of this task in accordance with the following instructions :
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> Pursuant to my directions the Reichsfuehrer-SS is called upon :
>
> (1) to bring back those German citizens and racial Germans abroad who are eligible for permanent return into the Reich ;
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> (2) to eliminate the harmful influence of such alien parts of the population as constitute a danger to the Reich and the German community ;
>
> (3) to create new German colonies by resettlement, and especially by the resettlement of German citizens and racial Germans coming back from abroad."

These directives were first implemented in the occupied territories of Poland. On 25th November, 1939, Himmler received a document prepared

by the Racial-Political Office of the Nazi Party and entitled " The Problem of the Manner of Dealing with the Population of the Former Polish Territories on the Basis of Racial-Political Aspects."

This document contained a general statement on the goals of Nazi racial policy in Eastern Europe, which was couched in the following terms :

" The aim of the German policy in the new Reich territory in the East must be the creation of a racial and therefore . . . uniform German population. This results in ruthless elimination of all elements not suitable for Germanization.

" This aim consists of *three interwoven tasks :*

First, the complete and final Germanization of the population which seems to be suitable for it.

Second, deportation of all foreign groups which are not suitable for Germanization, and

Third, the resettlement by Germans."

The document then contained the following elaborate programme regarding the selection of Polish citizens of German stock to be re-incorporated into the Reich and the forcible Germanizations of the purely Polish population :

" All Germans, beyond doubt established as German nationals, are to be registered in a German People's List. They receive the German citizenship. Only these Germans have the right to be Reich citizens.

" All other persons are not entitled to the right to be Reich citizens and therefore have no political rights.

" In the future Germans are to carry exclusively German names ; that is, family names which in their root and etymology are of German origin. Names which are only Germanized in the written form, but show their Slavonic origin, cannot be regarded to be German names. They too are to be changed.

" The official language of all authorities, including courts, is exclusively German.

" Poles cannot be business owners. The real estates, also the farms they possessed up to now, are being expropriated. Poles are not permitted to exercise an independent trade and cannot be masters of a trade ; all existing apprentice contracts are annulled ; promising Polish apprentices can be taken to Germany proper as apprentices.

" As to the treatment of the population remaining in the Eastern territories—mainly of the Polish and the German-Polish mixed population—it is constantly to be born in mind, that all measures of the legislature and administration have but one purpose, namely, to achieve a Germanization of the non-German population by all means and as quickly as possible. For this reason a continuation of a national Polish cultural life is definitely out of question. The Polish orientated population, in as far as it cannot be assimilated, is to be deported, the remainder to be Germanized. Therefore, a basis for a national and cultural autonomous life must no longer exist. In future there will be no Polish schools in the Eastern territories. In general there will be

only German schools with emphasis on National Socialist racial teachings. Poles and members of the German-Polish mixed population who are not yet completely Germanized are not permitted to attend German universities, trade schools or high and secondary schools. Children of the members of this part of the population are only admitted if they are members of the Hitler Youth and are reported by it.

" Any religious service in Polish is to be discontinued. The Catholic and even the Protestant religious service are only to be held by especially selected German-conscious German priests and only in German. Considering the political importance and the danger of the Catholic-Polish church connected with it, one could get the idea to outlaw the Catholic church entirely. However, one has to keep in mind that the population is strongly attached to the church and that such a measure could perhaps result in the opposite of Germanization. Specially selected, German-minded Catholic priests could probably gain not unimportant a success for the Germanization by a clever influence on the Catholic-Polish part of the population. The probability that especially Catholics of German extraction who were Polonized in the past centuries, could, with the help of suitable German priests, be brought back to the German people, is very great. In case of the Protestant Church the priests, who during the Polish time, especially during the last year, tried to betray the German people in a hatefulness which can hardly be described (under the leadership of their bishop Bursche), are ruthlessly to be removed as enemies of any national conviction and of National Socialism. Polish church holidays are to be abrogated. Only the holidays of both denominations permitted in the Reich are to be observed.

" In order to prevent any cultural or economic life, Polish corporations, associations and clubs cease to exist ; Polish church unions are also to be dissolved.

" Polish restaurants and cafes as centres of the Polish national life are to be closed down. Poles are not permitted to visit German theatres, variety shows, or cinemas. Polish theatres, cinemas and other places of cultural life are to be closed down. There will be no Polish newspapers, nor printing of Polish books nor the publishing of Polish magazines. For the same reasons Poles must not have radios and should not possess a phonograph.

" Our Germanization policy has the aim to extract the Nordic groups from the remaining population and to Germanize them, and, on the other hand, to keep the racially foreign Polish strata on a low cultural level and to deport them from time to time to Central Poland."

A special programme was devised in the same document regarding the treatment of the Jews and of the mixed population, that is of families set up by marriages between Poles and Germans. It dealt in particular with the treatment of children of such mixed marriages :

" *Treatment of the mixed population.*

" These thoughts make it most recommendable to transfer those persons, who were not included in the German People's List but who

live in a racial mixed marriage with Poles or who are of mixed German-Polish descent, to Germany proper, if they are not especially active for the Polish ideology. The final Germanization can be achieved in Germany proper. Children from such German-Polish racial mixed marriages have, whenever possible, to be educated in Germany proper and in German surroundings (educational institutions). The influence of the Polish parent must be excluded to the greatest possible extent.

" Probably only a small part of the Polish population within the new Reich territory can be Germanized ; the easiest way will be to transfer them, and especially their children, to Germany proper, where, as a matter of course, a collective employment or settlement is completely out of question.

" *Special treatment of racially valuable children.*

" A considerable part of the racially valuable groups of the Polish people, who, on account of national reasons are not suitable for Germanization, will have to be deported to the rest of Poland. But here it has to be tried to exclude racially valuable children from the re-settlement and to educate them in suitable educational institutions, probably like the former military orphanage at Potsdam, or in a German family. The children suitable for this are not to be over 8 to 10 years of age because, as a rule, a genuine ethnic transformation, that is, a final Germanization, is possible only up to this age. The first condition for this is a complete prevention of all connections with their Polish relatives. The children receive German names which etymologically are of accentuated teutonic origin, their descendant certificate will be kept by a special department. All racially valuable children whose parents died during the war or later, will be taken over in German orphanages without any special regulation. For this reason a decree prohibiting the adoption of such children by Poles is to be issued.

" Any keeping of biologically healthy children in church institutions is prohibited.

" Children of such institutions, if not older than approximately 10 years, are to be transferred to German educational institutions.

" Poles with a neutral attitude, who are willing to send their children to German educational institutions, do not need to be deported to the rest of Poland.

" As already related, the final aim must be the complete elimination of the Polish national spirit. These Poles who cannot be Germanized must be deported to the remaining Polish territory.

" In all cases of eviction of classes which are racially equivalent to us and valuable, the possibility of a retention of the children and their special education is to be considered.

" If the Eastern territories are to be Germanized it is necessary that all the land, including land which was handed down from generation to generation by its Polish owners, be expropriated in favor of the German settlers. Thereby the Polish peasant loses the basis of his existence and is therefore to be deported to the remainder of Poland, if he cannot be Germanized.

" Jews, regardless whether they are Jews by creed or baptized, are to be deported to the remainder of Polish territory by cancellation of all their obligations, ruthlessly and as soon as possible.

" Persons of mixed Polish-Jewish blood, regardless of their degree, are to be placed on the same level, without any exceptions and under all circumstances, as Poles and Jews who are to be deported."

The following further lines of action were laid down in regard to Poles and Jews :

" Independent of the not yet published future solution of the problem regarding the legal State structure of the remainder of Poland, one must start from the fact that the remainder of Poland will also in future be under the ruling influence of the Reich.

" The population of this territory is composed of Poles and Jews and in addition of a large number of Polish-Jewish half breeds. A part of the population must be considered as definitely of alien blood from a racial point of view, at any rate as unsuitable for assimilation. Under the circumstances it must be stated in principle that the German Reich is in no way interested in raising the Polish and Jewish parts of the population of the remainder of Poland to a higher racial and cultural level, or in their education.

" The inhabitants of the remainder of Poland must be given their citizenship. However, they are not to have any independent political parties, and associations which might provide a possible nucleus for a future national concentration must be forbidden. Non-political clubs should not be allowed either, or only from very special points of view. Cultural associations, for instance, vocal societies, clubs for the study of the home-country, gymnastic and sports clubs, social clubs, etc., can by no means be regarded without misgivings, as they can easily promote nationalism amongst their members. In particular, the gymnastic and sport clubs also lead to a physical strength of the population, in which we are not interested.

" Medical care on our part should be confined to preventing epidemics from spreading to the Reich territory.

" All measures serving birth control are to be admitted or to be encouraged. Abortion must not be punishable in the remaining territory. Abortives and contraceptives may be publicly offered for sale in every form without any police measures being taken. Homosexuality is to be declared not punishable. Institutes and persons who make a business of performing abortions should not be prosecuted by the police. Hygienic measures from a racial point of view should not be encouraged in any way.

" It will be the task of the German administration to play up the Poles and Jews against each other."

The above programme was later developed by Himmler. In a directive entitled " Reflections on the Treatment of Peoples of Alien Race in the East," he spoke of the necessity to bring about the extinction of alien races, and issued the following instructions regarding the treatment of children :

" A basic issue in the solution of all these problems is the question of schooling and thus the question of sifting and selecting the young. For the non-German population of the East there must be no higher school than the fourth-grade elementary school.

" The sole goal of this school is to be :

Simple arithmetic up to 500 at the most ; writing of one's name ; the doctrine that it is a divine law to obey the Germans and to be honest, industrious and good. I don't think that reading should be required.

" Apart from this school there are to be no schools at all in the East. Parents, who from the beginning want to give their children better schooling in the elementary school as well as later on in a higher school must make an application to the Higher SS and the police leaders. The first consideration in dealing with this application will be whether the child is racially perfect and conforming to our conditions. If we acknowledge such a child to be as of our blood, the parents will be notified that the child will be sent to a school in Germany and that it will permanently remain in Germany.

" The parents of such children of good blood will be given the choice of either giving away their child ; they will then probably produce no more children so that the danger of this subhuman people of the East obtaining a class of leaders which, since it would be equal to us, would also be dangerous for us, will disappear ; or else the parents pledge themselves to go to Germany and to become loyal citizens there. The love towards their children whose future and education depends on the loyalty of the parents will be a strong weapon in dealing with them.

" Apart from examining the applications made by parents for better schooling of their children, there will be an annual sifting of all children of the General Government between the ages of six and ten in order to separate the racially valuable and non-valuable. The ones who are considered racially valuable will be treated in the same way as the children who are admitted on the basis of the approved application of their parents."

This programme was approved by Hitler on 25th May, 1940, and orders were given for its execution in complete secrecy. Greifelt was one of those initiated from the outset. Similar instructions were issued for dispossessing the victims of this programme of national extinction of their property by means of confiscation. On 16th December, 1939, Himmler issued the following orders :

I

" To strengthen Germanism and in the interest of the defence of the Reich, all articles mentioned in section II of this decree are hereby confiscated. This applies to all articles located in the territories annexed by the Fuehrer's and Reich Chancellor's decree of 12.10.39 and in the General Government for the occupied Polish territories. They are confiscated for the benefit of the German Reich and are at the disposal of the Reich Commissioner for the Strengthening of Germanism. Provided always that this does not apply to articles which are fully or

for more than 75% the property of German citizens or persons of German race. In particular are confiscated all articles mentioned in section II which are in archives, museums, public collections or in the private possession of Poles and Jews if their protection and expert safekeeping is in German interest.

II

" (1) Historical and pre-historical articles, documents, books, which are of interest for questions of cultural value and of public life, specially for the question of the German share in the historical, cultural and economic development of the country, and documents which are relevant for the history of present events.

" (2) Articles of art of cultural value, *e.g.*, pictures, sculptures, furniture, carpets, crystal, books, etc.

" (3) Furnishings and jewelry made of precious metal.

IV

" All confiscations made before this decree by authorities of the Reichfuehrer SS and Chief of German Police and the Reichcommissioner for the Strengthening of Germanism are hereby confirmed. They are to be regarded as made for the benefit of the German Reich and are at the disposal of the Reichcommissioner for the Strengthening of Germanism."

Further evidence submitted to the Tribunal showed that all the general directions and instructions set out above were strictly implemented. They resulted in the undertaking of a series of criminal measures which are described in more detail below.

(iii) *Kidnapping of Alien Children*

One of the measures undertaken by the accused in order to carry out the programme of Genocide, consisted in forcibly removing from occupied territories children regarded as racially fit to be Germanized. This policy was defined by Himmler in a letter of 18th June, 1941, where, speaking of Polish children, he said the following :

" I would consider it right if small children, of Polish families, who show especially good racial characteristics were apprehended and educated by us in special children's institutions and children's homes which must not be too large. The apprehension of the children would have to be explained with endangered health . . .

" After half a year the genealogical tree and documents of descent of those children who prove to be acceptable should be procured. After altogether one year it should be considered to give such children as foster children to childless families of good race. . . ."

Later, in 1943, Himmler formulated this policy in the following terms :

" I consider that in dealing with members of a foreign country, especially some Slav nationality, we must not start from German points of view and we must not endow these people with decent German thoughts and logical conclusions of which they are not capable, but we must take them as they really are."

" Obviously in such a mixture of peoples there will always be some racially good types. Therefore I think that it is our duty to take their children with us, to remove them from their environment, if necessary by robbing or stealing them. . . . Either we win over any good blood that we can for ourselves and give it a place in our people or . . . we destroy this blood. . . ."

Pursuant to this scheme Greifelt issued appropriate orders, known as " Regulation 67/1," where he instructed RKFDV and RUSHA officials in the following terms :

" In order to be able to regain for German Folkdom those children, whose racial appearance indicates nordic parents, it is necessary that the children who are in former Polish orphanages and with Polish foster-parents, are subjected to a racial and psychological process of selection. These children, who are considered to be racially valuable to German Folkdom, shall be Germanized. . . ."

The decree further provided, in great detail, for the registration of the children, their racial examination by RUSHA, a medical examination and their subsequent treatment. Particular care was taken to keep as a secret that the children involved were of Polish stock :

" Special attention is to be given that the expression ' Polish children suitable for Germanization ' may not reach the public to the detriment of the children. The children are rather to be designated as German orphans from the regained Eastern Territories."

At the same time orders were issued by Himmler and carried out by the Main Staff Office, RKFDV, regarding the treatment of children of unsuitable parents. Children of politically unreliable parents on account of their having shown hostile feelings towards Polish citizens of German stock, were to be segregated from their parents. They were to be put in local German public schools and included in the Hitler Youth organisation. Higher education was prohibited.

Evidence was produced to the effect that, in handling this matter, a steady correspondence developed between Himmler's office, RUSHA, VOMI and the Main Staff Office, involving the accused. It was proved that, among others, Hofmann and Hildebrandt as heads of RUSHA, were acquainted with all the details in the summer of 1941, and took part in the kidnapping. Schwalm was another direct participant.

Of the officials of VOMI evidence showed that Lorenz and Brueckner were also active in numerous cases.

(iv) *Abortions on Eastern Workers*

Another method applied was to prevent the birth of children by women of the Eastern occupied territories, Poland and the U.S.S.R. Abortions were prescribed wherever pregnancy had occurred as a result of sexual intercourse between members of the Nazi occupying authorities and local women. These instructions were issued by Himmler in March, 1943 :

" Where pregnancy is caused by sexual intercourse between a member of the SS or the Police and a non-German woman, residing in the occupied Eastern territories, an interruption of pregnancy is to be carried out positively by the competent physician of the SS or the

Police, unless that woman is of good stock, which is to be ascertained in advance in every case.

" The Russian physicians or the Russian Medical Association, which must not be informed of this order, are to be told in individual cases, that the pregnancy is being interrupted for reasons of social distress. It must be explained in such a way, that no conclusions to the existence of a definite order may be drawn."

This order was later extended to women working in the Reich as slave labour.

The organisation RUSHA took an active part in the carrying out of the above-described orders, chiefly through its heads Hofmann and Hildebrandt. Its role consisted mainly in conducting racial examinations of the pregnant women, under the following specific instructions :

" . . . If it is found by this racial examination that a racially valuable is to be expected, then the consent for abortion is to be denied. If on the basis of the racial examination the offspring is expected not to be racially valuable, the consent for abortion is to be granted.

" The racial examination is to be carried out rapidly. Further directives concerning the carrying out of the racial examination and the treatment of the cases in which the consent for abortion is to be denied are issued by the Reichsfuehrer SS and Chief of the German Police, or by the RUS—Main Office SS. . . . "

It is on the basis of such examinations that decisions regarding abortions were taken.

The fate of the children allowed to be born was that of complete Germanization from the cradle ; this was shown in a letter from Himmler's office to RUSHA :

" The reception into the care of the NSV or of Lebensborn of the child of good racial stock will necessitate in most cases its separation from the mother who remains at her working place. Particularly for this reason the reception into that care of the child of good racial stock is only possible with the mother's consent. She has to be made to consent to it through interpretations by the caretaking office which set forth the advantages but not the ends of this procedure. . . ."

The Tribunal took note of the fact that the mother was " to be *made* to consent."

(v) *Taking away of Infants of Eastern Workers*

As distinct from the kidnapping of grown up children for Germanization, the accused were involved in a programme of stealing newly born infants of Eastern workers brought to Germany as forced or slave labourers in factories and agriculture. This was done in connection with the abortion policy, in cases where pregnancy was not discovered until it was too late to perform an abortion or the child was born before pregnancy was discovered. The following instructions were given in a Decree of 27th July, 1943 :

" After giving birth the foreign working women have to resume work as soon as possible according to the instructions of the Plenipotentiary for the assignment of labor. . . .

" The children born by the foreign working women may in no case be attended by German institutions, be taken into German children's homes, or else be reared and educated together with German children. Therefore, special infant-attendance-institutions of the simplest kind, so-called ' Foreigners' children's nursing homes,' have been erected within the billets where these children of foreigners are attended to by female members of the respective nationality. . . . It is therefore important that the children of foreigners who, partly, are of a similar race and bearers of German blood and may therefore be considered as valuable are not assigned to the ' Foreigners' children's nursing home,' but if possible, they are to be saved for the German nationality and to be educated as German children.

" For this reason an examination of the racial characteristics of the father and mother has to be carried out in cases where the father of a foreigner's child is of German or of kindred race (Germanic) . . ."

Racial examinations were conducted by RUSHA and these examinations determined whether or not the infants were to be taken away from their mothers. Children considered to be racially impure were also to be taken away and put in separate assembly centres, completely segregated from German and other children. A confidential report made to Himmler disclosed the treatment to which such " impure " infants were subjected :

" I found that all of the babies located in this home were undernourished. As I was told by SS-Oberfuehrer Langoth only $\frac{1}{2}$ liter milk and $1\frac{1}{2}$ cubes of sugar per baby per day are furnished to the home on the basis of a decision of the Land Food Office. With this ration the babies must perish from undernourishment in a few months. I was informed that this agreement exists concerning the raising of these babies. . . .

" There exists only one way or the other. Either one does not wish that these children remain alive—then one should not let them starve to death slowly and take away so many liters of milk from the general food supply ; there are means by which this can be accomplished without torture and pain. Or one intends to raise these children in order to utilise them later on as labor. In this case they must be fed in such a manner that they will be fully usable as workers. . . ."

Those more particularly involved in the carrying out of this policy were RUSHA's heads Hofmann and Hildebrandt.

The Tribunal dismissed, for lack of evidence, the prosecution's contentions that, in addition to RUSHA, Lebensborn and its members were also implicated in the taking away of infants.

(vi) *Punishment for Sexual Intercourse with Germans*

In pursuance of the same racial policy, workers from occupied countries in Germany were subjected to still more drastic measures involving their personal security and their lives.

With the advent of foreign workers in Germany there followed incidents of sexual intercourse between them and Germans ; the Nazis issued decrees outwardly meant to protect the German race, and by doing so they ordered and provoked the murder of numerous inhabitants of occupied countries.

On 3rd July, 1940, Pancke, then chief of RUSHA, sent a report to Himmler's deputy, Bormann, suggesting the first measures to be taken. He said :

> " At present, there are hundreds of thousands of prisoners in Germany of all nationalities and degrees, partly in camps, but for the most part, however, as workers.
>
> " . . . The dangers of inter-mixing and bastardizing of our people are extraordinarily grave. They lie to a great extent in the almost unlimited lack of knowledge throughout our nation of the problems of blood."

As a result, the Reich Main Security Office, Reichssicherheitshauptamt (RSHA), which was the top Gestapo Office, promulgated decrees which provided that if a foreigner had sexual intercourse with a German woman, he should be arrested and examined by a racial examiner of RUSHA. The fate of the arrestee depended entirely on RUSHA's findings. Those considered to be racially inferior were subject to " special treatment," that is to death, or to seclusion in a concentration camp. Those found to be racially valuable were subject to Germanization. The " Special treatment " was prescribed in the following terms :

> " Special treatment is hanging . . .
>
> " Sexual intercourse is forbidden to the manpower of the original Soviet Russian territory.
>
> " For every case of sexual intercourse with German countrymen or women, special treatment is to be requested for male manpower from the original Soviet Russian territory, transfer to a concentration camp for female manpower.
>
> " When exercising sexual intercourse with other foreign workers, the conduct of the manpower from the original Soviet Russian territory is to be punished as a severe violation of discipline with transfer to a concentration camp.
>
> " The intercourse between other foreign workers employed in the Reich and the manpower from the original Soviet Russian territory also brings great dangers to be dealt with by the security police, therefore, it should also be fought with measures against the foreign workers. . . ."

These instructions were subsequently extended to subjects of other nations, such as Czechs.

The complicity of RUSHA and its leading members in carrying out the instructions was proved by numerous documents. Thus, for instance, Hofmann made the following orders :

> " With regard to illicit sexual intercourse of labourers of foreign stock the following ordinances are in force :
>
> " All serious offences such as assault and sexual offences and sexual intercourse with German women and girls are to be reported at once to the Security Service (Security Police) ; as a matter of principle the department of justice will not be contacted in the beginning. As a rule both parties will be arrested.

" After being investigated as to his nationality the party of foreign race is subject to a racial evaluation by the competent RuS Field Leader ; a potential suitability toward Germanization is to be explored.

" When a case of sexual intercourse is detected, the Amtsarzt (official physician) has to ascertain whether the participating German woman is pregnant. It is to be stated how far the pregnancy is advanced and whether another and what person beside the one of foreign stock in question might have fathered the prospective child (this investigation to be made by the Youth Office). If the person of foreign stock is fit for Germanization and if both parties are evaluated favourably under the racial viewpoint, marriage is possible under certain conditions ; however, marriage between laborers from Serbia, or other Eastern labourers, and German girls are not permitted for the time being. A female worker of foreign stock, caused by the German man (in abuse of his position) to submit to sexual intercourse, will be taken into protective custody for a brief period, thereafter assigned to a different job. In other cases the female worker of foreign race is to be confined to a concentration camp for women. Pregnant women are to be sent to a concentration camp only after they have given birth and stilled the baby."

Similar orders were issued by Hildebrandt.

(vii) *Impeding the Reproduction of Enemy Nationals*

Measures, concerning mainly inhabitants of Poland, were taken to prevent their reproduction and thus contribute to the destruction of non-German races. They took the form of various decrees, and were chiefly aimed at drastically curtailing marriages.

They were taken in close connection with yet another measure, the so-called German People's List (Deutsche Volksliste). This list was introduced for Poland and was later extended to other foreign nationals. It classified Polish citizens into four groups. Group 1 included so-called ethnic Germans who had taken an active part in the struggle for the Germanization of Poland ; Group 2 included those ethnic Germans who had not taken such an active part, but had " preserved " their German characteristics ; Group 3 comprised individuals of alleged German stock who had become " Polonized," but who it was believed, could be won back to Germany, and also persons of non-German descent married to Germans or members of non-Polish groups, who were considered desirable so far as their political attitude and racial characteristics were concerned. Finally, Group 4 comprised persons of German stock who had become politically merged with the Poles. After registration in the List, individuals from Groups 1 and 2 became automatically German citizens. Those from Group 3 acquired German citizenship subject to revocation, and those from Group 4 received German citizenship through naturalization proceedings. Persons ineligible for the List were classified as stateless, and all Poles from the occupied territory, that is from the Government General of Poland, as distinct from the incorporated territory, were classified as non-protected.

By a decree of 25th April, 1943, classes protected under the List were allowed to marry among themselves subject to restrictive measures. Re-

strictions were imposed by Himmler, who raised the marriageable age to 28 for men and 25 for women. According to the decree of 25th April, 1943, persons protected and persons non-protected were prohibited from intermarrying without special permission from the Main Staff Office.

An earlier decree of 9th February, 1942, provided that persons from Group 3 were prohibited from marrying persons from Group 4, persons of alien race, or Germans holding citizenship subject to revocation who were not classified in Group 3. And there were further restrictions of a similar nature.

According to a memorandum issued by the Prague office of RUSHA on 6th August, 1944, persons of Polish and Ukrainian descent were to be prevented " as a matter of principle " from marrying each other.

It soon became apparent that in spite of all the above decrees, the measures undertaken were not bringing forth the desired results. As recorded at a conference between members of RUSHA and VOMI it was established that " because of the raising of the marriage age for Poles the number of legitimate children was reduced, resulting in an increase of the number of illegitimate children." The conference recommended the following measures to discourage the birth of illegitimate children :

> " With regard to the question of reducing the number of illegitimate children, it was the general concensus of opinion to allow the unwed Polish mothers a minimum subsistence for the care of the child, the subsistence to be paid for by the Polish fathers and to be paid out only if the care of the child is not assured by either the unwed mother or her family. This was to prevent any negligence. Here it must be the primary principle not to spend one German penny for Polish welfare. This method of putting the illegitimate, racially undesirable Polish child at a definite disadvantage, even though it will not, in general, reduce the number of illegitimate children, will at least not encourage a rise in the number of illegitimate children. The Main Race and Settlement Office suggested that the father of the illegitimate child be required to make especially large payments, but that the money become part of a general fund from which the necessary sums might then be paid out. In cases where the paternity cannot be established, all potential fathers will be equally liable to payment. This measure is not likely to increase the pleasure of having an illegitimate child ; all surplus money might be turned over to German youth welfare. . . ."

More far-reaching measures were undertaken concerning the prevention of births to foreign women working on farms in Germany, as a result of sexual intercourse with foreign workers. The following measures were introduced :

> " Comprehensive sterilization of such men and women of alien blood in German agriculture who, on the basis of our race laws—to be applied even more strictly in these cases—have been declared inferior with regard to their physical, spiritual and character traits.
>
> " A ruthless but skillful propaganda among farm workers of alien blood, to the effect that neither they nor their children, produced on the soil of the German people, could expect much good, in other words

immediate separation between parents and children, eventually complete estrangement; sterilization of children afflicted with hereditary disease . . ."

"An inconspicuous distribution of contraceptives among farm workers of alien blood.

"General and strictest compliance with the principle of taking away for good from their mothers all newly born children of female farm workers of alien blood as well as children of German women if the father is of alien race, at the latest 4 weeks after their birth, and then sending them to geographically remote homes. . . ."

The evidence showed that those involved in the execution of these measures were the members of RUSHA, VOMI and the Main Staff Office. Representatives of the first two made suggestions concerning measures to be enacted, and requested and obtained the right to have individual cases decided by Higher SS and Police Leaders, which resulted in decisive intervention on the part of the Main Staff Office. The latter prepared the decrees concerning marriages. Greifelt signed several of them. Lorenz, as Chief of RUSHA, and Brueckner as Chief of Amt VI (RUSHA's office safeguarding the German race in the Reich), were responsible for the actual crimes committed pursuant to the above programme. VOMI was also involved, and Hofmann and Hildebrandt had, here again, full knowledge of the programme and actively took part in its execution.

(viii) *Forced Evacuations, Resettlement and Germanization of inhabitants of occupied territories*

By far the most important in scope and consequences was the method of imposing Germanism by forcibly evacuating and resettling inhabitants of occupied countries, and subjecting them to Germanization and slave labour.

Evacuations and resettlement were conducted in connection with the classification of the populations affected under the scheme of the German People's List. In addition to the four groups previously explained, a subdivision was made within each group which included three categories of cases. 'C' cases concerned those regarded to be racially and politically reliable; 'A' cases concerned those considered to be less politically reliable, but still of racial value; 'S' cases comprised the remainder, that is individuals found to be of alien blood and of no racial value. Generally, 'C' cases were transferred from their country of origin to the Eastern territories incorporated to the Reich, it being assumed that they would speed up Germanization of these territories. As being less reliable, 'A' cases were transferred to Germany proper in order to be more easily absorbed. The remainder, *i.e.*, 'S' cases, were either evacuated to the Government General of Poland or else confined in concentration camps and/or used as slave labour.

Evacuations of local inhabitants took place in all territories designated to become German by the bringing in of German resettlers. They affected in the first place Poles, but were soon followed by Yugoslavs from Slovenia and Frenchmen from Luxembourg, Alsace and Lorraine. German resettlers came to take their place from many other countries, including Russia, Poland and Greece. One way in which this was implemented can be illus-

trated by a directive issued by Greifelt regarding the resettlement of the Yugoslav population from Slovenia (Southern Corinthia) :

> " The Slovenian intelligentia will be submitted to a racial examination. The racially valuable elements (groups I and II) will not be evacuated to Serbia but will be transferred to Germany proper to be Germanized.
>
> " The above change does not affect the ordinance to the effect that a sharp selection will be made from among the native population of Southern Corinthia and that the undesirable population must be evacuated in accordance with existing directives."

The whole scheme was operated by coercion with the constant use of intimidation, deceit or mere force. Most of those affected, both evacuees and resettlers, were compelled to pass through the German People's List procedure and then to leave their native land. By January, 1944, nearly 3 million Poles alone had been registered under the List procedure, and hundreds of thousands had been deported to the Government General or to the Reich as slave labour. A corresponding number of resettlers were transferred from their countries and resettled on the Polish property left behind by those evacuated.

All these forcible transfers of populations were carried out in most inhumane conditions. Shortly after Poland was conquered, the German Commander-in-Chief in the East made the following descriptions of the existing state of affairs in a draft report :

> " The resettlement scheme is causing particular and steadily increasing alarm in the country. It is quite obvious that the starving population, struggling for its very existence, can regard the wholly destitute masses of evacuees, who were torn from their homes over night, as it were, naked and hungry, and who are begging shelter from them, only with the greatest anxiety. It is only too understandable that these feelings are intensified to immense hatred by the numerous children starved to death on each transport and the train loads of people frozen to death . . ."

Himmler himself, in a speech to Party comrades, acknowledged that during evacuations people froze to death on transport trains in the East, but he said : " I imagine that we have to be ruthless in our settlement, for these provinces must become Germanic, blond provinces of Germany."

Strict instructions were issued to apply ruthless methods. The Nazi Governor-General of Poland, Frank, submitted the following report to Hitler on 25th May, 1943, on the deteriorating position in Poland :

> " According to my own conviction, the reason for the complete destruction of public order is to be found exclusively in the fact that the expelled persons were in some cases given only 10 minutes and in no case more than 2 hours, to scrape together their most necessary belongings to take with them. Men, women, children and old people were brought into mass camps, frequently without any clothing or equipment ; there they were sorted into groups of people fit for work, less fit for work and unfit for work (especially children and aged persons), without regard to possible family ties. All connections between the members of families were thus severed, so that the fate of one group remained

unknown to the other. It will be understood that these measures caused an indescribable panic among the population affected by the expulsion, and led to it that approximately half of the population, earmarked for expulsion, fled. They fled, in their despair, from the expulsion district and have thus contributed considerably to the increase of the groups of bandits which existed for some time in the Lublin district and which act with continuously increasing audacity and force."

The evidence examined by the Tribunal disclosed the implication in the above policy of Germanization of the Main Staff Office of RKFDV, involving in particular, Greifelt and Creuz as Higher SS and Police leaders and Himmler's deputies, and also of VOMI and RUSHA and their leading staff. A decree of Himmler of 9th May, 1940, contained by implication the following general reference to the above accused :

" Among the people of alien (not German) nationality in the annexed Eastern districts as well as in the Government General, there are often such who are eligible for Germanization on the basis of their racial suitability. I therefore ordered that a selection of the racially most valuable families of nordic nature be made, according to directives issued by me, and I intend to put them into plants in the old Reich. Since this is not a question of utilization of labor in the ordinary sense, but an extremely important national-political task, the accommodation of this group of persons cannot be done in the usual way through the labor offices.

" For this reason I entrust the Higher SS and Police Leaders in their capacity as my deputies for the Strengthening of Germanism with this task of the distribution of people and at the same time with the utilization of this group of persons. . . . It should be endeavoured to accommodate able-bodied sons and daughters, who are not necessarily needed in the same plant, in other, more distant places."

Other documentary evidence showed the part taken by Greifelt and the Main Staff Office. Thus, apart from his already quoted directive concerning Slovenes from Yugoslavia, in a letter to Himmler of 22nd September, 1941, regarding racial examinations of inmates of Baltic refugee camps, Greifelt reported that 70 per cent. were " fit for immediate labour service " ; that 28.5 per cent. were " foreign elements which should be brought back to their land of origin " ; and that 1.5 per cent. were " considered as politically incriminated or suspected or asocial " and were " as such to be handed to the Chief of the Security Police for commitment to a concentration camp." In another report to Himmler of 19th November, 1941, concerning the settlement of Lithuanian Germans, Greifelt suggested a complete resettlement scheme, including the disposal of property of those deported. He also issued express instructions regarding the slave labour of persons deported from Alsace, Lorraine and Luxembourg. It was shown that Creuz, Greifelt's deputy, had similarly been responsible for plans and orders. In the matter of the use of undesirable inhabitants as slave labour, he outlined the entire re-Germanization programme in a report of 25th March, 1943, in the following terms :

" The selection of the persons is made by the Branch office of the SS Main Race and Settlement Office, Litzmannstadt.

" The persons found suitable for being Germanized will be turned over to the individual Higher SS and Police Leaders in Germany proper according to the plannings to be drawn up by the Main Staff Office.

" The Higher SS and Police Leaders are competent for the selection of the work assignments . . . ; the definite decision, . . . is theirs exclusively. . . .

" Until 31st January, 1943, 14,592 persons from the former Polish territories have been selected by the Branch Office of the SS Main Race and Settlement Office and were transferred into Germany proper. . . .

" It is emphasised that the care of the persons suitable for re-Germanization shall not degenerate into an exaggerated kind of welfare. It was also often necessary to discipline some obstinate persons in the harshest manner and to keep them in line through the use of compulsory measures.

" If there still exists, as is understandable, a lack of willingness for re-Germanization, it is nevertheless to be expected that the next generation, on account of its racial orientation, will have almost completely merged with Germanism. The case and education of juveniles is therefore considered the main task in the procedure of re-Germanization."

Slave labour included also the use of young girls as domestic workers in German households. In a decree of 9th October, 1941, Himmler ordered as follows :

" One of the greatest calamities is at present the shortage of female domestic help, especially in families with many children.

" I therefore order that girls of Polish and Ukrainian descent, who meet the requirements of the racial evaluation groups I and II shall be selected by the racial examiners of the Main Race and Settlement Office and shall be brought into the Reich territory. The selection is not to be limited only to those persons who are to be evacuated, but, as far as possible, to all available girls. In this connection not only the Warthegau but also the other incorporated Eastern Territories, the General Government and, after prior understanding is reached with locally competent offices, the former Esthonian, Latvian and Lithuanian territories are to be considered.

" Assignments may only be made to households of families with many children who are firm in their ideology and fit for training such girls."

Domestic servants thus forcibly brought to Germany were also subjected to Germanization. In a report to Himmler of 20th February, 1942, Creutz stated the following :

" Regarding the status of the allocation of female domestic help eligible for re-Germanization I wish to report as follows :

" 521 female domestics suitable for re-Germanization were allocated to non-farming households until 31st December, 1941 (total number of allocated persons including children : 10,520).

" The selection of the persons eligible for re-Germanization is made by the Field-Office of the SS-Main Race and Settlement Office in Litzmannstadt. The allocation in the Reich is carried out by the locally competent Higher SS and Police Leaders.

" The Field Office of the SS-Main Race and Settlement Office makes its selections primarily from among the evacuated Poles. In addition, pursuant to the personal order of the Reichsfuehrer-SS, it has the responsibility of removing qualified female domestics, eligible for re-Germanization, from the re-incorporated Eastern territories (especially from the Warthegau), and of transferring them to the Reich proper. It receives the names of girls in the Warthegau through my deputy. Furthermore, it contacted the local employment offices and welfare offices in the allocation of the girls."

The evidence regarding RUSHA disclosed that it took part in the entire scheme of resettling and Germanizing foreign populations and using them as slave labour. In all three of these closely connected operations RUSHA carried out its usual task of selecting and racially evaluating the so-called ethnic Germans and foreigners. The treatment of all these persons depended on RUSHA's findings and recommendations. RUSHA's responsibility for racial examinations in this sphere as well is stressed in the following draft instructions for the Immigration Centre :

" The Race and Settlement Office (RUS) determine the racial suitability of the resettler according to general directions by the Reichsfuehrer-SS. The results are listed in a card index. This race and settlement card index is also centrally stored in Litzmannstadt and is consulted when determining the final settlement."

The examinations took place after the resettlers had been brought to VOMI camps. On the basis of ' A,' ' C ' and ' S ' classifications some resettlers were allowed to settle down in the Eastern territories, some were taken to Germany as labourers and some were sent to the Government General of Poland. Those chiefly responsible for these activities were Hofmann, Hildebrandt and Schwalm. Numerous documents were produced in evidence to this effect.

VOMI was implicated in the scheme in that it provided camps for the resettlers and was in charge of the latter at this particular stage. It operated some 1,500 to 1,800 camps and at the end of the war there were still hundreds of thousands of persons confined in these camps as resettlers, evacuees and slave labourers. Lorenz and Bueckner, as heads of VOMI bore full responsibility for the carrying out of this part of the scheme. The treatment of the inmates in the care of VOMI was illustrated by the following instructions issued to Lorenz by Himmler on 21st September, 1941 :

" The escape of a Slovene is to be reported immediately by the Camp Commander of the VOMI to the Gestapo. The Getapo, in turn, will notify immediately, the Higher SS and Police Leader Alpenland.

" The family of the escapee as well as his relatives will be removed immediately from the camp and be taken to a concentration camp. Their children will be taken away from them and sent to a home.

" At once investigation has to be made in the camp in order to determine who knew of the proposed escape and aided it. All men

who knew about the escape and lent a helping hand will be hanged in the camp."

(ix) *Compulsory Conscription of Enemy Nationals into the Armed Forces*

The racial policy of the Nazis was carried out also by forcibly drafting into the German armed forces foreign subjects of real or alleged German stock. The evidence disclosed that tens of thousands of such foreign nationals, after having been registered in the German People's List procedure, were conscripted into the Waffen-SS, or into the regular armed forces. Thus, for instance, the following facts were discovered in an information bulletin of 28th September, 1943 :

> " The first more extensive recruiting of ethnic Germans for the Waffen-SS took place in Rumania in 1940. This was done under the pretence of recruiting labor for the Reich. In a later, second action, a thousand men belonging to this ethnic German group in Rumania were recruited. At that time these recruitments were not made for the purpose of strengthening the German army but with the idea—strongly backed by the Repatriation Office for Ethnic Germans (VOMI) and the present SS-Obergruppenfuehrer Berger, that the participation of the ethnic Germans in the war within the ranks of the Waffen-SS would cause a still closer union between these ethnic German groups and the German people, and, especially after the war, in territories settled by ethnic Germans, lead to the development of a veteran's generation like those in the German Reich. . . .
>
> " The political situation in the Serbian Banat made it possible, after the dissolution of the Jugoslav state, to collect the ethnic Germans living there into a unit, called the SS-division ' Prinz Eugen.' Above and beyond this all further available men of the ethnic German group in the Banat fit for service, were drafted into the police forces or served as temporary policemen in the Banat. Of the ethnic German group in the Banat and Serbia, counting approximately 150,000 ethnic Germans, 22,500 are serving in the aforementioned units, that is to say, more than 14% of this whole number."

The same bulletin gave a list, country by country, of the " allotment of German ethnic groups," enumerating the total number of persons in the Waffen-SS and Wehrmacht. The following two entries are typical examples : " Rumania, Waffen-SS, 54,000 ; Slovakia, Waffen-SS, 5,590, Wehrmacht 257."

Orders were issued to carry out enlistments with the use of compulsory measures and to punish the recalcitrants. This fact was stressed in a letter to the SS-Main Office of 12th July, 1943 :

> " . . . the SS and police court in Belgrade reported on 14th August, 1942, that the E.g. volunteer division Prince Eugen no longer was an organisation of volunteers, that on the contrary, the ethnic Germans from the Serbian Banat were drafted to a large extent under threat of punishment by the local German leadership, and later by the replacement agency."

One of the punishments was the confinement to a concentration camp, and towards the end of the war they also included executions. This latter fact

was proved by a letter dated 28th September, 1944, from the Higher SS and Police Leader, Southeast, to deputies of the RKFDV :

> " In the individual case of a member of group 3 who refused acceptance of the German People's List identification card in order to avoid being drafted into the army, the Reichsfuehrer has decided that in this and similar cases firm action will have to be taken and has ordered the execution of the individual in question.
>
> " If, in spite of having been properly instructed, persons enrolled in the German People's List should refuse acceptance of their German People's List identification cards a motion for special treatment will have to be submitted in future."

It will be remembered that " special treatment " meant death by hanging.

Those of the accused charged specifically for this type of offence were Lorenz and Brueckner. The Tribunal was satisfied with the evidence concerning Lorenz's guilt, but found that the evidence submitted against Brueckner was " insufficient " to establish his culpability.

(x) *Plunder of Public and Private Property*

The execution of the racial programme in the sphere of forcible resettlement lead to extensive plunder of private and public property by the Office for the Strengthening of Germanism and the associated organisations.

In August, 1942, Greifelt submitted a report to Himmler concerning the incorporated territories in Poland. The report revealed that, in four Eastern " Gaus " only, the total number of confiscated farms and estates amounted to 626,642 with an approximate total area of 14 million acres.

No compensation was ever paid for the land confiscated, and the only compensation envisaged at one time, without ever being made, was that concerning the land in the Government General of Poland. This was shown in a memorandum of Greifelt concerning a conference held with Hitler on 12th May, 1943 :

> " The Reichsfuehrer SS has pointed out that the property in question in the incorporated Eastern territories was formerly German property which was robbed in 1918 and for which no one can demand compensation. On the other hand, the situation in the Government General is different since the Poles there are still owners of their property. In so far as this property will be utilised for German resettlement measures, one could, therefore, consider a compensation for the previous owner."

With regard to property confiscated from Jewish owners no compensation at all was contemplated. This was disclosed in another memorandum of Greifelt's, written in December, 1942, where it was stated that " the Reichsfuehrer SS (Himmler) had signed a general directive whereby the entire Jewish real estate was to be placed at the disposal of the Office for the Strengthening of Germanism."

The fact that confiscations were carried out in order to Germanize the territories affected, was stressed by Greifelt in a letter to Himmler of 23rd February, 1941 :

> " After having issued your carrying-out decree concerning the treatment of the population in the Eastern occupied countries of 12.9.1940,

you will find it necessary to issue instructions concerning the treatment of the property belonging to persons included in Groups III and IV of the ' List for the Repatriation of German ethnic Groups ' and this for the agricultural as well as for the trade sections. . . .

" In the interest of Germanizing the country as fast and as effectively as possible and of separating from both these groups their property located in the occupied Eastern territories as soon as feasible, my office is of the opinion that real estate situated in the Annexed Eastern areas, and belonging to members of Groups III and IV of the List should be expropriated. . . .

" My office proposes to expropriate the property of these persons under the law concerning the treatment of property belonging to nationals of the former Polish State. . . ."

Confiscations were carried out in such a ruthless and indiscriminate manner that it caused the Reich Minister of Justice to enter a protest against the extent of confiscation of Polish property. In a letter to Hitler of 22nd May, 1942, the Minister reported the following :

" During the execution of this order . . . the Poles were robbed not only of their technical appliances but also of their food and personal articles and clothes.

" The Polish inhabitant who has been left practically without means after the extent of the confiscation, has become very agitated, which might result in further expressions of hate and acts of sabotage against Germans. The action will also have bad effects as far as nutrition policies are concerned."

To this Greifelt replied on 8th July, 1942, in the following terms :

" Since these Poles began to steal the fodder for their animals after they had lost their agricultural enterprises, and furthermore because the resettlers were in want of the missing live and dead stock which belonged to the farms, it became necessary for economic reasons to confiscate this stock and to return it to the now German farms, to which it belonged."

In addition to ruthlessness special care was taken to carry out confiscations in the utmost secrecy and hide them from public opinion at large. Opposing a loan plan which had been suggested by the Reich Minister of Finance, Greifelt wrote to Himmler on 21st October, 1943 :

" On the basis of this figure it would be possible for everybody in foreign countries to calculate that the entire Polish house property without exceptions has been confiscated. The reasons for hesitation dictated by international law and foreign policy which in 1940 were conclusive for formulating the ordinance concerning Polish property in such a way that it could not be realised by any uninitiated person that actually all Polish property was supposed to be confiscated, would thus be thrown overboard."

VOMI was directly connected with this policy of plunder. The evidence showed that many confiscations took place for the purpose of using the property for the housing of resettlers. Such confiscations were carried out by Lorenz under the guise of requisitions. Greifelt gave the following account

of VOMI's activities in this respect in a letter to Himmler dated 17th December, 1940 :

> " Realising the impossibility of providing temporary housing accommodation for the resettlers by normal lawful means the Office for the Repatriation of Racial Germans was empowered by an authorisation issued by the Reichsfuehrer on 30th December, 1939, to requisition lodging space suitable for the communal housing of Racial German resettlers.
>
> " On the strength of this authority the Office for the Repatriation of Racial Germans has requisitioned a large number of inns, hospitals, sanatoria, old people's homes and especially convents. To a large extent this requisitioning was done with full collaboration of the minor administrative authorities."

Lorenz spoke openly of confiscations for Germanization purposes in a letter to Himmler's secretary, Brandt, of June, 1943 :

> " . . . Another reason for the maintenance of the camps . . . is the following :
>
> " The buildings confiscated there for the accommodation of resettlers mainly come from former church property. An unrestricted surrender of this property to the Wehrmacht, the National Socialist Public Welfare Organisation, etc., undoubtedly would result in this property gradually returning to the hands of the previous clerical owners. In order to prevent such a development, which is undesirable to the Reichsfuehrer-SS, I have so far, persistently opposed the surrender of these camps."

The allegation of the prosecution that " Lebensborn," and more particularly its leading members Sollmann, Ebner, Tesch and Viermetz, were also involved in the plunder of property, was dismissed by the Tribunal on the following grounds :

> " While it appears from the evidence that Lebensborn utilised certain property formerly belonging to Jews, such as several hospitals, old people's homes, and children's homes, it further appears that these properties had already been confiscated by other agencies and were empty at the time Lebensborn took them over. . . . While there is evidence to the effect that in isolated instances Lebensborn also utilised a small amount of personal property for the welfare and maintenance of children under Lebensborn care, it has not been established beyond a reasonable doubt that Lebensborn actually confiscated such property without payment ; nor has it been established that any defendant connected with Lebensborn was connected with any plan or programme to plunder occupied territories."

(xi) *The Charge of Euthanasia*

One of the accused, Hildebrandt, was charged " with special responsibility for and participation in the extermination of thousands of German nationals pursuant to the so-called ' euthanasia programme ' of the Third Reich." The evidence submitted by the prosecution was that a unit under him killed thousands of insane Germans in the area of Danzig, which the Nazis treated as incurable and doomed to die of their illness.

The Tribunal dismissed this charge on the grounds that the administration of death under Nazi legislation against citizens of the Third Reich only, did not constitute a crime against humanity.(1)

(xii) *Persecution and Extermination of the Jews*

The Tribunal decided that charges brought against the defendants under this count had been established and proved in the parts dealing with punishments for sexual intercourse with Germans, deportations of foreign nationals, and plunder of property, as the victims in all these instances included Jews.

3. THE JUDGMENT OF THE TRIBUNAL

(i) *Individual Guilt of the Accused*

Thirteen accused were found guilty on one or more counts, and one was acquitted. Some were found guilty of only membership in criminal organisations. The counts referred to by the Tribunal were the following: Count 1, crimes against humanity; Count 2, war crimes; Count 3, membership in a criminal organisation.

Those found guilty were the following and for the following reasons:

ULRICH GREIFELT

" The defendant Ulrich Greifelt, as Chief of the Main Staff Office and deputy to Himmler, was, with the exception of Himmler, the main driving force in the entire Germanization program. By an abundance of evidence it is established beyond a reasonable doubt, as heretofore detailed in this judgment, that the defendant Greifelt is criminally responsible for the following actions: kidnapping of alien children; hampering the reproduction of enemy nationals; forced evacuations and resettlement of populations; forced Germanization of enemy nationals; the utilisation of enemy nationals as slave labor; and the plunder of public and private property.

" The evidence submitted is insufficient to establish beyond a reasonable doubt the defendant Greifelt's guilt upon the following specific charges: Abortions on Eastern workers; taking away infants of Eastern workers; and the punishment of foreign nationals for sexual intercourse with Germans.

" The defendant Greifelt is found guilty upon Counts 1 and 2 of the indictment.

" The Tribunal finds that the defendant Greifelt was a member of a criminal organisation; that is, the SS, under the conditions defined and specified by the Judgment of the International Military Tribunal, and he is, therefore, guilty under Count 3 of the indictment."

RUDOLF CREUTZ

" Rudolf Creutz, as deputy to Greifelt, was an active participant in certain phases of the Germanization program, as has heretofore been set forth in detail in this judgment; and it has been established beyond any reasonable doubt that the defendant Creutz is criminally responsible for, and implicated

(1) For more details, see pp. 33-34, below. See also *Trial of Erhard Milch*, Vol. VII of this Series, pp. 51-52.

in, the following criminal activities : the kidnapping of alien children ; the forced evacuation and resettlement of populations ; the forced Germanization of enemy nationals ; and the utilisation of foreign nationals as slave labor.

" Upon the following specific charges the evidence is insufficient to justify a conclusion of guilt : Abortions on Eastern workers ; taking away infants of Eastern workers ; punishment of foreign nationals for sexual intercourse with Germans ; and hampering the reproduction of enemy nationals.

" The defendant Creutz is found guilty upon Counts 1 and 2 of the indictment.

" The Tribunal finds that the defendant Creutz was a member of a criminal organization ; that is, the SS, under the conditions defined and specified by the judgment of the International Military Tribunal, and he is, therefore, guilty under Count 3 of the indictment."

KONRAD MEYER-HETLING

" Konrad Meyer-Hetling was Chief of the Planning Office within the Main Staff Office. During his entire period of service in this position, he was a part-time worker only, still retaining a professorship at the university of Berlin. Meyer-Hetling is a scientist of considerable world renown—an agricultural expert.

" The prosecution's case rests principally upon the ' General Plan East,' a survey and proposed plan for the ' reconstruction of the East,' prepared by Meyer-Hetling at Himmler's request and submitted to Himmler on 28th May, 1942. It is the contention of the prosecution that this plan formed the basis for the measures taken in the incorporated Eastern territories and other occupied territories.

" A consideration of General Plan East, as well as correspondence dealing with this plan, reveals nothing of an incriminatory nature. This plan, as contended by the defendant, envisaged the orderly reconstruction of the East —and particularly village and country—after the war. The plan plainly stated : ' According to plan, the achievement of the work of reconstruction will be spread over five periods of five years each, totalling 25 years.' There is nothing in the plan concerning evacuations and other drastic measures which were actually adopted and carried out in the Germanization program. As a matter of fact, it is made quite plain by the evidence, as the defendant contended, that this General Plan East was never adopted and no effort was made to carry out its proposals. Actually, Himmler, instead of an orderly reconstruction, decided upon and pursued a drastic plan which in all its cruel aspects sought the reconversion of the East into a Germanic stronghold practically overnight. Of course, Meyer-Hetling is not responsible for these measures which he did not suggest.

" Simply by virtue of his position as chief of planning, the prosecution would have the Tribunal assume that Meyer-Hetling was the person responsible for all planning and, consequently, the drastic actions taken must have had their origin in his planning. The difficulty with such an assumption is that there is no proof to support it. He is charged, for instance, with such

criminal activities as kidnapping alien children, abortions on Eastern workers, and hampering the reproduction of enemy nationals. Yet in thousands of pages of documentary and oral evidence, there is not a single syllable of evidence even remotely connecting him with any of these activities.

" Upon the evidence submitted, the defendant Meyer-Hetling is found not guilty on Counts 1 and 2 of the indictment.

" The Tribunal finds that the defendant Meyer-Hetling was a member of a criminal organization ; that is, the SS, under the conditions defined and specified by the judgment of the International Military Tribunal, and he is, therefore, guilty under Count 3 of the indictment.

OTTO SCHWARZENBERGER

" Otto Schwarzenberger was Chief of Finance in the Main Staff Office. As such, he dealt with the operational finances and expenses of all organizations charged in the indictment with participation in the Germanization program. He also handled operational finances of other organizations, such as DUT, DAG, EWZ, and UWZ.

" Schwarzenberger has contended throughout the trial that, as Chief of Finance, his duties consisted almost entirely of paying out funds on lump-sum requisitions submitted to him by various organizations, and that, as Chief of Finance, he had no power to approve or disapprove requisitions for funds, which was a duty resting solely with the Reich Minister of Finance. He contends, furthermore, that not even in the requisitions and bills submitted to his office was there anything indicating the purpose for which the funds were to be used or had been used, and he never had knowledge of the purposes for which these funds were being dispersed. Schwarzenberger's contentions are supported by an abundance of evidence. It would appear from the evidence that Schwarzenberger's principal task was to submit to the Reich Minister of Finance a budget containing the estimated operational needs of the various departments ; and upon approval by the Reich Minister of Finance, the funds were deposited with Schwarzenberger's office for payment to the various organizations.

" Volumes of documents have been introduced by the prosecution in this case—hundreds pertaining to the various organizations involved—and Schwarzenberger's name is conspicuous in its absence among these documents. No documentary evidence of any incriminatory nature has been offered against this defendant ; yet the prosecution would have the Tribunal assume, as it is argued, that he held numerous conferences with all departments with reference to all financial matters and was intimately acquainted with all activities of the various departments. This is an assumption which the prosecution bases wholly upon the position held by the defendant and which is not supported by proof.

" Upon the evidence submitted, the defendant Schwarzenberger is found not guilty on Counts 1 and 2 of the indictment.

" The Tribunal finds that the defendant Schwarzenberger was a member of a criminal organisation ; that is, the SS, under the conditions defined and specified by the judgment of the International Military Tribunal, and he is, therefore, guilty under Count 3 of the indictment."

HERBERT HUEBNER

" As Chief of Labor Staffs and the Resettlement Staff in Posen, Herbert Huebner was concerned in the forcible evacuation and resettlement actions as well as the slave labor program. Within the area under his jurisdiction and supervision, these actions were carried out on a large scale. One document, written by him, suffices to show his connection with these actions. Huebner, on 29th August, 1941, wrote to the SS Settlement Staff at Lodz and Posen as follows :

> ' According to the newest order of the Reich-Governor, the Poles who will have to be displaced in the course of the settlement must under no condition leave the Warthegau,—*e.g.*, in order to be allocated for labor in Germany proper via the employment offices,—since the Poles will probably be needed later on as manpower (in this area). The Landraete (Chiefs of District Administration) will have to provide emergency work for them until large-scale projects will provide the possibility to make use of all available Polish manpower.
>
> ' The Reich Governor will instruct the Landraete to-morrow by circular letter to make all provisions to prevent the displaced Poles from leaving the Gau. The Landraete also were again urged to support the displacement measures in every way.
>
> ' I request you to comply with this order under all conditions and, where necessary, to instruct the Landraete to provide housing for the Poles to be displaced. In all cases they are to be informed in time of any planned displacement measures.'

" It has been established by the evidence beyond a reasonable doubt that the defendant Huebner actively participated in the forced evacuation and resettlement of foreign populations and the use of foreign nationals as slave labor.

" The evidence is insufficient to authorise a conclusion of guilt on the part of Huebner with regard to the other specifications of the indictment.

" The defendant Huebner is found guilty on Counts 1 and 2 of the indictment.

" The Tribunal finds that the defendant Huebner was a member of a criminal organization ; that is, the SS, under the conditions defined and specified by the Judgment of the International Military Tribunal, and he is, therefore, guilty under Count 3 of the indictment."

WERNER LORENZ

" The defendant Werner Lorenz, as chief of VOMI, was an active participant in practically every phase of the Germanization program, as has heretofore been set forth in detail in this judgment. The evidence establishes beyond any reasonable doubt that Lorenz is criminally responsible for and implicated in the following criminal activities : the kidnapping of alien children ; hampering the reproduction of enemy nationals ; the forced evacuation and resettlement of foreign populations ; the forced Germanization of enemy nationals ; the utilisation of enemy nationals as slave labor ; the forced conscription of non-Germans into the SS and armed forces ;

and the plunder of public and private property. The evidence is insufficient to authorise a conclusion of guilt with regard to forcible abortions on Eastern workers.

" The defendant Lorenz is found guilty upon Counts 1 and 2 of the indictment.

" The Tribunal finds that the defendant Lorenz was a member of a criminal organisation ; that is, the SS, under the conditions defined and specified by the Judgment of the International Military Tribunal, and he is, therefore, guilty under Count 3 of the indictment.

HEINZ BRUECKNER

" Heinz Brueckner, as head of the Amt VI of VOMI, actively participated in certain phases of the Germanization program, as has heretofore been set forth in detail in this judgment. It has been established beyond a reasonable doubt that this defendant is criminally responsible for and implicated in the following criminal activities : the kidnapping of alien children ; hampering the reproduction of enemy nationals ; the forced evacuation and resettlement of foreign populations ; the forced Germanization of enemy nationals ; and the utilisation of enemy nationals as slave labor.

" The evidence is insufficient to authorise a conclusion of guilt on the part of Brueckner with regard to the other specifications of the indictment.

" The defendant Brueckner is found guilty upon Counts 1 and 2 of the indictment.

" The Tribunal finds that the defendant Brueckner was a member of a criminal organization ; that is, the SS, under the conditions defined and specified by the judgment of the International Military Tribunal, and he is therefore, guilty upon Count 3 of the indictment.

OTTO HOFMANN

" Otto Hofmann, as chief of RUSHA from 1940 to 1943, actively participated in the measures adopted and carried out in the furtherance of the Germanization program, as has heretofore been set forth in detail in this judgment. The evidence establishes beyond any reasonable doubt Hofmann's guilt and criminal responsibility for the following criminal activities pursued in the furtherance of the Germanization program : the kidnapping of alien children ; forcible abortions on Eastern workers ; taking away infants of Eastern workers ; the illegal and unjust punishment of foreign nationals for sexual intercourse with Germans ; hampering the reproduction of enemy nationals ; the forced evacuation and resettlement of foreign populations ; the forced Germanization of enemy nationals ; and the utilization of enemy nationals as slave labor.

" The evidence is insufficient to prove this defendant's guilt with regard to the plunder of public and private property.

" The defendant Hofmann is found guilty upon Counts 1 and 2 of the indictment.

" The Tribunal finds that the defendant Hofmann was a member of a criminal organization ; that is, the SS, under the conditions defined and specified by the judgment of the International Military Tribunal, and he is, therefore, guilty under Count 3 of the indictment."

RICHARD HILDEBRANDT

" Richard Hildebrandt was Higher SS and Police Leader at Danzig-West Prussia, from October, 1939, to February, 1943, and simultaneously he was Leader of the Administration District Danzig-West Prussia of the Allgemeine SS and Deputy of the RKFDV. From 20th April, 1943, to the end of the war, he was chief of RUSHA. From 1939 to 1945, while serving in these capacities, he was deeply implicated in many measures put into force in the furtherance of the Germanization program, as has heretofore been set forth in detail in this judgment. By an abundance of evidence, it has been established beyond a reasonable doubt that the defendant Hildebrandt actively participated in and is criminally responsible for, the following criminal activities : the kidnapping of alien children ; forcible abortions on Eastern workers ; taking away infants of Eastern workers ; the illegal and unjust punishment of foreign nationals for sexual intercourse with Germans ; hampering the reproduction of enemy nationals ; the forced evacuation and resettlement of populations ; the forced Germanization of enemy nationals ; and the utilisation of enemy nationals as slave labor."

On the charge of euthanasia the Tribunal, while finding Hildebrandt not guilty within the scope of its jurisdiction, made the following statement concerning the criminal nature of euthanasia :

" Hildebrandt, as the sole defendant, is charged with special responsibility for and participation in the extermination of thousands of German nationals pursuant to the so-called ' Euthanasia program.' It is not contended, that this program, insofar as Hildebrandt might have been connected with it, was extended to foreign nationals. It is urged by the prosecution, however, that notwithstanding this fact, the extermination of German nationals under such a program constitutes a crime against humanity ; and in support of this argument the prosecution cites the judgment of the International Military Tribunal as well as the judgment in the case of the United States of America *vs.* Brandt, Cast No. 1. Neither decision substantiated the contention of the prosecution. For instance, in holding defendants guilty in the Brandt judgment, the Tribunal expressly pointed out that the defendants, in participating in this program, were responsible for exterminating foreign nationals. The Tribunal expressly stated :

> ' Whether or not a state may validly enact legislation which imposes euthanasia upon certain classes of its citizens, is likewise a question which does not enter into the issues. Assuming that it may do so, the Family of Nations is not obliged to give recognition to such legislation when it manifestly gives legality to plain murder and torture of defenceless and powerless human beings of other nations.
>
> ' The evidence is conclusive that persons were included in the program who were non-German nationals. The dereliction of the defendant Brandt contributed to their extermination. That is enough to require this Tribunal to find that he is criminally responsible in the program.'

" It is our view that euthanasia, when carried out under state legislation against citizens of the state only, does not constitute a crime against humanity. Accordingly the defendant Hildebrandt is found not to be criminally responsible with regard to this specification of the indictment.

" The evidence is insufficient to implicate this defendant on the specification regarding the plunder of public and private property.

" The defendant Hildebrandt is found guilty upon Counts 1 and 2 of the indictment.

" The tribunal finds that the defendant Hildebrandt was a member of a criminal organization ; that is, the SS, under the conditions defined and specified by the judgment of the International Military Tribunal, and he is, therefore, guilty under Count 3 of the indictment.

FRITZ SCHWALM

" The defendant Fritz Schwalm was an active participant in certain phases of the Germanization program, as has heretofore been set forth in detail in this judgment. It has been established by the evidence beyond a reasonable doubt that this defendant is criminally responsible for and implicated in the following criminal activities conducted in the furtherance of this program : kidnapping of alien children ; the forced evacuation and resettlement of populations ; the forced Germanization of enemy nationals ; and the utilisation of enemy nationals as slave labor.

" Upon the other specifications of the indictment the evidence is insufficient to justify a conclusion of guilt on the part of this defendant.

" The defendant Schwalm is found guilty upon Counts 1 and 2 of the indictment.

" The Tribunal finds that the defendant Schwalm was a member of a criminal organisation ; that is, the SS, under the conditions defined and specified by the judgment of the International Military Tribunal, and he is, therefore, guilty under Count 3 of the indictment."

MAX SOLLMANN

" The defendant Max Sollmann, as chief of Lebensborn—together with that institution—is charged with criminal responsibility in three specifications of the indictment, namely, the kidnapping of alien children, taking away infants of Eastern workers, and the plunder of public and private property. With two of these specifications we have already dealt. We now consider the charge concerning the kidnapping of alien children.

" It is quite clear from the evidence that the Lebensborn Society, which existed long prior to the war, was a welfare institution, and primarily a maternity home. From the beginning, it cared for mothers, both married and unmarried, and children, both legitimate and illegitimate.

" The Prosecution has failed to prove with the requisite certainty the participation of Lebensborn, and the defendants connected therewith, in the kidnapping program conducted by the Nazis. While the evidence has disclosed that thousands upon thousands of children were unquestionably

kidnapped by other agencies or organisations and brought into Germany, the evidence has further disclosed that only a small percentage of the total number ever found their way into Lebensborn. And of this number only in isolated instances did Lebensborn take children who had a living parent. The majority of these children in any way connected with Lebensborn were orphans of ethnic Germans. As a matter of fact, it is quite clear from the evidence that Lebensborn sought to avoid taking into its homes, children who had family ties ; and Lebensborn went to the extent of making extensive investigations where the records were inadequate, to establish the identity of a child and whether it had family ties. When it was discovered that the child had a living parent, Lebensborn did not proceed with an adoption, as in the case of orphans, but simply allowed the child to be placed in a German home, after an investigation of the German family for the purpose of determining the good character of the family and the suitability of the family to care for and raise the child.

" Lebensborn made no practice of selecting and examining foreign children. In all instances where foreign children were handed over to Lebensborn by other organizations after a selection and examination, the children were given the best of care and never ill-treated in any manner.

" It is quite clear from the evidence that of the numerous organizations operating in Germany who were connected with foreign children brought into Germany, Lebensborn was the one organization which did everything in its power to adequately provide for the children and protect the legal interests of the children placed in its care.

" Upon the evidence submitted, the defendant Sollmann is found not guilty on Counts 1 and 2 of the indictment.

" The Tribunal finds that the defendant Sollmann was a member of a criminal organization ; that is, the SS, under the conditions defined and specified by the judgment of the International Military Tribunal, and he is, therefore, guilty under Count 3 of the indictment."

GREGOR EBNER

" Upon the evidence submitted, the defendant Gregor Ebner is found not guilty upon Counts 1 and 2 of the indictment.

" The Tribunal finds that the defendant Gregor Ebner was a member of a criminal organization ; that is, the SS, under the conditions defined and specified by the judgment of the International Military Tribunal, and he is, therefore, guilty under Count 3 of the indictment.

GUENTHER TESCH

" Upon the evidence submitted, the defendant Guenther Tesch is found not guilty upon Counts 1 and 2 of the indictment.

" The Tribunal finds that the defendant Guenther Tesch was a member of a criminal organization ; that is, the SS, under the conditions defined and specified by the judgment of the International Military Tribunal, and he is, therefore, guilty under Count 3 of the indictment."

INGE VIERMETZ

" Inge Viermetz was found not guilty on all counts and acquitted."

(ii) *The Sentences*

The five accused found guilty of membership in a criminal organisation only, that is Meyer-Hetling, Schwarzenberger, Sollmann, Ebner and Tesch, were sentenced to a term of imprisonment equivalent to the time already spent in custody as suspects and accused persons. This amounted to various terms of less than 3 years in each case.

The others were convicted as follows :

Greifelt	... ...	Imprisonment for life	
Crautz	... ...	,, ,,	15 years
Huebner	... ...	,, ,,	15 ,,
Lorenz	... ...	,, ,,	20 ,,
Brueckner	... ...	,, ,,	15 ,,
Hofmann	... ...	,, ,,	25 ,,
Hildebrandt	... ...	,, ,,	25 ,,
Schwalm	... ...	,, ,,	10 ,,

At the time of going to press these sentences had not been confirmed.

B. NOTES ON THE CASE

Of the crimes for which the accused were tried and convicted in this case two offences deserve special attention. One is the crime of genocide. It was taken by the prosecution and the Tribunal as a general concept defining the background of the total range of specific offences committed by the accused, which in themselves constitute crimes against humanity and/or war crimes.

The second offence is membership of criminal organisations. In previous reports it has been dealt with in a summary way with reference to provisions that have emerged in the recent past within the body of international law. As it deals with an entirely new concept in this sphere, and as it has given rise to numerous trials and convictions, the present Notes contain a full account of the origin and development of the crime of membership, of its meaning and of the rules under which it has been treated by courts of law in war crime trials.

For some criminal acts, such as plunder of public and private property, conscription into German forces of inhabitants of occupied countries, the reader is referred to notes made in connection with other trials.

These Notes end with an account of the relevance of some pleas submitted by the defence.

1. THE CRIME OF GENOCIDE[1]

Under Count one of the Indictment, the prosecution had charged that the accused " were connected with plans and enterprises involving . . . persecutions on political, racial and religious grounds and other inhumane acts against civilian populations, including German civilians and nationals of

[1] Genocide has also received reference in Vol. VI, pp. 32, 48, 75, 83 and 99, and some treatment in Vol. VII, pp. 7-9 and 24-6.

other countries, and against prisoners of war." This charge included the whole range of acts described in the part dealing with the evidence before the Tribunal, which acts were defined as constituting crimes against humanity and/or war crimes. The point made by the prosecution was that, insofar as crimes against humanity were concerned, all these " acts . . . plans and enterprises . . . were carried out as part of a systematic programme of genocide, aimed at the destruction of foreign nations and ethnic groups, in part by elimination and suppression of national characteristics."

In its judgment the Tribunal concurred with this view by stating that the entire programme carried out by the accused and their organisations was conceived and implemented " for one primary purpose . . . which may be summed up in one phrase: the two-fold objective of weakening and eventually destroying other nations while at the same time strengthening Germany, territorially and biologically, at the expense of conquered nations."

(i) *Origin and Substance of the Concept of Genocide*

The term of genocide was coined and its substance defined by Professor R. Lemkin of the United States.(1) The word itself is the amalgamation of the ancient Greek term *genos* (race, tribe) and the Latin *cide* (killing), and falls into the group of words such as homicide, infanticide and the like, " Generally speaking," said Professor Lemkin, " Genocide does not necessarily mean the immediate destruction of a nation. . . . It is intended rather to signify a co-ordinated plan of different nations aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. . . . Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group." The detailed objectives of such an action are directed towards the " disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups."

As an illustration of a given action falling within the scope of Genocide, the author referred to confiscations of property, such as precisely those tried in this case:

> " The confiscation of property of nationals of an occupied area on the ground that they have left the country may be considered simply as a deprivation of their individual property rights. However, if the confiscations are ordered against individuals, solely because they are Poles, Jews, or Czechs, then the same confiscations tend in effect to weaken the national entities of which these persons are members."

(ii) *Developments concerning the Concept of Genocide*

The concept of Genocide was used at the trial of the Nazi Major War Criminals before the International Military Tribunal at Nuremberg. The prosecution charged the defendants with having " conducted deliberate and

(1) See Raphael Lemkin, *Axis Rule in Occupied Europe*, Carnegie Endowment for International Peace, Washington, 1944, pp. 79-95.

systematic genocide, viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial or religious groups." This fact was recognised by the International Military Tribunal in its Judgment in the following terms :

> " In Poland and the Soviet Union these crimes (*i.e.*, war crimes and crimes against humanity) were part of a plan to get rid of whole native populations by expulsion and annihilation, in order that their territory could be used for colonisation by Germans."(1)

Reference was also made to mass deportations, slave labour and the hampering of the native biological propagation.

The subject of genocide and its place in contemporary international law was taken up by the United Nations. On 11th December, 1946, the General Assembly of the United Nations adopted a resolution in which it declared genocide a crime under the existing international law and recommended the signing of a special convention for its repression in the future. This resolution read as follows :

> " 1. Whereas, genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings, and such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented in these human groups, and is contrary to moral law and to the spirit and aims of the United Nations ;
>
> " 2. Whereas, many instances of such crimes of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part ;
>
> " 3. And whereas, the punishment of the crime of genocide is a matter of international concern ;
>
> The General Assembly
>
> Affirms that genocide is a crime under international law which the civilised world condemns, and for the commission of which principals and accomplices, whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds, are punishable ;
>
> Invites the Member States to enact the necessary legislation for the prevention and punishment of this crime ;
>
> Recommends that international co-operation be organised between states with a view to facilitating the speedy prevention and punishment of the crime of genocide, and
>
> To this end, the General Assembly requests the Economic and Social Council to undertake the necessary studies, with the view of drawing up a draft convention on the crime of genocide to be submitted to the next ordinary session of the General Assembly."

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(1) *Judgment of the International Military Tribunal for the Trial of German Major War Criminals ;* London, H.M. Stationery Office, 1946, p. 52.

As a result, and after nearly two years of study, the General Assembly of the United Nations adopted on 9th December, 1948, a Convention on the Prevention and Punishment of the Crime of Genocide. The Convention contains 19 Articles, the most important of which read as follows :

" *Article* 1

" The contracting Parties confirm that genocide whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish.

" *Article* 2

" In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national ethnical, racial or religious group, as such :

(*a*) killing members of the group ;

(*b*) causing serious bodily or mental harm to members of the group ;

(*c*) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part ;

(*d*) imposing measures intended to prevent births within the group ;

(*e*) forcibly transferring children of the group to another group.

" *Article* 3

" The following acts shall be punishable :

(*a*) Genocide ;

(*b*) Conspiracy to commit genocide ;

(*c*) Direct and public incitement to commit genocide ;

(*d*) Attempt to commit genocide ;

(*e*) Complicity in genocide.

" *Article* 4

" Persons committing genocide or any of the other acts enumerated in Article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

" *Article* 6

" Persons charged with genocide or any of the other acts enumerated in Article 3 shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

" *Article* 7

" Genocide and the other acts enumerated in Article 3 shall not be considered as political crimes for the purpose of extradition.

" The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force."(1)

As can be seen the offences enumerated in Article 2 of this Convention cover practically the entire field tried in this case. The most conspicuous

(1) See *United Nations Bulletin*, Vol. 5, No. 12, 15 December, 1948, pp. 1012-1015.

instances are abortions, punishments for sexual intercourse, preventing marriages and hampering reproduction, and the measures undertaken for forced Germanization, including the kidnapping or taking away of children and infants, the deportation and resettlement of populations, and the persecutions of Jews.

The adopted text was opened to Signature and ratification on 10th December, 1948. A separate Resolution was adopted requesting the International Law Commission of the United Nations to study the possibility of establishing a criminal chamber of the International Court of Justice at The Hague, for the trial of persons charged with genocide.

(iii) *Relationship between Genocide and Crimes against Humanity*

The general concept of genocide has been recently redefined by Professor Lemkin in the following terms :

> " There are three basic phases of life in a human group ; physical existence, biological continuity (through procreation), and spiritual or cultural expression. Accordingly, the attacks on these three basic phases of the life of a human group can be qualified as physical, biological, or cultural genocide. It is considered a criminal act to cause death to members of the above-mentioned groups directly or indirectly, to sterilize through compulsion, to steal children, or to break up families. Cultural genocide can be accomplished predominantly in the religious and cultural fields by destroying institutions and objects through which the spiritual life of a human group finds expression, such as houses of worship, objects of religious cult, schools, treasures of art, and culture. By destroying spiritual leadership and institutions, forces of spiritual cohesion within a group are removed and the group starts to disintegrate. This is especially significant for the existence of religious groups. Religion can be destroyed within a group even if the members continue to subsist physically."(1)

As it is conceived in the above quoted Convention, genocide is a crime as much in time of peace as in time of war. This is one of its distinctive features in comparison with crimes against humanity. The latter were recognised as crimes arising out of or in connection with a war of aggression. This feature derives from Art. 6 (*c*) of the Charter of the International Military Tribunal, of 8th August, 1945, which defines crimes against humanity as offences committed " in execution of or in connection with any crime within the jurisdiction of the Tribunal." The latter is a reference to crimes against peace and war crimes, which both fall into the part of international law dealing with war. The appurtenance of crimes against humanity to this particular field of international law was stressed by the International Military Tribunal at Nuremberg in its Judgment concerning the Nazi major war criminals :

> " To constitute crimes against humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were,

(1) R. Lemkin, *Genocide as a Crime under International Law*, United Nations Bulletin, Vol. IV, No. 2, 15 January, 1948, p. 71.

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

On account of the fact, however, that crimes against humanity include "persecutions on political, racial or religious grounds," crimes against humanity of this nature fall within the concept of genocide when committed in time of war. In these particular circumstances the specific acts constituting genocide are at the same time crimes against humanity. In the opinion of one member—the French representative—of the United Nations Ad Hoc Committee which drew up the Draft Convention, genocide is even the most typical of the crimes against humanity.(1)

The fact that crimes against humanity are limited to offences punishable under the laws of war has not been altered by Law No. 10 of the Allied Control Council for Germany under whose terms the accused were tried. The definition of crimes against humanity in Art. II of Law No. 10 contains no reference to crimes against peace and war crimes, which are both offences punishable under the laws of war. On the other hand, under the terms of its Preamble, Law No. 10 was enacted "in order to give effect to the terms of the Moscow Declaration of 30th October, 1945, and the London Agreement of 8th August, 1945, *and the Charter issued pursuant thereto.*" According to Art. I of the same law "the Moscow Declaration . . . and the *London Agreement of 8th August*, 1945 . . . are made integral parts of this Law." This link may be thought to give the definition of crimes against humanity in Law No. 10 the same connotation as in the Nuremberg Charter, and has been so interpreted by most judicial authorities.(2)

It thus appears that genocide, as envisaged by the United Nations in its resolution of 11th December, 1946 and in the Convention on Genocide is a crime under international law in general and is therefore not limited to offences falling within the narrower scope of the laws of war. It becomes a *delictum iuris gentium* alongside offences such as piracy, trade in women and children, trade in slaves, the drug traffic, forgery of currency and the like.(3) In the trial under review, however, genocide was treated within the set of the circumstances of the case, that is as an offence perpetrated in time of war and committed through a series of individual acts constituting crimes against humanity. It therefore remained within the sphere of the laws of war and on this account fell within the jurisdiction of the Tribunal which tried the accused.

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(1) See Ad Hoc Committee on Genocide (5 April-10 May 1948), *Report of the Committee and Draft Convention drawn up by the Commission*, Economic and Social Council, E/794, 24 May 1948.

(2) See Vol. IX, p. 44.

(3) See R. Lemkin, *op. cit.*, p. 70.

(iv) *Relationship between Genocide and War Crimes*

In addition to cases where genocide is reflected in acts constituting crimes against humanity, there are cases in which it may be perpetrated through acts representing war crimes. Among these cases are those coming within the concept of forced denationalisation.

In the list of war crimes drawn up by the 1919 Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, there were included as constituting war crimes " attempts to denationalise the inhabitants of occupied territory." Attempts of this nature were recognised as a war crime in view of the German policy in territories annexed by Germany in 1914, such as in Alsace and Lorraine. At that time, as during the war of 1939-1945, inhabitants of an occupied territory were subjected to measures intended to deprive them of their national characteristics and to make the land and population affected a German province.

The methods applied by the Nazis in Poland and other occupied territories, including once more Alsace and Lorraine, were of a similar nature with the sole difference that they were more ruthless and wider in scope than in 1914-1918. In this connection the policy of " Germanizing " the populations concerned, as shown by the evidence in the trial under review, consisted partly in forcibly denationalising given classes or groups of the local population, such as Poles, Alsace-Lorrainers, Slovenes and others eligible for Germanization under the German People's List. As a result in these cases the programme of genocide was being achieved through acts which, in themselves, constitute war crimes.

2. MEMBERSHIP OF CRIMINAL ORGANISATIONS

Convictions of the accused for membership in criminal organisations were made in consequence and on the basis of an important and elaborate development in international law regarding this subject.

The concept of the crime of membership originated in the United Nations War Crimes Commission and later evolved in rules laid down by Governments as part of contemporary international law and implemented by the International Military Tribunal at Nuremberg and other courts, and still further developed in the municipal law of various nations.[1] The following is a survey of this evolution.

(i) *Emergence of the Concept in the United Nations War Crimes Commission*

In the earliest stages of the Commission's activities the opinion was expressed that in certain cases no other *prima facie* evidence of guilt of alleged war criminals was required than the fact that such individuals belonged to groups or organisations known to have been actively engaged in the systematic perpetration of criminal acts. The organisations and groups envisaged were those of the Nazis, such as the ill-famed Gestapo, the S.S. and the S.A. The argument was brought forward that the groups involved were so deeply engaged in mass criminality that to require evidence of individual guilt in each specific case would be an unnecessary and even impossible task. Cases were recalled where all the witnesses of an established crime, such as massacres, had disappeared as victims of the crime, and where the group

[1] For the Polish approach to this question see Vol. VII, pp. 5-7, 18-24 and 86-7.

which had committed the crime was identified as a whole. In such cases, it was argued, the mere fact of identifying at a later stage the individuals who were members of such a group created a serious presumption that they had all taken part in the commission of the crime. Therefore membership of the group introduced in itself a presumption of guilt, and " the real crime consisted in the mere fact of being a member operating in an oppressed country."

At the same time evidence was at hand in the Commission that groups or organisations such as the Gestapo, SS and SA had not pursued their criminal activities on their own initiative. This evidence led to the top of the Nazi State and Party machinery and disclosed a series of explicit instructions coming from the Nazi Government. Proposals were consequently made to treat the Nazi Government itself as a criminal group, as it was the originator and instigator of all the crimes perpetrated by groups subordinated to its authority.

At this stage the Commission did not feel authorised to take a stand which could in fact amount to the introduction of precise legal rules in this matter whilst such rules had hitherto been non-existent. It took the wiser course of expressing only recommendations as to what should be done by the Governments, who were in a position to make the law required by the novelty of mass criminality as practised by the Nazis. A thorough study of the facts concerning the groups and organisations at stake was made and on 16th May, 1945, the following recommendation was adopted :

> " (*a*) To seek out the leading criminals responsible for the organisation of criminal enterprises including systematic terrorism, planned looting and the general policy of atrocities against the peoples of the occupied States, in order to punish all the organisers of such crimes ;
>
> " (*b*) To commit for trial, either jointly or individually all those who, as members of these criminal gangs, have taken part in any way in the carrying out of crimes committed collectively by groups, formations or units."

The recommendation under (*a*) met the proposals made in regard to the Nazi Government, to the extent to which it included it under the general denomination of " leading criminals responsible for the organisation of criminal enterprises." The recommendations under (*b*) met the proposals regarding the necessity of imposing punishment for membership of groups for which it has been proved that they had committed crimes. All details were left aside, and in particular the questions as to whether or not membership in itself should warrant punishment, in which cases and under what rules of evidence. Such details were to be laid down during the trial of the Nazi major war criminals before the International Military Tribunal at Nuremberg.

(ii) *Development at the Nuremberg Trial of Nazi Major War Criminals*

The first, and for the time being, the only authoritative pronouncement on criminal groups or organisations on the basis of international law, was made during the trial of the German Major War Criminals by the International Military Tribunal at Nuremberg. The pronouncement was made by the Tribunal on the basis of specific provisions of the Charter, which

defined its jurisdiction and procedure, and after considering specific charges brought by the Prosecutors. The latter played a very prominent part in defining the boundaries of the concept of collective penal responsibility and contributed largely to the final decision of the Tribunal. Both the law of the Charter and the Judgment of the Tribunal introduce a novel method of dealing with organised mass criminality of a type which is itself new in many respects. The Judgment can be regarded as a judicial precedent with far reaching effect. One of its legal effects was that the decision of an international court had, to a certain extent, become binding upon other national or local courts, and that it had introduced an effective judicial means of combating mass criminality organised by States against other States and nations.

(a) The Law of the Charter

The defendants at the Nuremberg Trial were all members of one or more Nazi groups or organisations, and in addition to bodies such as the Gestapo, S.S. or S.A., the prosecutors included in their Indictment bodies such as the General Staff and the High Command. The relevant provisions in the Nuremberg Charter are the following :

" *Article* 9

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

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

" *Article* 10

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

" *Article* 11

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

The criminal acts for which a group or organisation may be declared criminal are those covered by the Charter in its Art. 6, *i.e.*, crimes against peace, war crimes and crimes against humanity.

It will be noted that the Charter does not define a " group " or " organisation." The matter is left to the appreciation of the Tribunal as a question of fact. The above provisions lay down the following rules or principles :

(*a*) A declaration of criminality in respect of a group or organisation can be made by the Tribunal on condition that any of the defendants before it is a member of such group or organisation.

(*b*) The declaration is an act within the discretionary power of the Tribunal, which is not bound to adjudicate on the issue if it does not deem it appropriate to do so.

(*c*) The declaration is confined to establishing the criminal nature of the group or organisation, and no punishment is pronounced against the individuals involved. This is left to the subsequent courts.

(*d*) Once a group or organisation is declared criminal by the Tribunal, the bringing of its members to trial is within the discretionary power of the Signatories to the Charter. The declaration does not bind them to prosecute such members.

(*e*) An individual brought to trial as a consequence of the declaration is prosecuted for the crime of " membership " in the group or organisation. This is particularly emphasised in the wording of Art. 11.

(*f*) The legal effect of the declaration is that in the subsequent proceedings of the court before which a member is brought to trial, the criminal nature of the group or organisation is considered proved and cannot be questioned.

The most important provision is undoubtedly the last, quoted under (*f*). A narrow, literal interpretation of its terms could lead to the conclusion that the mere fact of having belonged to an organisation declared criminal is in itself a crime without further qualifications, and that the subsequent court has no choice but to condemn the accused once he is brought before it. Such far-reaching conclusion was, however, not arrived at by the Tribunal, neither was it meant in the Charter or advocated by the majority of the prosecutors. Both the latter, and the Tribunal in its Judgment, laid down certain conditions in which a member should be regarded as personally guilty.

(*b*) *The Theory of Collective Criminality*

Judicial declarations of the criminal nature of given groups or organisations, as were envisaged by the Nuremberg Charter, are based upon the concept of collective criminality and liability as distinct from individual criminality and liability. The Charter left only partially answered the question of just what this concept meant in the sphere of penal law, and what consequences were implied as a result of the rule that a declaration made by the Nuremberg Tribunal could not be overruled by other courts.

The prosecutors undertook to provide the answers, and in doing so they constructed a precise and complete theory. The theory was evolved by the United States Chief Prosecutor, Justice Robert H. Jackson, one of the promoters and principal authors of the Nuremberg Charter and the leading figure at the Trial. It was endorsed by the other prosecutors, with certain not unimportant reservations expressed by the Russian prosecutor, and was accepted and confirmed by the Tribunal in its Judgment. This develop-

ment took place in response to a decision of the Tribunal requesting the prosecution and the defence to clarify in particular the tests of criminality which were to be applied, in view of the fact that the Charter did not define a criminal group or organisation. The theory can conveniently be described under three main items : the concept of collective criminality ; the legal nature of a declaration of criminality ; and the effects of such declaration.

The Concept of Collective Criminality. When presenting the case against criminal groups or organisations to the Tribunal, Justice Jackson made reference in the first place to the fact that the Charter did not introduce an entirely new legal concept. He referred to the legislation of different countries in which membership in certain collective bodies, as well as the bodies themselves, were considered criminal and their members prosecuted as such and quoted the following examples :

A United States Law of 28th June, 1940, provides that it is unlawful for any person to organise or help to organise any society, group or assembly of persons to teach, advocate or encourage the overthrow or destruction of any government in the United States by force or violence, or to be or become the member of, or affiliate with, any such society, group or assembly of persons knowing its purposes.

In Great Britain there were in the past laws of a similar nature, such as the British India Act No. 30 of 1836. It provided that " whoever was proved to have belonged to a gang of thugs " was to be punished with " imprisonment for life with hard labour."

The French Penal Code provides that any organised " association or understanding " made with the object of preparing or committing crimes against persons or property, constitute a crime against public peace.

The Soviet Penal Code contains provisions similar to those of the French Code, around the concept of the " crime of banditry."

The most striking references were those made to the German laws themselves. The German Penal Code of 1871 punished by imprisonment the " participation in an organisation, the existence, constitution, or purposes of which are to be kept secret from the Government, or in which obedience to unknown superiors or unconditional obedience to known superiors is pledged." In 1927 and 1928 German Courts treated the entire German Communist Party as criminal, and pronounced sentences against its Leadership Corps. Judgment against members of the Communist Party included every cashier, employee, delivery boy and messenger, and every district leader. In 1924 German courts declared the entire Nazi Party to be a criminal organisation. The German Supreme Court laid down general principles for any organisation liable to a declaration of criminality and stated that it was " a matter of indifference whether all the members pursued the forbidden aims." It was " enough if a part exercised the forbidden activity." It also considered irrelevant whether " members of the group or association agreed with the aim, tasks, means of working and means of fighting " and what their " real attitude of mind " was. In all such cases they were held guilty.

While referring to these precedents, Justice Jackson introduced the essence of the concept of collective criminality, through the notion of " conspiracy " as it evolved more particularly in English and American law.

The criterion provided by the latter, for determining whether the ends of the indicted organisations were guilty ends, was whether the organisations contemplated " illegal methods " or intended " illegal ends." If so, the responsibility of each member for the acts of every other member was not essentially different from the liability for conspiracy. The principles of the latter were that no formal meeting or agreement was necessary ; that no member was bound to know who the other members were and what part they were to take or what acts they had committed ; that members were liable for acts of other members, although particular acts were not intended or anticipated, if they were committed in execution of the common plan ; and, finally, that it was not essential to be a member of the conspiracy at the same time as the others or at the time of the criminal acts.

It was in connection with these firmly established precedents that the United States Chief Prosecutor submitted to the Tribunal the principles which, in his opinion and in that of his colleagues, should govern the concept of collective criminality. "We think," said Justice Jackson, " that on ordinary legal principles the burden of proof to justify a declaration of criminality is, of course, upon the prosecution." He then declared that this burden was discharged by answering the following four essential tests of criminality, which represent at the same time the fundamental elements of the concept of collective criminality :

(1) The group or organisation must be " some aggregation of persons associated in identifiable relationship with a collective, general purpose," or, as this was put by another United States prosecuting officer, with " a common plan of action." The notions of " group " or " organisation " are non-technical. They " mean in the context of the Charter what they mean in the ordinary speech of the people." The term " group " is used " as a broader term, implying a looser or less formal structure or relationship than is implied in the term organisation."

(2) Membership in such group or organisation " must be generally voluntary," that is " the membership as a whole, irrespective of particular cases of compulsion against individuals or groups of individuals within the organisation must not have been due to legal compulsion."

(3) The aims of the organisation " must have been criminal in that it was designed to perform acts denounced as crimes in Art. 6 of the Charter," that is crimes against peace, war crimes or crimes against humanity. The organisation " must have participated directly and effectively in the accomplishment " of these criminal aims and " must have committed " crimes from Art 6.

(4) The criminal " aims or methods of the organisation must have been of such character that its membership in general may properly be charged with knowledge of them."

As a fifth and last condition, required only for the purpose of enabling the Nuremberg Tribunal to make a declaration of criminality under the Charter, the United States Chief Prosecutor referred to the necessity of establishing that some individual defendant tried by the Tribunal had been a member of the organisation, and was guilty of some act on the basis of which the organisation was to be declared criminal.

Such were the elements of the concept of collective criminality as defined by the Prosecution and as lying at the root of the concept of " criminal organisation " and of a declaration under the Nuremberg Charter. It will be noted that with qualifications, such as voluntary membership and knowledge of the criminal purposes or acts, they are far from operating on the basis of automatic and indiscriminate collective guilt. What they do is to circumscribe a sphere of undisputed criminal activity conducted by a multitude of individuals who have, as a whole, willingly and knowingly taken part in it. On the other hand, as defined, they relate to a specific judicial act which, although denouncing the whole group as criminal, does not prejudice the issue of guilt and punishment of the individual members. This, as we will see, is only partly and in principle solved in a declaration of criminality, whereas the actual decision is left to the competent courts and fully allows for acquittals, as the case may be.

Legal Nature of the Declaration of Criminality. The declaration of criminality as provided in the Nuremberg Charter, is a specific judicial act. The indicted organisations, said the United States Chief Prosecutor, were " not on trial in the conventional sense of that term." They were " more nearly under investigation as they might have been before a Grand Jury in Anglo-American practice." The competence of the Tribunal was limited to trying " persons," which meant only " natural persons " and not entities or bodies. As a consequence the Tribunal was not " empowered to impose any sentence " upon the indicted groups and organisations. " The only issue," he added, concerned " the collective criminality of the organisation or group, and it was to be adjudicated by what amounts to a declaratory judgment." The declaration, said the British Prosecutor Sir David Maxwell-Fyfe, was in the nature of a " *res adjudicata* " or of a " judgment *in rem* " as distinct from a " judgment *in personam.*"

The adjudication is, thus, entirely of a " declaratory " nature, and leaves open all questions of individual guilt and punishment. These, as has been mentioned on several occasions, are left to the national or local courts competent to try individual members on the basis of the " declaratory judgment " of the Nuremberg Tribunal.

Effects of the Declaration of Criminality. The chief effect of a declaration of collective criminality is that the criminal nature of the group or organisation in question " is considered proved " and cannot be " questioned " (Art. 10 of the Charter). But, as will now be seen, this does not prejudice the question as to whether *all* the individual members are to be regarded as guilty and punished, and consequently does not result in automatic and obligatory convictions.

The prosecution made this point clear when advocating that, from the view point of the individual members, the consequence of the declaration was that it created a rebuttable *presumption* of guilt, and thus reversed the burden of proof. Members, when tried, were not allowed to disprove that their organisation or group was criminal at the time of their membership, but they were entitled to disprove the tests made against them individually as members of the body declared criminal. " Nothing precludes him (a member) from denying that his participation was voluntary," said Justice Jackson, " and proving that he acted under duress ; he may prove that he

was deceived or tricked into membership ; he may show that he had withdrawn, or he may prove that his name on the rolls is a case of mistaken identity. Actual fraud or trick " of which a member is a victim, " has never thought to be the victim's crime." As regards the member's knowledge of the criminal nature of the organisation, " he may not have known on the day he joined, but may have remained a member after learning the facts. And he is chargeable not only with what he knew, but with all which he was reasonably indicted."

It will be seen later that the Tribunal did not wish to answer the thesis of presumption of guilt either way, but that it decided that, apart from cases where a member was proved guilty of specific crimes, the tests of voluntary membership, and of actual or reasonably presumed knowledge represented the main issues upon which the subsequent courts were to decide each individual case of guilt.(1)

It thus appears that a declaration has a binding effect in the subsequent proceedings insofar as it finally decides upon the question of criminality of a given group or organisation. This is a novelty in international law in that the judgment of a Tribunal which has not tried individual members has effect in the proceedings of courts trying them.

(*c*) *General Ruling of the International Military Tribunal*

A general ruling was made with particular regard to the effects of a declaration of criminality upon the punishment of individual members by the competent courts. Referring to the provisions of the Charter, as well as to provisions of other laws enacted in anticipation of declarations by the Tribunal in this field, the Tribunal established in the first place that, under these rules, there was a " crime of membership " for individuals who belonged to organisations declared criminal. It said :

> " A member of an organisation which the Tribunal has declared to be criminal may be subsequently convicted of the *crime of membership* and be punished *for that crime* by death."(2)

(1) It is interesting to note that, during the proceedings one of the judges expressed opinions to the effect that a declaration of criminality could or even should be understood to result in obligatory and automatic convictions. Thus, the French judge, M. Donnedieu de Vabres, questioned the legal basis for introducing the tests submitted by Justice Jackson. According to these tests, emphasised the French judge, a member could be acquitted by proving that his membership was not voluntary or that he never knew of the criminal purpose of the organisation. However, he said, " I suppose that this Tribunal has a different conception. I suppose that it considers the condemnation of the individual who was a member of the criminal organisation, obligatory and automatic. Strictly speaking, the interpretation which has been advocated by Mr. Jackson is not written in any text. It does not appear in the Charter. Consequently, by virtue of what texts would the Tribunal in question (meaning the subsequent court) be obliged to conform to this interpretation ? " To this Justice Jackson replied that " there could be no such thing as automatic condemnations, because the authority given in the Chapter is to bring persons to trial for membership." " But," added Justice Jackson, " the points could be raised by the defendant that he had defences, such as duress, force against his person, or threats of force, and would have to be tried." See *Proceedings*, Part 8, H.M. Stationery Office, London, 1947, p. 103-104. Doubts such as those expressed by the French judge are an illustration of how the terms of the Charter could have, however unwittingly, been misinterpreted, had there not been a theory to explain their real purpose and meaning. It is also worth noting that, before making final decisions in its Judgment, all judges debated at length the theory of the United States Chief Prosecutor in the course of the proceedings and manifested their anxiety to clarify in every detail the issues involved. For full data, see *op. cit.*, p. 97-113.

(2) Italics are introduced.

However, added the Tribunal :

> " This is not to assume that international or military courts which will try these individuals will not exercise appropriate standards of justice. This is a far-reaching and novel procedure. Its application, unless properly safeguarded, may produce great injustice."

The Tribunal, thus, agreed with the basic thesis of the prosecution that the rules of the Charter and the concept of collective criminality involved in a declaration within the Tribunal's jurisdiction, should not be construed so as to result in an unqualified, indiscriminate and automatic collective penal responsibility of all members. The Tribunal emphasised this point with reference to its discretionary power in making declarations of criminality :

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

In this manner the Tribunal severed categorically the link of cause and effect which could have been made between the notion of a group held collectively criminal and that of the guilt of its individual members : even though the declaration is founded on the premise that the group was criminal as a whole, the guilt of all or any of its members remains on the traditional ground of " personal " guilt.

In order to determine the field of " personal criminal guilt " within the scope of an organisation declared criminal as a whole, the Tribunal delivered a definition of the " criminal organisation " and while doing so, it fully accepted the tests submitted by the prosecution :

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

Two distinct consequences appear from this statement—first the concept of and the tests regarding the criminality of a group or organisation, and secondly, the tests for establishing the guilt of individual members of the group. With regard to the first, the concept is reached when there is a " group bound and organised for a common purpose " and when such a

group " is formed or used in connection with the commission of crimes." When these two elements are fulfilled, a declaration that an organisation is criminal as a whole is justified. Since the Tribunal stressed that the organisation had to " be formed *or* used " in connection with the commission of criminal acts, this meant that it is not essential for the group to have actually committed crimes ; it is sufficient if it was set up for this purpose. With regard to the second, the tests are those of elimination, and two classes of members are excluded. First, those " who had no knowledge of the criminal purpose *or* acts of the organisation " and secondly, those " who were drafted by the State unless they were personally implicated in the commission " of criminal acts. The second proviso means that persons who were compulsorily drafted, even if they had knowledge of the criminal purpose of the organisation, are not guilty unless they personally were implicated in the commission of crimes.

The tests used to make the above elimination furnish at the same time those regarded by the Tribunal as representing the basis for convicting individual members on the part of the competent courts. As already stressed, under Article 10 of the Charter, a declaration delivered by the Tribunal makes possible the bringing to trial of individuals for the " crime of membership," in which case the criminal nature of the organisation cannot be challenged. The Tribunal did not specify who was to bear the onus of proof regarding tests of personal guilt, when a member is brought to trial, but the wording used by the Tribunal in respect of each of the organisations it declared criminal, tends to indicate that it wished the burden to lie on the prosecution. It would, therefore, appear that two alternative courses were made open to the competent courts. The first would be to hold the view, and this course was advocated by the United States Chief prosecutor and was eventually prescribed for the Denazification Courts in the United States zone of Germany, that the declaration made by the Nuremberg Tribunal creates a presumption of guilt against every member, and that consequently all the prosecution is required to do is to establish that the accused was a member of the organisation. In this case it was to be presumed, until proof to the contrary was established by the defendant, that he knew of the criminal purposes or acts of the organisation or that he was personally implicated in the commission of crimes, although he did not join the organisation on a voluntary basis. The second course is to hold the view that no presumption of individual guilt derives from the declaration of the Nuremberg Tribunal, and that consequently, the prosecution is called to prove not only that the accused was a member of the organisation declared criminal, but also that he knew the relevant facts and was personally implicated in the commission of crimes.

The Nuremberg Tribunal left untouched the question of how such evidence could be made good by either the prosecution or the defence. Competent courts were left full latitude in admitting circumstantial evidence, and the question of whether it is reasonable to believe that the accused had or had not knowledge of the criminal purpose or acts of his organisation can, and was in most cases, solved on the basis of the accused's rank and position, his duties and assignments while serving in the organisation and the like. With regard to the second test, that of the implication of persons who joined the organisation on a non-voluntary basis, the Tribunal's word " unless "

following the description of a member compulsorily enlisted, indicates that, whenever the accused has established his compulsory enlistment, the burden of proof that he has actually committed crimes lies on the prosecution.

It would thus appear that, by omitting to give an explicit answer to the issue of the burden of proof, the Nuremberg Tribunal in fact delegated this task to the competent courts and shunned interfering with their jurisdiction beyond the points mentioned in the Judgment. It also appears that a great responsibility has thus been put on the subsequent courts, and that differing jurisprudence may take place, as it in fact has.

(d) Recommendations regarding Punishment

The International Military Tribunal ended its general ruling by making a recommendation to the subsequent courts as to the punishment they were to impose for the crime of membership. It referred to Law No. 10 of the Allied Control Council for Germany and to a De-Nazification Law of 5th March, 1946, the relevant provisions of which will be found later. The recommendations read as follows :

> " Since declarations of criminality which the Tribunal makes will be used by other courts in the trial of persons on account of their membership in the organisations found to be criminal, the Tribunal feels it appropriate to make the following recommendations :
>
> 1. That so far as possible throughout the four zones of occupation in Germany the classifications, sanctions and penalties be standardised. Uniformity of treatment so far as practical should be a basic principle. This does not, of course, mean that discretion in sentencing should not be vested in the court ; but the discretion should be within fixed limits appropriate to the nature of the crime.
>
> 2. Law No. 10, to which reference has already been made, leaves punishment entirely in the discretion of the trial court even to the extent of inflicting the death penalty.
>
> The De-Nazification Law of 5th March, 1946, however, passed for Bavaria, Greater-Hesse and Wurttemberg-Baden, provides definite sentences for punishment in each type of offence. The Tribunal recommends that in no case should punishment imposed under Law No. 10 upon any members of an organisation or group declared by the Tribunal to be criminal exceed the punishment fixed by the De-Nazification Law. No person should be punished under both laws.
>
> 3. The Tribunal recommends to the Control Council that Law No. 10 be amended to prescribe limitations on the punishment which may be imposed for membership in a criminal group or organisation so that such punishment shall not exceed the punishment prescribed by the De-Nazification Law."

The De-Nazification Law of 5th March, 1946, referred to by the Tribunal, is in force in the United States Zone and its heaviest penalty does not exceed 10 years' imprisonment. The Nuremberg Tribunal, thus, made a strong point of the necessity of reducing the punishments provided by Law No. 10 in order to fit " the nature of the crime." The Tribunal found that the

" crime of membership " in itself(1) did in no case deserve a more severe punishment than that prescribed in the De-Nazification Law of March, 1946.

It will be noted that, in order to achieve such a result, the Tribunal found it necessary to recommend the amendment of Law No. 10. No such amendment took place apparently for the reason that it was not indispensable to achieve the effect sought. Art. II, para. 3, of Law No. 10 gives the competent courts full latitude to impose various punishments, including imprisonment for a term of years, at their discretion in each case and in respect of each class of crime. Room was, thus, left for implementing the recommendation of the International Military Tribunal without amending the law.

(iii) *The Law applied in the case of the Accused*

The law under which Greifelt and the other accused were tried for membership of criminal organisations, as well as for crimes against humanity and war crimes, was Law No. 10 of the Allied Control Council for Germany, of 20th December, 1945. The crime of membership is provided against in Art. II para. 1 of the Law together with crimes against peace, crimes against humanity and war crimes. The relevant passages read as follows :

> " Each of the following acts is recognised as a crime : . . . . .
>
> " (*d*) Membership in categories of a criminal group or organisation declared criminal by the International Military Tribunal."

The penalties generally prescribed for any crime under the Law include imprisonment with or without hard labour, which may be imposed for life, as well as death penalty. In the case of membership, however, the rules concerning punishment were supplemented by the above-cited recommendations of the International Military Tribunal. A study of the sentences passed by the United States Military Tribunal in Nuremberg for the crime of membership shows that these Tribunals have in fact followed the recommendation of the International Military Tribunal.

(iv) *The Guilt of the Accused for the crime of Membership*

The conviction of the accused for the crime of membership was made, according to Art. II para. 1 (*d*) of Law No. 10, on the grounds of the declaration made by the International Military Tribunal in regard to the criminal nature of the main organisation to which they belonged, that is the S.S. (Die. Schutzstaffeln der Nationalsocialistischen Deutschen Arbeiterpartie).

The International Military Tribunal's declaration concerning the S.S. read as follows :

> " The S.S. was utilised for purposes which were criminal under the Charter involving the persecution and extermination of the Jews, brutalities and killings in concentration camps, excesses in the administration of occupied territories, the administration of the slave labour programme and the mistreatment and murder of prisoners of war. The defendant Kaltenbrunner was a member of the S.S. implicated in

(1) This distinction is important, for a defendent prosecuted for membership can at the same time be found guilty of either of the other specific crimes covered by Law No. 10, i.e. crimes against peace, war crimes or crimes against humanity. In such cases the punishments applicable are those from Art. II of Law No. 10 without restriction.

these activities. In dealing with the S.S. the Tribunal includes all persons who had been officially accepted as members of the S.S. including the members of the Allgemeine S.S. members of the Waffen S.S., members of the S.S. Totenkopf Verbaende and the members of any of the different police forces who were members of the S.S. The Tribunal does not include the so-called S.S. riding units. The Sicherheistdienst des Reichsfuhrers S.S. (commonly called the S.D.) is dealt with in the Tribunal's Judgment on the Gestapo and S.D.

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

In the above declaration the International Military Tribunal included all persons who had been officially accepted as members of any of the branches of the S.S., except the so-called Riding units. The main branches were the Allgemeine S.S., the Waffen S.S., and the S.S. Totenkopf Verbaende. On the other hand, it excluded from the classes of members liable to prosecution for the crime of membership, those members who were drafted by the State in such a way as to give them no choice in the matter and who had committed no crimes personally, as well as those who had ceased to be members before 1st September, 1939.

In the trial under review all the defendants, with the exception of the one acquitted of all charges, held prominent ranks in the categories of the S.S. covered by the above declaration of the International Military Tribunal. Greifelt, Lorenz, Hofmann and Hildebrandt were Obergruppenfuehrers (Lt.-Generals) in the S.S., Creutz, Mayer-Hetling, Schwarzenberger and Ebner were Oberfuehrers (Senior Colonels), Huebner and Sollmann were Standartenfuehrers (Colonels), and Schwalm an Obersturmfuehrer (Lt.-Colonel). Finally, Brueckner and Tesch were Sturmbannfuehrers (Majors).

In its judgment the Tribunal made no specific reference to the branch of the S.S. to which the accused belonged, but it is likely that they all were members of the Allgemeine S.S.

As to the tests of individual guilt stressed by the International Military Tribunal with regard to members of the S.S., they consisted, as stressed in the Judgment, in ascertaining whether the accused "became or remained members of the organisation with knowledge that it was being used for the commission of acts declared criminal by Article 6 of the Charter (*i.e.*, crimes against peace, war crimes, and crimes against humanity), or whether they

were " personally implicated as members of the organisation in the commission of the crimes." On the face of the evidence concerning each of the accused, the Tribunal was satisfied that, being members of the S.S., they had the relevant knowledge and/or were personally implicated in the perpetration of crimes committed by the S.S.

(v) *Jurisprudence of other trials*

Many more trials of war criminals led to the conviction of accused persons for membership in criminal organisations. Several cases may be cited as typical of the jurisprudence which was created on these occasions. Five of these were tried by United States Military Tribunals at Nuremberg and three more by United States General Military Government Courts in Germany on the basis of declarations made by the International Military Tribunal and on the grounds of Law No. 10 of the Allied Control Council for Germany.

The cases are illustrative of how the general ruling and recommendations of the International Military Tribunal were implemented in connection with its declarations regarding the criminal nature of Nazi groups and organisations. Some of them show the way in which the issue of the burden of proof concerning the personal guilt of the defendants was solved, and how the tests of their guilt were applied.

(a) Trials by United States Military Tribunals at Nuremberg.

(1) *Trial of Karl Brandt et al. (Medical Case)*

In the first trial held by United States Military Tribunals at Nuremberg, 23 German doctors and scientists were prosecuted for carrying out criminal medical experiments.(1) The trial opened on 9th December, 1946, and was commonly known as the " Medical Case." The judgment was delivered on 19th and 20th August, 1947. The chief defendant, Karl Brandt, was personal physician to Hitler, Gruppenfuhrer in the S.S. and Major-General in the Waffen S.S., Reich Commissioner for Health and Sanitation, and member of the Reich Research Council. He was charged with the other defendants for medical experiments amounting to war crimes and crimes against humanity as defined in the Allied Control Council Law No. 10.

All experiments were conducted in concentration camps (Dachau, Sachsenhausen, Natzweiler, Ravensbruck, Buchenwald, etc.), and caused inhumane suffering, torture or death of many inmates. They consisted in high altitude experiments to investigate the limits of human endurance and existence at extremely high altitudes (up to 68,000 feet) ; freezing experiments to investigate means of treating persons severely chilled or frozen ; malaria experiments to investigate immunisation and treatment of malaria ; lost (mustard) gas experiments to investigate treatment caused by that gas ; sulfanilamide experiments to investigate the effectiveness of the drug ; bone, muscle and nerve regeneration and bone transplantation experiments ; seawater experiments to study methods of making seawater drinkable ; epidemic jaundice experiments to establish the cause of and discover inoculations against that disease ; sterilization experiments to develop a method best suited for sterilising millions of people ; spotted fever experiments to investigate the

(1) Case 1, tried by United States Military Tribunal No. 1. See Vol. IV of these Reports, pp. 91-3, and Vol. VII, pp. 49-53.

effectiveness of vaccines ; experiments with poison to investigate the effect of various poisons. In addition to this, several defendants were charged with activities involving murder, torture and ill-treatment not connected with medical experiments. In all cases inmates of concentration camps were used as " guinea-pigs " and were as a rule healthy subjects.

Karl Brandt and nine other accused were indicted for having committed such criminal acts as members of the S.S. and were, accordingly, also prosecuted as " guilty of membership in an organisation declared to be criminal by the International Military Tribunal " at Nuremberg.

When deciding upon this particular charge, the United States Military Tribunal referred to the general ruling of the International Military Tribunal and applied in each case the tests of individual guilt defined by the latter. On the face of the evidence submitted, Karl Brandt and eight other defendants were found guilty of membership on the ground that they had been in the S.S. until the end of the war and that, as such, they were actually and personally " implicated in the commission of war crimes and crimes against humanity." One defendant was found guilty of having " remained in the S.S. voluntarily throughout the war, with actual knowledge of the fact that that organisation was being used for the commission of acts declared criminal by Control Council Law No. 10."

(2) *Trial of Joseph Altstoetter et al.* (*Justice Case*)

In one of the most outstanding subsequent trials at Nuremberg, 16 German high officials of the Reich Ministry of Justice, judges and prosecutors of Nazi courts were prosecuted for the commission of criminal offences by means of legislative or judicial acts.(1) The trial opened on 17th February, 1947, and was commonly designated as the " Justice Case." The judgment was delivered on 3rd and 4th December, 1947.

The principal defendant Joseph Altstoetter, was Chief (Ministerialdirektor) of the Civil law and Procedure Division of the Reich Ministry of Justice, and Oberfuhrer in the S.S. Together with the other defendants he was charged with misusing legislative or judicial power in such a manner as actually to commit crimes against persons subjected to Nazi laws and/or courts of justice. The evidence submitted was to the effect that Nazi legal machinery was used as one of the means " for the terroristic functions in support of the Nazi régime ". Death sentence and other severe penalties were prescribed for acts which either did not represent criminal offences under standards of modern justice or did in no case warrant such heavy punishments. Sentences were pronounced by Nazi courts in pursuance of such criminal laws in a very large number of cases. The accused were indicted for being implicated in such acts, which, under the terms of the Control Council Law No. 10, amounted to war crimes or crimes against humanity.

Seven defendants, including Altstoetter, were accused of having committed such crimes as members of organisations declared criminal by the International Military Tribunal.(2) The organisations involved were the S.S.,

(1) Case No. 3, tried by United States Military Tribunal No. 3. See Vol. VI, pp. 1-110.
(2) *Ibid*, pp. 4-5, 65-72 and 77.

S.D. and Leadership Corps, of the Nazi Party. Some of the defendants were members of two organisations simultaneously. They were accordingly charged separately with the crime of membership in such organisations. As in the previous case the Tribunal applied the tests of criminality defined by the International Military Tribunal and found the accused individuals guilty of membership on different grounds. Alstoetter was found guilty as a member of the S.S. falling within the groups declared criminal by the International Military Tribunal, on the grounds that he had knowledge of the criminal purposes and acts of the S.S. and remained voluntarily in the organisation. The test of knowledge was likewise positively established against two other defendants. In one case the Tribunal was satisfied by the evidence that the accused actually knew of the execution of political prisoners and that he personally took part in the misdeeds. It also arrived at such conclusion on the basis of circumstantial evidence deriving from the accused's official position and duties. " No man who had his intimate contacts with the Reich Security Main Office, the S.S., the S.D., and the Gestapo could possibly have been in ignorance of the general character of those organisations." In the second case the evidence regarding the *mens rea* of the accused was entirely of a circumstantial nature. The crimes, said, the Tribunal, " were of such wide scope and so intimately connected with the activities of the Gauleitung (the accused's organisation) that it would be impossible for a man of the defendant's intelligence not to have known of the commission of these crimes, at least in part if not entirely." It is interesting to note that the chief defendant, Altstoetter, was found guilty only on the count of membership and freed from other charges. He was sentenced to 5 years' imprisonment.

Two defendants were acquitted. In one case the defendant was charged as a member of the Leadership Corps of the Nazi Party, and the Tribunal established that his group did not in fact belong to the Leadership Corps, nor to any other organisation declared criminal. In the second case the accused was charged as a member of the Leadership Corps Staff and a " sponsoring " member of the S.S. The Tribunal ruled that neither a Gaustellenleiter nor a " sponsoring " member of the S.S. could be regarded as a member of an organisation declared criminal by the International Military Tribunal.

(3) *Trial of Oswald Pohl et al*

One of the most interesting trials in this field is the so-called " Pohl Case," which opened on 10th March and closed on 3rd November, 1947.(1) The Tribunal dealt with 18 defendants, all of whom but one were members of the S.S. They were top ranking officials in the " S.S. Economic and Administrative Main Office," known as " W.V.H.A." (Wirtschafts-und Verwaltungshauptampt), which was one of the twelve main departments of the S.S. and to which was added the main office of the Inspector of Concentration Camps. The principal accused, Pohl, was Chief of the W.V.H.A. and as such, the administrative head of the entire S.S. organisation. Himmler was his only superior. The other accused were heads of the various branches of the W.V.H.A.

(1) Case 4, tried by United States Military Tribunal No. 2. See Vol. VII, pp. 49 and 63.

The S.S. Economic and Administrative Main Office was in charge of running concentration camps and a large number of industrial, manufacturing and service enterprises in Germany and occupied countries. It was responsible for all financial matters of the S.S., for the supply of food, clothing, housing, sanitation and medical care of inmates and S.S. personnel of concentration camps ; for the construction and maintenance of houses, buildings and structures of the S.S., the German police and of the concentration and prisoners of war camps ; and for the order, discipline and regulation of the lives of the concentration camps inmates. In addition it was charged with the supply of slave labour of the concentration camp inmates to public and private employers throughout Germany and the occupied countries, as well as to enterprises under its own management.

On account of such relationship with concentration camps and slave labour, all the accused were charged with taking part in the commission of " atrocities and offences against persons and property, including plunder of public and private property, murder, extermination, enslavement, deportation, unlawful imprisonment, torture, persecutions on political, racial and religious grounds, ill-treatment of, and other inhumane and unlawful acts against thousands of persons, including German civilians, nationals of other countries, and prisoners of war." The accused were thus tried as chief instruments of the criminal policy conducted by the heads of the Nazi Party and State against the millions who were ill-treated or perished in concentration camps or as slave labour.

In addition to the above offences, all the accused except one were charged under a separate count for the crime of membership in an organisation declared criminal by the International Military Tribunal, and were all indicted as falling within the categories covered by the Tribunals' declaration.

When summing up the various counts of the indictment, including that of membership, the United States Military Tribunal made a general ruling regarding the evidence and discarded entirely the principle of the presumption of guilt in the following terms :

> " Under the American concept of liberty, and under the Anglo-Saxon system of jurisprudence, every defendant in a criminal case is presumed to be innocent until the prosecution by credible and competent proof has shown his guilt to the exclusion of every reasonable doubt. This presumption of innocence follows him throughout the trial until such degree of proof has been adduced. Beyond a reasonable doubt, does not mean beyond a vain, imaginary or fanciful doubt, but means that the defendant's guilt must be fully proved to a moral certainty, before he is condemned."

It will be seen that the Tribunal applied this ruling to all individual cases of membership and lay the burden of proof concerning tests of personal guilt on the prosecution. This illustrates the fact previously mentioned that the International Military Tribunal did not decide the question of the burden of proof, and thus made possible the elaboration of a differing jurisprudence in this respect. The striking feature in this trial is that the above ruling was applied by an American court, notwithstanding the fact that rules issued by the American authorities for other courts are founded on the principle that a declaration of criminality reverses the onus of proof and frees the

prosecution from submitting evidence in respect of the personal guilt of the members.(1) In view of the fact that no rules to this effect were issued with particular regard to the United States Military Tribunals at Nuremberg, and that the International Military Tribunal had left the field clear, the above ruling was within the powers of the United States Tribunal and the legal basis of its jurisprudence cannot be challenged.

The ruling was applied with particular clearness in respect of two defendants whom the Tribunal acquitted from all charges.

In one case the accused, Rudolf Scheide, was Chief of a department of the W.V.H.A. as technical expert in the field of motor transport, and was in charge of all the transport service of the W.V.H.A. The prosecution contended that, in connection with his office and the large field of tasks carried out by him with the various branches of the W.V.H.A., the accused " gained knowledge of how the concentration camps were operated, how the prisoners were treated, who they were, and what happened to them." It also contended that he " knew that the concentration camps were engaged in the slave labour programme, and that he furnished transportation in this programme with knowledge of its use." And finally, that he " knew of the mass extermination programme carried out by the concentration camps " and provided the department concerned in this programme " with transportation, spare parts, tyres, gasoline, and other necessary commodities for carrying out this programme." The accused denied knowledge of all these crimes and the Tribunal came to the following conclusion :

> " After weighing all the evidence in the case, and bearing in mind the presumption of innocence of the defendant, *and the burden of proof on the part of the prosecution*, the Tribunal must agree with the contentions of the defendant."(2)

The Tribunal then found the accused not guilty on the following grounds :

> " The defendant admits membership in the S.S., an organisation declared criminal by the Judgment of the International Military Tribunal, *but the prosecution has offered no evidence* that the defendant had knowledge of the criminal activities of the S.S., or that he remained in the said organisation after September, 1939, with such knowledge or that he engaged in criminal activities while a member of such organisation."(2)

According to the ruling of the International Military Tribunal, it will be remembered that proof in respect of the last test (personal commission of crimes) would appear always to lie on the prosecution, whereas nothing stands in the way of subjecting the test of knowledge to a reversal of the burden of proof as advocated by the United States Chief Prosecutor and as followed up in a number of United States rules.

In the same case the accused, Leo Volk, was head of a legal department of the W.V.H.A. As with Scheide, the prosecution contended that he had knowledge of the criminal purposes and acts of the W.V.H.A. on account of his office and duties. The accused's defence was that he had no such knowledge, but merely prepared notarial documents, carried on law suits and generally gave legal advice. The Tribunal was satisfied that the accused

(1) See *History of the United Nations War Crimes Commission and the Development of the Laws of War*, pp. 322, and 331-332.

(2) Italics introduced.

was a " vital figure " in his department and refuted the defence thesis that, in order to convict him, proof should be submitted that, if he knew of the criminal purposes or acts of his organisation, he must have had the power to prevent crimes from being committed. The Tribunal declared :

> " It is enough if the accused took a *consenting part* in the commission of a crime against humanity. If he was part of an organisation actively engaged in crimes against humanity, was aware of those crimes and yet voluntarily remained a part of the organisation, lending his own professional efforts to the continuance and furtherance of those crimes, he is responsible under the law."

However, continued the Tribunal, the defence contends that the accused " was not aware of any crimes and *it is this which the prosecution must establish* before it can ask for a conviction,"(1) meaning that the accused had knowledge of the crimes.

The Tribunal found that no such evidence had been submitted, and that the accused did not voluntarily join the organisation but was drafted from a private firm he personally did not want to leave for the W.V.H.A. It also established that, in the W.V.H.A. he had a special status in that he was employed under special contract. In view of these facts the Tribunal decided that the accused's guilt for membership had not been established " beyond reasonable doubt " and while convicting him on other counts, it acquitted him from this particular charge.

Two more defendants were acquitted from the charge of membership. One of them was head of the Office of Audits in the W.V.H.A. from 1942 until the end of the war. Here again the Tribunal established lack of evidence on the part of the prosecution regarding the relevant tests and concluded in the following terms :

> " Perhaps in the case of a person who had power or authority to either start or stop a criminal act, knowledge of the fact coupled with silence could be interpreted as consent. But Vogt was not such a person. His office in W.V.H.A. carried no such authority, even by the most strained implication. He did not furnish men, money, materials or victims for the concentration camps. He had no part in determining what the inmates should eat or wear, or how hard they *did* work or how they *were* treated. The most that can be said is that he knew that there were concentration camps and that there were inmates. His work cannot be considered any more criminal than that of the bookkeeper who made up the reports which he audited, the typist who transcribed the audit report or the mail clerk who forwarded the audit to the Supreme Auditing Court."

As a consequence the accused was acquitted on all counts. Leo Volk was acquitted for not belonging to any of the classes or categories of S.S. members included in the declaration of the International Military Tribunal.

In other instances the Tribunal applied extensively circumstantial evidence to admit proof of guilty knowledge as charged by the prosecution.

Defendant August Frank was Chief Supply Officer of the Waffen-S.S. and Death Head Units under the defendant Pohl, and became Pohl's Chief

(1) Italics in the last quotation introduced.

Deputy of the W.V.H.A. In view of his position and the field of his competence and duties the Tribunal came to the following conclusions :

> " . . . . anyone who worked, as Frank did, for eight years in the higher councils of that agency cannot successfully claim that he was separated from its political activities and purposes."

From that the Tribunal further concluded that he " could not have been ignorant " or that he " must have known " of the purposes as well as of a series of criminal acts described by the Tribunal. He was found guilty of " participating and taking a consenting part " in the " slave labour programme . . . and in the looting of property of Jewish civilians for the eastern occupied territories." In this connection he was also convicted for the crime of membership.

Another defendant, Erwin Tschentscher, was chief of a department of W.V.H.A. dealing with supplies of food for the Waffen-S.S. and the police in Germany. He contended in defence that his only link with concentration camps was to furnish food for the guards, and declined any knowledge of concentration camp crimes and slave labour practices. On the face of his position and duties, as well as of the evidence that he paid visits to several concentration camps, the Tribunal expressed its findings in the following terms :

> " The Tribunal concludes that the defendant Tschentscher was not a mere employee of the W.V.H.A., but held a responsible and authoritative position in this organisation. He was Chief of Amt-B-I, and in this position had large tasks in the procurement and allocation of food. Conceding that he was not directly responsible for furnishing food to the inmates of concentration camps, he was responsible for furnishing the food to those charged with guarding these unfortunate people.
>
> . . . . .
>
> " The Tribunal is fully convinced that he knew of the desperate condition of the inmates, under what conditions they were forced to work, the insufficiency of their food and clothing, the malnutrition and exhaustion that ensued, and that thousands of deaths resulted from such treatment. His many visits to the various concentration camps gave him a full insight into these matters.
>
> " The Tribunal finds without hesitation that Tschentscher was thoroughly familiar with the slave labor program in the concentration camps, and took an important part in promoting and administering it."

For these reasons the accused was found guilty both of actual participation in war crimes and crimes against humanity and of the crime of membership.

In all other cases the Tribunal had either clear evidence of the actual participation of the accused in specific criminal acts, such as in the case of Pohl himself, or else sufficient evidence to draw conclusions as to their guilty knowledge, and on this basis pronounced sentences of guilt for the crime of membership.

(4) *Trial of Friedrich Flick et al*

The trial of Friedrich Flick and five other defendants opened on 20th April and closed on 22nd December, 1947.[1] It was one of several trials

[1] Case 5, tried by United States Military Tribunal No. 4. See Vol. IX of these Reports, pp. 1-59.

commonly designated as " industrial cases," for the defendants were not officials of the Nazi State, but private citizens engaged as business men in German heavy industry. Flick owned a steel corporation controlling or affiliated with iron and coal mining companies. The other defendants were his assistants or associates. They were charged *inter alia* with taking part in, and being members of, groups or organisations connected : *Count I :* with " enslavement and deportation to slave labour " of concentration camp inmates and other civilians, as well as with the " use of prisoners of war " in work prohibited by international law (armament production, etc.), *Count II :* with " plunder of public and private property, spoliation, and other offences against property " in occupied territories ; *Count III :* with " persecutions on racial, religious and political grounds " ; *Count IV :* with " murders, brutalities, cruelties, tortures, atrocities and other inhumane acts committed principally by the S.S."

Although in the majority of counts the defendants were described as members of organisations " connected " with criminal activities, only one accused, Steinbrinck, was member of an organisation declared criminal by the International Military Tribunal (the S.S.) ; he was consequently the only defendant specifically indicted for the crime of membership. In addition, under Count IV, both he and the chief defendant, Flick, were accused of offences closely connected with membership of the S.S. They were charged with having contributed, as members of a private group called the " Keppler Circle " or " Friends of Himmler," large sums to the financing of the S.S. " with knowledge of its criminal activities," and to have thereby been accomplices in war crimes and crimes against humanity perpetrated by the S.S. It is important to note that the charge was not, and could not be, that they were guilty of membership in the " Keppler Circle," for this circle was not included in the organisations declared criminal by the International Military Tribunal. Neither was " knowledge " of the S.S. criminal activities mentioned in this instance as a test for the crime of membership, but only as a basis for charging the two defendants as accomplices or accessories to the crimes committed by the S.S. This part of the indictment proved, however, to be relevant for deciding the case of Steinbrinck, as it contained facts furnishing evidence regarding his guilty knowledge as a member of the S.S.

As in the " Pohl Case," the United States Military Tribunal which tried Flick, Steinbrinck and others rejected the thesis of presumption of guilt and took the view that the burden of proof concerning the tests of criminality for membership lay on the prosecution. So, in the case of Steinbrinck it declared the following :

> " Relying upon the International Military Tribunal's findings . . . the prosecution took the position that it devolved upon Steinbrinck to show that he remained a member without knowledge of such criminal activities. As we have stated in the beginning the burden was all the time upon the prosecution."

The Tribunal decided the case on the basis of this rule.

In assessing the tests relevant for determining Steinbrinck's individual guilt, the Tribunal declared that there was no evidence showing that he was personally implicated in the commission of crimes perpetrated by the S.S.

and that no contention had been made to the effect that he was drafted on a compulsory basis. It therefore determined that his personal guilt was to be established solely on the basis of the test of knowledge of the criminal nature of the S.S.

As mentioned above, the Tribunal's findings on this test were made on the basis of the accused's activities as member of the " Keppler Circle." This circle was composed of about 30-40 bankers, industrialists and S.S. leaders, including the S.S. Reichsfuehrer Himmler himself. Steinbrinck was a member from the beginning, which dated as far back as 1932. The circle was originally formed by Hitler's economic adviser Keppler, who gave it his name, with a view to inducing industrialists and other top business men to support the Nazi programme and regime. The circle had regular informal meetings and its members made regular donations upon Himmler's request, amounting to a total of 1 million Reichsmarks annually. Himmler's explanation for such requests was that he needed funds for " his cultural hobbies and for emergencies for which he had no appropriations." Steinbrinck contributed very large sums of money every year. The Tribunal was satisfied that the meetings of the group did not have " the sinister purposes ascribed to them by the prosecution," and found " nothing criminal or immoral in the defendant's attendance at these meetings." It was also satisfied that, in the beginning and particularly before the war, " the criminal character of the S.S. was not generally known." It came, however, to the conclusion that " later " it " must have been known " ; " that during the war and particularly after the beginning of the Russian campaign " there was not " much cultural activity in Germany " ; and that consequently members of the group could not " reasonably believe " Himmler was spending their money for other purposes than to maintain the S.S. The Tribunal found " no doubt " that " some of this money " went to the S.S., and declared " immaterial whether it was spent on salaries or for lethal gas." From this it concluded that Steinbrinck was guilty of the crime of membership. The Tribunal's findings in this respect were, thus, entirely based on circumstantial evidence and were, from a practical point of view, founded on premises equivalent to that of a presumption of guilt.

The trial ended in the conviction of Flick, Steinbrinck and one more defendant, whereas the other three were acquitted. In passing sentence upon Flick and Steinbrinck the Tribunal admitted circumstances in mitigation of the punishments, and pronounced sentences not exceeding 7 years' imprisonment.

(5) *I.G. Farben Trial*

In the trial of the leading personnel of " I.G. Farben Industrie "(1) the world-wide German chemical concern, three of the twenty-three accused were charged with the crime of membership.

The trial opened on 14th August, 1947, and closed on 29th July, 1948. The three accused involved on the count of membership were Christian Schneider, Heinrich Buetefisch, and Erich von der Heyde.

Schneider, a chemist, held the post of member of the Board of Directors (Vorstand) and of the Central Committee of I.G. Farben. He also held

(1) See Vol. X, pp. 1-68.

other important posts, including that of head of Farben's Central Personnel Department. He was a member of the Nazi Party and a supporting or " sponsoring " member of the S.S. He was charged with membership on account of this latter link with the S.S.

Buetefisch, a Doctor of Engineering (Physical-Chemical), was also a member of Farben's Vorstand, and in addition to other posts, was chairman or member of control groups of many Farben concerns in the fields of chemicals, explosives, mining, synthetics, etc. He was a member of the Nazi Party and of the " Keppler Circle," referred to above. He was also a Lieutenant-Colonel of the S.S., and was charged with membership of the S.S.

Von der Heyde, a Doctor in Agriculture, served Farben's Economic Policy Department, and Counter-Intelligence Branch. He was a member of the Nazi Party and of the Reitersturm (Riding Unit), S.S. The prosecution contended that the accused was an active member of the Allgemeine (General) S.S.

None of the above three accused was found guilty of the charge and they were consequently all acquitted on the count of membership.

In the instance of Schneider the Tribunal found that the accused was only a " sponsoring " member of the S.S. and that as such his only contact with the S.S. " arose out of the payment of dues." The Tribunal referred to the judgment delivered in the trial of Altstoetter and agreed with the latter's finding that a sponsoring membership was not included in the declaration of the International Military Tribunal concerning the S.S.

In the instance of Buetefisch the Tribunal dealt with the accused's position as a member of the Himmler Circle of Friends, and established that at about the same time the accused had become an honorary member of the S.S. The findings were in part similar to those of the trial of Flick. The Himmler Circle of Friends, said the Tribunal, " played no part in formulating any of the policies of the Third Reich." It was also found that no evidence had been produced to the effect that the accused " had knowledge of the criminal purposes or acts of the S.S. at the time he became or during the period he remained a member." Finally the Tribunal established that the accused could not be regarded as a member of the S.S. within the terms of the International Military Tribunal's declaration. After stressing that the defendant had only been an honorary member of the S.S. the Tribunal, however, did not find this to be sufficient and decisive in itself :

> " We do not attach any special significance to the fact that the defendant was classified as an honorary member, but we are of the opinion that the defendant's status in the organisation must be determined by a consideration of his actual relationship to it and its relationship to him."

It was on the basis of such " actual relationship " that the Tribunal made its decision. It established that the accused had " consistently refused to procure a uniform in the face of positive demands that he do so " ; and that in addition he made " other significant reservations " which he " imposed and consistently maintained when and after he accepted honorary membership."

In the instance of von der Heyde the Tribunal's findings included the following statement :

> " Taking into account that the only definitely established affiliation of the defendant was with the non-culpable Riding Unit of the S.S., and that the evidence tending to show that he subsequently became a member of the General S.S. arises wholly out of the innocuous incidents connected with his efforts to obtain a marriage license, we must conclude that the guilt of the defendant von der Heyde . . . has not been satisfactorily established."

(b) Trials by United States General Military Government Courts

Several trials conducted by United States General Military Government Courts in Germany concern cases involving, in addition to the S.S., other Nazi organisations declared criminal by the International Military Tribunal. They are the Leadership Corps of the Nazi Party, and the Gestapo (State Secret Policy) and S.D. (Sicherheitsdienst—Security Police).

In the conclusion of the declaration concerning the Leadership Corps the International Military Tribunal stated the following :

> " The Leadership Corps was used for purposes which were criminal under the Charter and involved the Germanization of incorporated territory, the persecution of the Jews, the administration of the slave labour programme, and the mistreatment of prisoners of war. The defendants Bormann and Sauckel who were members of this organisation, were among those who used it for these purposes. The Gauleiters, the Kreisleiters, and the Ortsgruppenleiters participated, to one degree or another, in these criminal programmes. The Reichsleitung as the staff organisation of the Party is also responsible for these criminal programmes as well as the heads of the various staff organisations of the Gauleiters and Kreisleiters. The decision of the Tribunal on these staff organisations includes only the Amtsleiters who were heads of offices on the staffs of the Reichsleitung, Gauleitung and Kreisleitung. With respect to other staff officers and party organisations attached to the Leadership Corps other than the Amtsleiters referred to above, the Tribunal will follow the suggestion of the Prosecution in excluding them from the declaration.
>
> " The Tribunal declares to be criminal within the meaning of the Charter the group composed of those members of the Leadership Corps holding the positions enumerated in the preceding paragraph who became or remained members of the organisation with knowledge that it was being used for the commission of acts declared criminal by Article 6 of the Charter, or who were personally implicated as members of the organisation in the commission of such crimes. The basis of this finding is the participation of the organisation in war crimes and crimes against humanity connected with the war ; the group declared criminal cannot include, therefore, persons who had ceased to hold the positions enumerated in the preceding paragraph prior to 1st September, 1939."

The conclusion of the declaration made in respect of the Gestapo and S.D. read as follows :

> " The Gestapo and S.D. were used for purposes which were criminal under the Charter involving the persecution and extermination of the

Jews, brutalities and killings in concentration camps, excesses in the administration of occupied territories, the administration of the slave labour programme and the mistreatment and murder of prisoners of war. The defendant Kaltenbrunner, who was a member of this organisation, was among those who used it for these purposes. In dealing with the Gestapo the Tribunal includes all executive and administrative officials of Amt IV of the RSHA or concerned with Gestapo administration in other departments of the RSHA and all local Gestapo officials serving both inside and outside of Germany, including the members of the Frontier Police, but not including the members of the Border and Customs Protection or the Secret Field Police, except such members as have been specified above. At the suggestion of the Prosecution the Tribunal does not include persons employed by the Gestapo for purely clerical, stenographic, janitorial or similar unofficial routine tasks. In dealing with the S.D. the Tribunal includes Amts III, VI and VII of the RSHA and all other members of the S.D. including all local representatives and agents, honorary or otherwise, whether they were technically members of the S.S. or not.(1)

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

In the following three trials accused persons were convicted for membership of one or more of the above organisations. All trials were held by the United States General Military Government Court at Dachau.

In the trial of Hans Seibold and two others, held on 5th-7th March, 1947, the defendants were implicated in the killing of a member of the United States Army who, as was stated in the judgment, " was a surrendered and unarmed prisoner of war in the custody of the then German Reich." Two of the accused were members of the Leadership Corps of the Nazi Party, one being a Kreisleiter and the other an Ortsgruppenleiter. The third was a member of the Allgemeine S.S. Their position and ranks were within the classes of members liable to punishment under the declarations of the International Military Tribunal.

They were found guilty of a war crime and of the crime of membership in organisations declared criminal by the International Military Tribunal. One was sentenced to death and the other two to life imprisonment each.

In a similar trial held on 13th February, 1947, the accused, Erwin Schienkiewitz, was tried for killing two unknown members of the United States Army under circumstances identical with those of the previous case.

(1) The RSHA or Reichssicherheitshauptamt was the top co-ordinating body of the Gestapo. The " Amts " referred to were its various departments.

The accused was a member of the S.S., and was convicted to death for a war crime and the crime of membership in the S.S.

Finally, in a trial held from 10th January to 21st March, 1947, there were 23 accused with one Jurgen Stroop at their head. They were implicated in the ill-treatment, including death, beatings, and torture, of " members of armed forces then at war with the then German Reich, who were surrendered and unarmed prisoners of war in the custody of the then Germany Reich." Some were members of the S.S., and some others of the Leadership Corps, or of the Gestapo and the S.D. Thirteen were found guilty of both war crimes and the crime of membership, and were sentenced to punishments ranging from the death penalty to various terms of imprisonment.

3. RELEVANCE OF SOME DEFENCE PLEAS

(i) *The Plea concerning " Annexed Territories "*

One of the pleas of the defence was to the effect that the accused bore no penal responsibility for acts committed in territories which were annexed and incorporated in the German Reich. Such was, for instance, the case with Polish territories outside the Government General, as well as with Alsace and Lorraine and parts of Yugoslav Slovenia (Southern Carinthia).

The argument was used by several defence counsel, and the following quotation from the plea of Meyer-Hetling's counsel may be cited as a striking illustration :

> " . . . the Polish State was completely subjugated and dissolved following the events of 1st September, 1939. The war between Germany and Poland, which started on 1st September, 1939, led to the complete military collapse of Poland within a few weeks, as I have already explained. The Polish Army was dispersed. Its greater part was captured by German troops. . . . The Polish Government resigned. A new government was only gradually formed abroad. On 17th September, 1939, Soviet forces marched into Poland, occupied the parts of Poland not yet in German hands and took the remainder of the Polish army still there prisoner. Thus the entire Polish territory was occupied and its army completely annihilated. The material prerequisites for a declaration of annexation had thus been created. . . . According to recognised practice in international law, the material prerequisites for subjugation or conquest of a state do not include the dissolution of the government and the abdication of the sovereign, after all the territorial and sovereign influence has been eliminated. If the government and sovereign flee to other countries, their activity abroad in connection with the admissibility of the annexation is of no importance under international law, even if they should still be recognised diplomatically by individual states. . . . International law, true to its tendency to make established facts legally valid, sees in the actual cessation of state power during the war the authority to eliminate the legal status of a state as well. On the other hand, the possibility of restoring the extinct state power by future events such as the victory of an ally is not taken into consideration at all.
>
> " It must be deduced therefrom that the 5th partition of Poland—the events of September, 1939, may be seen in that light—was an annexation in accordance with international law."

As the prosecution stressed, " the burden of this argument was that since these territories were absorbed by the Reich, the laws and customs of war no longer applied and hence no war crimes could have been committed."

This plea was rejected by the Tribunal on the ground that a unilateral decision taken by a State to incorporate parts of foreign territories does not in itself give title for recognition of the annexation by other States. The Tribunal's finding in the matter was couched in the following terms :

> " It has been urged and argued at length that certain territories, such as the incorporated Eastern territories of Poland and parts of Luxembourg, Alsace and Lorraine, were incorporated into the Reich and thereby became a part of Germany during the war. Hence it is urged, the laws and customs of war are inapplicable to these territories.
>
> " Any purported annexation of territories of a foreign nation, occurring during the time of war and while opposing armies were still in the field, we held to be invalid and ineffective. Such territory never became a part of the Reich but merely remained under German military control by virtue of belligerent occupancy. Moreover, if it could be said that the attempted incorporation of territories into the Reich had a legal basis, it would avail the defendants nothing, for actions similar to those occurring in the areas attempted to be annexed also occurred in areas which Germany never professed to have incorporated into the Reich."

The above finding was in fact a confirmation of the stand taken previously by the International Military Tribunal in the case of the Nazi major war criminals, in a passage already quoted in an earlier Volume in this series.([1])

The same view was taken by another U.S. Military Tribunal at Nuremberg, in the case against Josef Altstoetter and 15 others.([2])

From these pronouncements it clearly appears that the status of a territory under enemy occupation remains unaltered and maintains its true nature of occupied land whatever the occupying Power does with the aim of giving different legal status. From this it follows that, given the circumstances of belligerent occupation, an occupying Power cannot claim the right to impose its domestic laws and thereby make legal acts which are otherwise forbidden by international law.

(ii) *The Plea of Superior Orders.*

In this case, as in many others, the Tribunal confirmed the rule that to commit acts, which are criminal, upon superior orders is not in itself a basis for exculpating the perpetrator, but may be taken, at the court's discretion, as a mitigating circumstance.

In applying this rule in the case of the defendants, most of whom had pleaded not guilty on the grounds of orders issued by their superiors, the Tribunal implemented Art. II 4 (*b*) of Law No. 10, which reads :

> " The fact that any person acted pursuant to the order of his government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation."

([1]) See Vol. II, p. 151.

([2]) See Vol. VI, pp. 32, 52, 62 and 91-3.

The finding of the Tribunal with regard to the relevance of the above rule in the case of the accused was couched in the following terms :

> " Another defense urged is that, in performing certain functions, the defendants were acting under superior orders. By Control Council Law No. 10, it is expressly provided that superior orders shall not free a defendant from responsibility for crime but this fact may be considered in mitigation of punishment. We have, in passing judgment on all the defendants, given due consideration to this defence as it might affect the punishment of the individual defendants. It is our view in this respect, that justice demands a fair consideration of the fact that each and all defendants occupied a subordinate position, being answerable to Himmler, and several of the defendants were even subordinate to other defendants at bar."