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NAZIISM ON TRIAL: A CRITICAL ANALYSIS OF THE PUBLIC TRIALS OF NAZI LEADERS AS SOURCES FOR THE RECONSTRUCTION OF THE HISTORY OF THE NAZI REGIME

Kenneth Ian Segel

Thesis submitted in partial fulfillment of
the requirements for the Degree of Master of Arts
in Hebrew Letters and Ordination

Hebrew Union College - Jewish Institute of Religion

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DEDICATED TO MY WIFE

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The International Military Tribunal which sat at Nuremberg delivered its verdict on October 1, 1946, convicting nineteen of twenty-two individual defendants and three of six indicted groups and organizations. The formulation of a judicial tribunal to try the leaders of defeated Germany provoked wide comment, much of it critical. Many asked how victors could fairly judge a losing enemy. It was the purpose of this thesis to attempt an estimate of the work of the Tribunal based on the record of the trial and the judgment rendered.

The Nuremberg Trial offers no precedent for a drumhead court-martial of the leaders of a vanquished state. It stands for a 'fair' trial in which the rights of the accused were respected. Still, it was the victors who established the ground-rules and sat in judgment. The industrialists were not defendants despite their vital role in assisting and supporting Hitler. The convictions at Nuremberg were largely the result of the Germanic proclivity for systematic records and the unexpectedly swift final victory, which placed files of documents in Allied hands. Not until the Nuremberg Trial disclosed the German archives was it known how cynical and brazen was the Nazi conspiracy for aggression.

The trial was a collective trial, but it was through the life stories of each individual that many hidden springs

of the National Socialist State could be detected. What marked the German slaughter of millions was its cool, impersonal organizational efficiency. Hitler came into power because of the failure of the government to provide a solution to the economic crisis. His policy toward the Jews seemed to be determined by expediency.

Even if the trial was imperfect and the representatives of the Soviet Union charged the Germans with crimes the Russians had committed, the trial had to be held in some form. A catharsis of the pent-up emotions of millions of people had to be provided and a record of what had taken place duly preserved for whatever use later generations would make of it.

The trial raised many questions. The responsibilities of the individuals indicted, of the German people, of Prussian militarism, of big business, and of the German national character were clearer at the end of the trial than they were at the beginning. They are clearer now than they were during the trial.

The Third Reich is the most completely documented totalitarian regime of recent times, and in this contribution to history the trial also played its role.

CHAPTER I

OVERVIEW

(a) INTRODUCTION

If mankind really is to master its destiny or control its way of life, it must first find means to prevent war. So long as it cannot, war demands will dictate the course of our collective and individual lives. And if we are to come to grips with the problem of preventing war, it is important that we know how wars are made, to what extent they result from impersonal pressures and tensions, and how far they are due to blunders or pugnacity of individual statesmen or political factions.

Never have the archives of a belligerent nation been so completely exposed as were those of Nazi Germany at the Nuremberg trial. In its preparation over a hundred thousand captured documents were screened, about ten thousand were translated, and over four thousand were used in evidence. Some of these ran to several volumes. They were not old records dragged to light by a subsequent generation which knew not how to value them. They were laid out in a court room before the very highest of their surviving authors, who, with able counsel and first hand knowledge, subjected them to correction, explanation, and attempted justification. The result is a documentation unprecedented in history as to any major war.

Not until the Nuremberg trial disclosed the German archives was it known how cynical and brazen was the Nazi conspiracy for aggression. Of course, in Mein Kampf, Hitler openly declared his aim to acquire more territory and to do it by war; but these only struck the world as the mad daydreams of one then a prisoner. By April, 1939, however, he had held supreme power in the German state since 1933 and was in a position to order final preparations for the war that began September 1, 1939. On May 23, 1939, Hitler secretly reiterated to his high officials his purpose: to expand "our living space in the East" and to "attack Poland at the first suitable opportunity."[1] His pact with the Soviet Union made him feel safe in going ahead. On August 22, Hitler again harangued his top civilian and military officials:

> Destruction of Poland is in the foreground. The aim is elimination of living forces, not the arrival at a certain line.... I shall give a propagandistic cause for starting the war, - never mind whether it be plausible or not. The victor shall not be asked later on whether we told the truth or not. In starting and making a war, not the right is what matters but victory.[2]

Thus the conflagration was set. The rapidity with which the German armies swept away opposition showed that Germany was in no danger of attack, for it alone was prepared for modern war. The appeasement policies of England served as a green light.

Moreover, the Nazi regime, in driving Germany toward war and in conducting it, waged the most frightful of the world's persecutions against Jews, Catholics, Protestants, Freemasons, organized labor, and all suspected of pacifist tendencies. By the war's end it had exterminated a staggering number of human beings by gas chambers, gas wagons, medical means, firing squads, overwork, and undernourishment. It had seized, transported to Germany, and impressed into forced labor around five million. The magnitude of this planned reversion to barbarism taxes the civilized imagination and the cruelty of its execution taxes credulity.

Too few Americans seem now to appreciate that only by the narrowest margin and largely because of his own blunders and the Russian winters did Hitler lose his war for control of all Europe. But when the war did end successfully, the surviving planners and executioners of this policy were prisoners in American or allied custody. What was to be done?

To expect the Germans to bring the Nazi war criminals to justice was out of the question. That was proved by the farcical experiment after World War I. After World War II, organized society in Germany was in a state of collapse. There was no authoritative judicial system except remnants of the violently partisan judiciary set up by Hitler. German law had been perverted to be a mere expression of the Nazi will.

To have turned the men over to the anti-Nazi factions in Germany would have been a doubtful benevolence. Even a year and a half later, when Schacht, Von Papen, and Fritzsche were acquitted by the Tribunal, they begged to remain within the protection of the American jail lest they be mobbed by the angry and disillusioned elements of the German population. They knew only too well the fate of Mussolini.

Where in the world were neutrals to take up the task of investigation and judging? Does one suggest Spain? Sweden? Switzerland? True, these states as such were not engaged in the war, but powerful elements of their society and most leading individuals were reputed not to be impartial but to be either for or against the Nazi order. Only the naive or those forgetful of conditions in 1945 would contend that we could have induced "neutral" states to assume the duty of doing justice to the Nazis.

Of course, the victors might have refused all responsibility for either the safety or the punishment of the Nazi leaders and turned them loose; however, in 1945 what the victors had to confront was an insistent and world-wide demand for immediate, unhesitating and indiscriminating vengeance. Speedy court-martials yielding quick judgment and fast sentencing to death were called for.

The wisest, though not most popular, course would have been for the victors to behave as civilized victors and take the responsibilities implicit in demanding and accepting capitulation of the whole German state and population. Unless history was to lay the war guilt and the guilt for organized programs of atrocities upon the whole German people, some process must identify these individuals who were in fact responsible and make an authentic record of their deeds.

(b) BACKGROUND

The idea of punishing war criminals, at least those who had fought unsuccessfully, was by no means new in history. Samuel killed King Agog, hewed him to pieces before the Lord; the anger of Samuel was sharpened and justified by a sense of righteousness of his cause. Joshua, the Old Testament records, when the Hebrews invaded the land of Canaan, slew "both man and woman, young and old and ox and sheep and ass with the sword... the young man and the virgin, the suckling also and the man with gray hairs." Vercingetorix was put to the sword. In the more humane climate of the nineteenth century, when Napoleon surrendered to the British after his defeat at Waterloo, he was not tried but was rendered harmless by removal to the rock of Saint Helena, although he had been universally denounced as the enemy of the peace of Europe.

At the end of World War I a list of 4,900 war criminals, including the Kaiser, Hindenburg, Ludendorff, and Bethmann Hollweg, was eventually brought down to a baker's dozen by the refusal of the Dutch to surrender the Kaiser, by the reappearance of old cleavages of interest among the victorious powers, and by German resistance to the Allies' demand to surrender the alleged violators of the customs and usages of war to foreign powers. This, the Germans said, was illegal under German law. They also pointed out that turning over Germans to allied courts would only fan the unrest flaring up all over Germany in the postwar years.

Nine trials took place before the German Supreme Court in Leipzig two and a half years after the end of the war. Of the 901 men tried, 888 were acquitted or the charges were summarily dismissed for want of sufficient proof. Only thirteen cases ended in convictions, and these carried relatively short terms of imprisonment. A German major was sentenced to two years in jail for the killing of French prisoners of war. One man was sentenced to ten months' imprisonment, another to six months for mistreatment of British captives. Two defendants were sentenced to four years for having taken part in the sinking of a hospital ship, the Llandovery Castle, and then of having fired on the life boats. This they had been ordered to do because the captain of their submarine had believed the Llandovery

Castle to be carrying munitions under the cover of its red cross, had found that it was not, and had wanted to destroy the witnesses to his crime.[3]

The Americans declared that the German military and political leaders and the alleged violators of the customs and usages of war could not be guilty of crimes under international law, since no international penal statutes existed on such violations. The British, who during the war had strongly favored trying the Kaiser as well as those guilty of violations of the rules of war, especially when the violations had to do with the use of submarines, professed themselves surprised to find the names of Hindenburg, Ludendorff, and Bethmann Hollweg on the list of the French and Belgians, which at this point had been brought down to 896 names.[4]

Many of the Allied policies of World War II were set by the failures of the policies of World War I. This time, President Franklin D. Roosevelt said, no stab-in-the-back legend would spread among the German people, and he demanded unconditional surrender. This time it would be brought home to the Germans that war, aggressive war, is a crime, that they had been not only the victims of but also the participants in a criminal regime, a criminal conspiracy planted in the Prussian-German soil of militarism, and that the uprooting of such evil growths must be thorough.

(c) NEGOTIATIONS

By 1942, the nations outside the countries occupied by the Germans knew without question that atrocities on an enormous scale were being perpetuated against Jews, prisoners of war, and civilian populations. The underground movements in Poland, Russia, France, and the Low Countries sent a stream of information and circumstantial accounts to London and Washington and Moscow. The Israelitisches Wochenblatt, published in Switzerland, regularly carried news that reached it through the underground of the deportations and killings.[5]

The United Nations War Crimes Commission was officially established in London on October 20, 1943, to draw up lists of criminals who would be tried in due course. Fifteen nations were represented, including the United States and Great Britain but not the Soviet Union which in this as in other matters preferred to pursue its own course. These lists did not include the names of the so-called major war criminals.

In the autumn of 1943, the United States Secretary of State, Cordell Hull, journeyed to the Soviet Union where he and Molotov and Eden signed the Moscow Declaration of November 1, promising the trial of war criminals but naming no one. It declared:

> Those German officers and men and members of the Nazi party...who have been responsible for...atrocities, massacres and executions will be sent

> back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries. The above declaration is without prejudice to the case of the major war criminals whose offenses have no particular geographical localization and who will be punished by the joint decision of the governments of the allies.[6]

Even before the United States entered the war, President Roosevelt and Winston Churchill together had warned the Germans that they would be held accountable for war crimes. In a statement on October 25, 1941, Churchill declared, "Retribution for these crimes must henceforward take its place among the major purposes of this war." These warnings were often repeated in the course of the war by all the warring nations. In March, 1943, the United States Senate and House of Representatives in a concurrent resolution declared unanimously: "The dictates of humanity and honorable conduct in war demand that the inexcusable slaughter and mistreatment shall cease...and that those guilty of these criminal acts shall be held accountable and punished."[7]

The allied foreign ministers, as well as Stalin, Churchill, Roosevelt, and indeed any attentive reader of the press, had no doubt whatever as to who the perpetrators of these crimes were. The chief criminals were the leaders of the Nazi Party and State, the High Command of the Army and Navy, the diplomats, the industrialists, the bankers, the judges, and the bureaucrats. Such members of the Roosevelt administration as Secretaries Stimson and Stettinius and

Attorney General Biddle wrote a memorandum to the President for the Yalta Conference on January 1, 1945, saying, "The names of the chief German leaders are well known and the proof of their guilt will not offer great difficulties."[8]

The German people themselves were never to be formally indicted. The French prosecution, alone among the four victorious powers, made no distinction between the Nazis and the rest of the nation. The Americans were careful to draw a line between the general population and those on trial. Thomas J. Dodd, in his opening statement, said, "As every German Cabinet minister or high official knew, behind the laws and decrees of the Reichsgesetzblatt was not the agreement of the people or their representatives but the terror of the concentration camps and the police state."[9] Mr. Justice Jackson declared in his opening speech, "We have no purpose to incriminate the whole German people. We know that the Nazi party was not put into power by a majority of the German vote," but by an alliance of extreme Nazis, German reactionaries, and the most aggressive of militarists."[10]

Mr. Justice Jackson came to the trial with the firm belief that aggressive war was a crime; that the idea of neutrality had been outmoded by the Kellogg-Briand Pact of August 27, 1928, outlawing war; and that individuals who acted in behalf of their governments were to be held responsible for what had previously been acts of state.

For him the outlawing of war was the cornerstone of the new world order. Even the crimes against the Jews were to be linked to a conspiracy to wage aggressive warfare. Otherwise, Mr. Justice Jackson feared, the perpetrators could not properly be brought before the court. The Kellogg-Briand Pact, he said, "had started a new era in which the criminal responsibility of statesmen who deliberately resorted to war in violations of treaties must be made clear." "Since the German war was illegal in its inception," he continued, "so the United States was justified in abandoning the rules of neutrality, and ...when it came to dealing with war criminals the position of the President was clearly stated to the American people - the launching of a war of aggression was a crime."[11]

The French expert in international law who was present at the London conference, Professor Andre Gros, and the Russians, remained unconvinced that individuals could be tried for committing war. Gros, taking the traditional view of responsibility for acts of state, declared, "we do not consider as a criminal violation a war of aggression. If we declare war a criminal act of an individual we are going further than the actual law."[12] The principle, he thought might become law in the years to come, "but as it now stands we do not believe these conclusions to be right." He said that what the conferees were doing in declaring certain acts, like aggression, criminal was "a creation by

four people who are just four individuals - defined by those four people as criminal violations of international law. These acts have been known for years before and have not been declared criminal violations of international law. It is ex post facto legislation."[13] The Russians (with their own experience of having been declared aggressors in the Finnish War of 1940-41 by the League of Nations no doubt in mind) sided with Gros.

Ultimately, the Russians produced a redraft of the clause on aggression which was far narrower than what Mr. Justice Jackson had hoped for. It declared the crime to be "aggression or domination over other nations carried out by the European Axis in violation of international laws and treaties."[14]

This was a useful and workable formula from the Soviet point of view, for, when the indictment was drawn up, Estonia, Latvia, and Lithuania were stated in it to be part of Soviet territory. On October 6, Mr. Justice Jackson, wrote aformal reservation in a letter to the other chief prosecutors: "This language is proposed by Russia and is accepted to avoid the delay which would be occasioned by insistence on alteration in the text."[15] Nothing in the indictment, he declared austerely, was a recognition by the United States of Russian sovereignty over these countries.

The London Conference named as defendants twenty-four men and six organizations. The idea of indicting organi-

zations was mainly American. Mr. Justice Jackson argued that the individual members of one of these criminal groups would be tried in due course on their own account but that the adoption of the Anglo-American concept of the conspiracy of a group, would help clarify the legal situation, save time, and avoid holding innumerable trials to prove the same point. This proposal ran into no great difficulties and was accepted, although the idea of a conspiracy was foreign to both French and Russian law.

The London Agreement of August 8, 1945, was drawn up in accordance with its far reaching purposes by the United States, Great Britain, the Soviet Union, and France. These four nations acted on behalf of the United Nations - that is, for the twenty-six countries that had gone to war with Germany. The agreement declared that the signatories, after consulting with the Allied Control Council for Germany, would establish the International Military Tribunal for the trial of war criminals whose offenses had no particular location.

The charter of the tribunal, which was part of the London Agreement, provided that the competence of the tribunal could be challenged neither by the prosecution nor by the defense; that its decisions would be made by majority vote, the deciding vote in the event of a tie to be cast by the President of the Court. This office the Russians had at first wanted rotated, but they accepted the proposal

to make a renowned and practiced Jurist, the British member of the tribunal, Lord Justice Geoffrey Lawrence, President of the Court.[16]

The court, according to the charter, could try any citizen of the enemy nations, the indictments need not be limited to Germans, and among the accused were two Austrians. It had the task of trying and punishing those persons who acting in the interests of the former European Axis countries, had planned to wage, or had waged, aggressive war, and those who had committed war crimes or crimes against humanity. Four categories of crimes were described in detail.

Control Council Law No. 10 recognized four types of crimes - crimes against peace, war crimes, crimes against humanity, and membership in organizations declared criminal by the International Military Tribunal. These crimes were defined as follows:

> (a). Crimes Against Peace. Initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation or waging a war of aggression, or a war of violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.
>
> (b). War Crimes. Atrocities or offenses against persons or property constituting violations of the laws or customs of war, including but not limited to, murder, ill treatment or deportation to slave labour or for any other purpose, of civilian

> population from occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.
>
> (c). Crimes Against Humanity. Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.
>
> (d). Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal.[17]

Thus crimes committed in Germany were included despite the Nazi laws of the period. The fact that a defendant had acted under an order of his government or of a superior was not to free him from responsibility for having carried it out, although superior orders could be considered in mitigation of punishment if the tribunal decided that such would be in the interest of justice. In this provision the charter of the tribunal took care of what was certain to be a chief defense of many of the accused. A clause expressly prohibiting the carrying out of inhuman or illegal orders had prudently been inserted in the military manuals of the British and American armies only a year before. Up to that time the accepted doctrine of

both armies had been that a soldier must obey the orders of his superiors, whether he liked them or not. With the trials coming up, the regulations were changed to provide that no order that offended a soldier's conscience need be carried out. Curiously, the German Army had a similarly phrased order. The German soldier in World War I and even under the Nazis was told in his book of military law that he was not to carry out orders he knew to be illegal.[18]

With regard to the rules of evidence a simple rule was settled upon: that the Tribunal "shall admit any evidence which it deems to have probative value." While this vested considerable discretion in the Tribunal, it had the merit of making admission of evidence turn on the value of what was proffered rather than upon compliance with some formal rule of evidence.[19]

The trial extended through more than four hundred sessions of court, covering ten months. Prosecutors for the four nations called thirty-three witnesses and put in evidence over four thousand documents. In addition to the defendants themselves, sixty-one witnesses testified in their behalf, one hundred forty three more gave evidence for them by written answers to interrogatories, and they offered a large number of defense documents. It was the demonstrated success of the procedure which led many of the German lawyers to declare that from a technical point of view, the trial was an important accomplishment.[20]

If the only purpose of the Nuremberg Trial had been to convict a few criminals, the enormous effort made by the four occupying powers would have been pure waste. The trial was amply justified, however, by its contribution to at least two branches of human knowledge: History and International Law.

Even if the trial was imperfect, the trial had to be held in some form. A catharsis of the pent-up emotions of millions of people had to be provided and a record of what had taken place duly preserved for whatever use later generations would make of it. The record would not completely document the infamy in the twentieth century, but it would reveal one vast concentration of evil that could be exorcised.

The trial raised many questions that will be discussed in the pages that follow. The responsibilities of the individuals indicted, of the German people, of Prussian militarism, of big business, and of the German national character were clearer at the end of the trial than they were at the beginning. They are clearer now than they were during the trial. The Third Reich was not the first or the last of the totalitarian regimes that have appeared in the last fifty years. It is, however, the most completely documented, and in this contribution to history the trial also played its role.

*CHAPTER II

COUNT ONE: THE COMMON PLAN

(a) The Indictment and the Proof. - Count One - the conspiracy count - charged that all twenty-two of the individual defendants participated in the formulation or execution of a common plan or conspiracy to commit, or which involved the commission of crimes against Peace, and in due course War Crimes, and which contemplated and came to embrace as typical and systematic means, crimes against humanity.

The indictment identified the "central core" of the common plan or conspiracy as the Nazi Party, which "became the instrument of cohesion among the defendants and their co-conspirators" and the tool for carrying out the purposes of the conspiracy. It alleged that each defendant, with knowledge of the aims of the conspiracy, became a member, or an accessory to the purposes, of the Party and conspiracy at some point in their development.

It charged that the aims of the Party, and hence the objectives of the common plan, were to abrogate the Treaty of Versailles and its restrictions on armament, to acquire territories lost in World War I or regarded as occupied by "racial Germans," and to obtain further territory in Europe as "living space" or Labensraum. These objectives expanded as the conspirators acquired greater power and ability to make their threats effective. When finally such resistance

was provoked as could be overcome only by armed force, the Nazi leaders deliberately planned and launched aggressive wars.[21]

The remainder of Count One alleged what amounted, in effect, to a capsule of German history: the Nazi conspirators' dissemination of the "master race" doctrine and the principle that war was a necessary activity of Germans; the establishment and expansion of a police state; the education and training of German youth for war; the creation of a vast and efficient propaganda machine; the militarization of Party organizations, notably the SA and SS; the commencement and development of a vast rearmament program; the break with the League of Nations and the 1936 reoccupation of the Rhineland; the specific planning for particular aggressions, beginning with the meeting of November 5, 1937; and finally, the commission in due course of the aggressions against Austria and Czechoslovakia and the launching of the aggressive war against Poland.

These allegations were clearly supported by the evidence. The aggressive objectives of the Nazis were, in Mr. Justice Jackson's words, "just as secret as Mein Kampf, of which over six million copies were published in Germany.[22] That book left no question of Hitler's determination to acquire land by force[23] and unmistakably linked the Nazi foreign and domestic programs.[24]

Defense counsel belittled the significance of Hitler's

book, suggesting that anyone could have assumed that "as Chancellor, Hitler would not maintain the party doctrines he defended years before purely as a member of the opposition."[25] Although Hitler, as Chancellor, was more circumspect, the same ideas were disseminated throughout Germany by his associates - in speeches by Hess reiterating "guns instead of butter" and in Rosenberg's "The Russians will have to move their center of gravity to Asia." Mein Kampf continued to be the Nazi bible, and, as the Tribunal stated, was "regarded as the authentic source of Nazi doctrine."[26] It was not, the Tribunal declared, to be treated "as a mere literary exercise, nor as an inflexible policy or plan incapable of modification. Its importance lies in the unmistakable attitude of aggression revealed throughout its pages."[27]

Abundant proof was introduced to show that the Nazi State was geared from its inception to carry out Hitler's aggressive aims. As the Fuehrer said in a speech to his military commanders in 1939:

> The building up of our armed forces was only possible in connection with the ideological education of the German people by the Party...I had to reorganize everything beginning with the mass of the people and extending it to the armed forces...While reorganizing the interior, I undertook the second task: to release Germany from its international ties.[28]

Scores of documents demonstrated the basic facts of the

rearmament program, of the brutal suppression of internal opposition, and of the development of para-military forces, the SS, the SA, the Hitler Youth, and the Labor Front.

Against this background the prosecution introduced documents of top-rank officials showing the translation of Hitler's theories into specific plans for action.[29] Most notable was a series of minutes or accounts of conferences between Hitler and small groups of the highest-ranking military and government officials at which a long-range program of German aggression was outlined and the chronology of contemplated attacks discussed.[30] To a group of five, assembled at the Reich Chancellery in Berlin on November 5, 1937, Hitler set forth the necessity of seizing living space on the continent of Europe and concluded that the question for Germany was "where the greatest possible conquest could be made at the lowest cost." Hist "first aim" was to conquer Austria and Czechoslovakia.[31] In March, 1938, the Anschluss with Austria was accomplished under Nazi military pressure. Later, in the spring of 1938, Hitler initiated plans "to smash Czechoslovakia by military action,"[32] but the Munich agreement made such action unnecessary. When, on March 15, 1939, Bohemia and Moravia were occupied without resistance, the initial program outlined at the November, 1937 meeting had been fully achieved.

At a further conference on May 23, 1939, the decision was made "to attack Poland at the first suitable opportunity."

"We cannot expect a repetition of the Czech affair," said Hitler. "There will be war." Though he hoped to isolate Poland, he foresaw intervention by the Western Powers. If such intervention materialized, the neutrality of Holland and Belgium was to be ignored and both countries occupied.[33] After a summer of intensive military preparations, Hitler held a final pre-attack briefing with his military leaders at Berchtesgaden on August 22, 1939, four days before the date set for hostilities. He said, in substance, that the moment for military invasion had come; that a war in the West had been considered ultimately unavoidable; and that he would give an appropriate propaganda reason for invading Poland. In starting a war, he declared, it is not right that matters, but victory.[34]

With Poland conquered and attention focused on the West, Hitler again addressed his military commanders on November 23, 1939. He reviewed at length his course of action from 1919 through the Polish campaign, establishing beyond question the existence of a deliberate plan of aggression. Surveying the future, he announced his intention of attacking France and England at the first opportunity and of occupying Belgium and Holland in the process. Breach of the Low Countries' neutrality would be "meaningless."[35] Captured German military files fill out in minute detail the aggressive plans announced in general terms at these key meetings.

(b) The Convictions

The judgment stated that the Tribunal was "fully satisfied by the evidence" that the leaders of Germany were guilty of the "supreme international crime," plotting and initiating wars of aggression.[36] It found that there was planning to wage wars at least as early as November 5, 1937, and probably before that.[38] The Tribunal said:

> That Germany was rapidly moving to complete dictatorship from the moment that the Nazis seized power, and progressively in the direction of war, has been overwhelmingly shown in the ordered sequence of aggressive acts and wars already set out in this judgment. In the opinion of the Tribunal, the evidence establishes the common planning to prepare and wage war by certain of the defendants. It is immaterial to consider whether a single conspiracy to the extent and over the time set out in the indictment has been conclusively proved. Continued planning, with aggressive war as the objective, has been established beyond doubt.[39]

Despite this holding and although Count One was the only charge leveled against all the defendants, it produced the fewest convictions. The Tribunal convicted eight defendants and acquitted fourteen of participation in the common plan. If the eight convicted, four were military men (Goering, Keitel, Raeder, and Jodl), two foreign ministers (von Neurath and Ribbentrop), and two high in Nazi circles (Hess and Rosenberg).

The conviction of these eight men of consiracy to commit

crimes against Peace was the most significant achievement of the Nuremberg verdict. It emphasized the basic determination of the Charter: that aggressive war is a crime and all who participate in a conspiracy to that end are answerable. An analysis of the opinion indicates, however, that the Tribunal differed in several major respects from the concept of the conspiracy count advanced in the argument of the prosecution.

This difference in approach was evident in the Tribunal's ruling that under the Charter it had no jurisdiction to try persons participating in a common plan, to commit War Crimes or Crimes against Humanity.[40] By this finding, Count One was limited to a common plan to commit crimes against Peace, obviating consideration of the American case on conspiracy to commit the other crimes. This ruling was based on a construction of the ambiguous phraseology of Article 6 of the Charter. Although it is probable that the Charter was intended to make punishable conspiracies to commit any of the crimes named, the Tribunal seemed to adopt the view that criminal statutes are to be interpreted restrictively. It may also have been motivated by the lack of sympathy for the conspiracy concept evident in other aspects of its opinion.

As to the scope of Count One, the American prosecution pointed out that the prisoners in the dock were not petty thieves or dope peddlers. "The forms of this grand type of

conspiracy are amorphous, the means are opportunistic," Mr. Justice Jackson said, "and neither can divert the law from getting at the substance of things." He urged that the Charter, by using the non-technical term "common plan," forestalled resort to parochial and narrow concepts of conspiracy taken from local law.[41] Other prosecutors supported this argument. As General Rudenko, the Soviet Chief Prosecutor, put it: "It stands to reason that in this case the threads and levers uniting the members of this conspiratorial criminal society are extremely complicated, since the conspirators had seized the government of the State."[42]

Since the defendants had in general conceded the occurrence of the pre-aggression conferences and the substantial accuracy of the documents introduced by the prosecution, counsel for the defense relied in the main upon three contentions. First, it was argued that the significance of Hitler's remarks at the key conferences was questionable. Raeder, for example, claimed that until the actual outbreak of hostilities he was convinced that Hitler did not mean war and would obtain a "political solution" of Germany's problems.[43] The Tribunal dismissed this claim:

> But all that this means when examined, is the belief that Germany's position would be so good, and that Germany's armed might so overwhelming, that the territory desired could be obtained without fighting for it... If any

> doubts had existed in the minds of any of his hearers in November, 1937, after March of 1939 there could no longer be any question that Hitler was in deadly earnest in his decision to resort to war.[44]

It was also strongly urged, particularly by Goering's counsel, that the defendants had never conspired together; that some indeed had never had an opportunity to conspire; and that some were not originally members, while others had long been high officials, of the Party.[45] "It contradicts experience," was Mr. Justice Jackson's reply, "that it was merely a coincidence that men of such diverse backgrounds and talents should so forward each other's aims." They all had quite different roles, because of the grand nature of the enterprise. But all made "integral and necessary contributions to the joint undertaking... The activities of all these defendants... blend together into one consistent and militant pattern animated by a common objective to reshape the map of Europe by force of arms."[46]

The third argument was that there could be no conspiracy in a dictatorship. Raeder, for example, claimed he was justified in relying on Hitler, his political leader, for all political judgments. Defense counsel argued: " A dictator enters into no conspiracy, or agreement; he dictates."[47] The Tribunal rejected the defense:

> A plan in the execution of which a number of persons participate is still a plan, even though conceived by only one of them; and those who

> execute the plan do not avoid responsibility by showing that they acted under the direction of the man who conceived it. Hitler could not make aggressive war by himself. He had to have the cooperation of statesmen, military leaders, diplomats and businessmen. When they, with knowledge of his aims, gave him their cooperation, they made themselves parties to the plan he had initiated. They are not to be deemed innocent because Hitler made use of them, if they knew what they were doing.[48]

(c) The Acquittals

The standard thus set for judging participation in the common plan - whether the defendants, with knowledge of Hitler's aims, gave him their cooperation - was far more restrictively applied than the prosecution had envisaged. The Tribunal rejected the prosecution's broad theory as to what constitutes a common plan. It held, instead, that a conspiracy to wage aggressive war must be clearly outlined in its purpose, with a concrete plan to wage war as its subject.

> The prosecution says, in effect, that any significant participation in the affairs of the Nazi Party or government is evidence of a participation in a conspiracy that is in itself criminal. Conspiracy is not defined in the Charter. But in the opinion of the Tribunal the conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and of action....The Tribunal must examine whether a concrete plan to wage war existed, and determine the

participants in that concrete plan.[49]

This limited construction of "conspiracy" may have been based on several considerations. Even in our domestic law, courts deal cautiously with the crime of conspiracy. As Mr. Justice Jackson stated, it "is the great dragnet of the law rightly watched by courts lest it be abused."[50] To have accepted the prosecutions theory in toto would have required a holding, in substance, that the Nazi government from 1933 on was an open conspiracy. As our domestic courts traditionally avoid "political questions," so international tribunals may well disclaim jurisdiction to pass on the legality of "energetic governments" unless such jurisdiction is unequivocally delegated by the world community.

The novelty of the trial may also have influenced the Tribunal. It was manifestly concerned with silencing critics who charged that conviction for "crimes against peace" would be ex post facto injustice,[51] and its cautious approach to the common plan to commit crimes against peace may have been an attempt to dispel doubts on this score.

Finally, the arguments of defense counsel as to the scope of the German law of conspiracy may have had some effect.[52] Counsel argued that German law punished a conspiracy hostile to the state only if action were taken pursuant to it; that conspiracies to commit other crimes were limited to a few serious offenses and to such pre-

parations as would constitute the participant an accomplice under our law, and that responsibility extended only to acts foreseen and approved from the beginning. Defense counsel were surprised at the notion that a gang of robbers should all be responsible for a murder committed by one of them.[53]

Accepting the Tribunal's restricted definition of conspiracy, the question remains whether the acquittal of fourteen of the defendants under Count One was fairly justifiable on the evidence. The Tribunal had found a common plan to prepare and wage war to have existed probably before November, 1937 - a plan which, by the Tribunal's definition, was clearly outlined in its criminal purpose and not too far removed from the time of action. Did none of these fourteen defendants cooperate in this common plan with knowledge of its aims?

The uniform defense was lack of knowledge that aggression was contemplated. Keitel admitted that the military supported Hitler in rejecting the no-armament provisions of the Treaty of Versailles, but he maintained that no danger of aggressive war was foreseen because rearmament was not adequate for such a war, even in 1939. "Armament may, in fact, must," his counsel said, "look just the same if it is carried out for security and defense as it does in the case of aggressive war."[54] Excerpts from General Marshall's report as Chief of Staff were cited: "Nature

tends to abhor weakness.... Weakness presents too great a temptation to the strong.... We must start, I think, with a correction of the tragic misunderstanding that a security policy is a war policy."[55]

Actions by allied nations and quotations from Allied leaders were invoked to show that Hitler's protestations of peaceful intentions were widely believed. Churchill, for example, wrote in 1935 that one could not then say whether Hitler would be the man to unleash a world war or gain fame as the man who restored the honor and peaceful intent of Germany.[56] In that same year England signed a naval limitation treaty with Germany. Baldwin and Chamberlain had told their people that Hitler had no hostile intentions.[57] Was, then, the defendants' belief that Hitler was capable of bluff but not war unreasonable?

The defendants, owing to their official positions, were obviously more capable of determining the true intentions of the Hitler regime than visitors or diplomats. The defense arguments did, nevertheless, interject a doubtful note into the proof.

In this aspect of the case the gaps in the evidence had not all been filled. Except for the notes of the key conferences with Hitler, there were few documents definitely linking the non-military defendants with preparation for a specific war. The prosecution, therefore, asked the Tribunal to infer knowledge from the proven facts and

intimated the use of an objective standard.[58] The Tribunal, however, insisted on being shown what the defendant did, in fact, know. In some few instances it was willing to infer subjective knowledge. It inferred that Hess discussed war plans in conferences with Hitler.[59] It inferred that Funk knew, or deliberately closed his eyes to the fact, that his Reichsbank was the recipient of the personal belongings of concentration camp victims.[60] But as a general standard the requirement of actual knowledge proved beyond a reasonable doubt was maintained.

This requirement was exceedingly difficult to satisfy in the case of non-military defendants. In the absence of direct evidence of participation in the planning, an inference of actual knowledge could be drawn only from such unusual circumstances as existed in the case of Hess. The contradictory nature of Nazi propaganda, now belligerent, now conciliatory, and the ever-present claim that rearmament was to "defend" Germany from its neighbors made it easy for defense counsel to stress the naivete of their clients.

Even defendants who were chargeable with implicit belief in Mein Kampf and Nazi doctrine stoutly denied any knowledge of preparations for aggressive war. On cross-examination Goering admitted that he had aligned himself with Hitler because Hitler believed in "the impotency of protest" and would overthrow the Treaty of Versailles by

am "objection of such a nature that it would actually be considered."[61] Even this unusual admission did not alone establish the requisite subjective knowledge. The other defendants were even more guarded. To show their knowledge and to establish when they joined the conspiracy presented an almost insoluble problem of proof.

The practical effect of the Tribunal's position is perhaps best illustrated in the case of Schacht, who was acquitted under both Counts One and Two by a majority of the Tribunal over the dissent of the Russian member. The evidence established and the Tribunal found that none of the defendants had made a greater contribution toward increasing Germany's war potential. As President of the Reichsbank, Minister of Economics, and General Plenipotentiary for War Economy, Schacht had by 1937 financed the vigorous rearmament program and actively organized German economy for war. He was, the Tribunal said, "a central figure in Germany's rearmament program" and his activities "were responsible for Nazi Germany's rapid rise as a military power."[62] But, as the Tribunal held, rearmament of itself was not a crime under the Charter. Criminality could be established only if it were shown "that Schacht carried out this rearmament as part of the Nazi plans to wage aggressive war." In short, did Schacht "know" that he was helping Hitler on the road to war? The Tribunal declared:

> The case against Schacht, therefore, depends on the inference that Schacht did

> in fact, know of the Nazi aggressive plans. ... The Tribunal... comes to the conclusion that this necessary inference has not been established beyond a reasonable doubt.[63]

This conclusion would not be surprising if knowledge of "Nazi aggressive plans" meant knowledge of preparations for war against a particular country since there was little evidence of Schacht's participation in concrete plans for a specific aggression. It is possible that the Tribunal based the acquittal solely on a ruling that general knowledge, unaccompanied by knowledge of preparations for war at a specific time against a specific country, was insufficient in law. Such a doctrine would seem indefensible. The prosecution contended, however, that Schacht had knowledge of, and participated in, planning and preparing for ultimate aggression in the event that Germany's demands were not satisfied. There are indications in the opinion that the Tribunal - after acquitting Schacht under Count Two because he had not been involved in planning the war against Poland and subsequent wars[64] - acquitted him under Count One because, even were the prosecution's theory adopted, it had not been established beyond a reasonable doubt that Schacht knew of general plans for aggressive war. If that was its view, the Tribunal's conclusion that such knowledge on Schacht's part was not established is difficult to support.

It seems hard to believe that a "central figure in the

rearmament program" could have been ignorant of the aims of that program. Indeed, the Tribunal found that "Schacht, with his intimate knowledge of German finance, was in a peculiarly good position to understand the true significance of Hitler's frantic rearmament, and to realize that the economic policy adopted was consistent only with war as its object."[65] Moreover, there was evidence of his participation in conferences at which war aims were more or less expressly proclaimed. For example, in a meeting held in May, 1936, which Schacht attended, Goering had stated that "all measures are to be considered from the standpoint of an assured waging of war." In September, 1936, Goering again stated in Schacht's presence that "the showdown with Russia is inevitable. ...If war should break out tomorrow we would be forced to take measures from which we might possibly still shy away at the present moment. They are, therefore, to be taken."[67]

To this Schacht's answer was that he was rearming Germany for defense and to insure "equality" at the conference tables, where Germany would be pressing her demands; that from 1936 on he had advocated limitation of rearmament for financial reasons;[68] that when at last he became aware of Hitler's aggressive intention he resigned as Minister of Economics and Plenipotentiary for War Economy; and that he was eventually dismissed from all positions of economic importance.[69]

His resignation seems on the contrary to have been brought on by a bitter jurisdictional conflict with Goering - a dispute not over whether the economy should be regimented for war, but on who should control the regimentation.[70] In November, 1937, after concluding that the struggle was lost, he resigned.[71] But simultaneously with the acceptance of his resignation, he was appointed Minister without Portfolio, to be Hitler's "personal adviser,"[72] and he remained President of the Reichsbank, where he was undisputed master.

Under his direction as President, the rate of exchange to prevail after the conquest of Austria was established, the Austrian National Bank and the Czech bank of issue were merged into the Reichsbank,[73] and the Reichsbank acted as fiscal agent for new armament loans.[74] After the seizure of Austria and after the occupation of the Sudetenland he made pro-Nazi speeches, justifying these aggressive acts and boasting that the armament he had created by his economic policy had made Germany's foreign policy possible.[75]

Towards the end of 1938, Schacht feared that Germany would be plunged into a severe inflation unless there were a temporary diminution in government expenditures,[76] but Hitler turned a deaf ear and in January, 1939, dismissed him from the Presidency of the Reichsbank. Until January, 1943, however, Schacht retained the post of Minister without Portfolio and accepted the incidental emoluments.[77]

Against the prosecution evidence, the Tribunal seems to have credited Schacht's personal denials that he did not, in fact, possess the knowledge which might normally be inferred from his position and activities. The Tribunal was undoubtedly influenced by the fact that after January, 1939, he had ceased to hold any position of economic or political importance. It pointed out that "he was clearly not one of the inner circle around Hitler which was most closely involved with this common plan. He was regarded by this groupwith undisguised hostility."[78]

This statement regarding Schacht's exclusion from the "inner circle" may have been intended to show that he had no subjective knowledge of the "inner circle's" aggressive plans. The phrase may, however, have a greater significance in view of the Tribunal's ruling in the case of other defendants, which suggests that in addition to requiring, for conviction under County One, personal knowledge of concrete plans for aggression, it insisted on proof of planning with Hitler himself.

Of the eight convicted defendants, four - Goering, Raeder, von Neurath, Keitel - had attended one of the important conferences of November 5, 1937, and May 23, 1939. Three others were shown to have conferred with Hitler about specific plans for aggressive war; von Ribbentrop, as to the dismemberment of Czechoslovakia, the attempt to elicit Italian support for the Polish attack, and the planning

for later aggressions; Rosenberg, regarding the invasions of Norway and the U.S.S.R.; and Jodl, regarding all operations except Poland. While as to Hess, there was a lack of similar documentary proof, this omission was supplied from other evidence. "Hess was Hitler's closest personal confidant," the Tribunal said. "Their relationship was such that Hess must have been informed of Hitler's aggressive plans when they came into existence, and he took action to carry out these plans whenever action was necessary."[79]

In the case of the defendants who were acquitted this evidence was lacking. In supporting Frick's acquittal under Count One, the Tribunal stated: "The evidence does not show that he participated in any of the conferences at which Hitler outlined his aggressive intentions."[80] In acquitting Streicher it said: "There is no evidence to show that he was ever within Hitler's inner circle of advisers....He was never present, for example, at any of the important conferences when Hitler explained his decisions to his leaders."[81] In acquitting Fritzche: "Never did he achieve sufficient stature to attend the planning conferences which led to aggressive war."[82]

The Tribunal's limitation of the Count to leading figures of the Nazi regime is even more evident in the cases of Funk and Bormann. Funk was convicted of "preparation" for aggressive war under Count Two on the basis of documents showing his conscious participation in the planning

for the wars on Poland and the U.S.S.R.[83] Yet the Tribunal held that his activity was subject to the supervision of Goering and that he "was not one of the leading figures in originating the Nazi plans for aggressive war," and acquitted him on Count One.[84] Funk's acquittal is explicable only on the ground that his planning was not at the Hitler level.

With respect to Bormann, who from 1933 to 1941 was Chief of Staff in the Office of the Fuehrer's Deputy (Hess), the Tribunal stated that the evidence did not prove he knew of Hitler's plans to wage aggressive wars and that he had not attended any of the important conferences. Although the Tribunal was willing in the case of Hess to infer knowledge from his position, it drew no such inference in the case of his Chief of Staff.[85]

A distinction was thus made between those leading figures of the regime whose positions brought them into direct contact with Hitler and those who were one step removed. This distinction would not, however, explain the cases of Schacht or of Frick who did confer with Hitler. The salient point is that they did not attend the "key conferences" of members of the "inner circle." Personal participation in the planning of the small group around Hitler seems to have been made the practical measure of guilt under Count One. Such a test appears excessively narrow. There would seem to be no basis in the facts of

life or theories of law for the view that one cannot plan aggression with the number-two man as well as with the number-one man.

Von Papen posed a somewhat related problem for the prosecution. His "intrigue and bullying" in Austria from 1934 to 1938 had the purpose and effect of weakening Austria, and making it less able to resist the German aggression.[86] The crucial question, however, was whether he knew of the plans to occupy Austria by force, if necessary. From the evidence concerning Von Papen's position and activities, probable knowledge of these plans, or at least familiarity with the Nazi aggressive aims, might be inferred. An application of the standard of subjective knowledge, coupled with the necessity of proving guilt beyond a reasonable doubt, had led to Schacht's acquittal. Measured by these standards von Papen's acquittal was no surprise.

Among the other defendants acquitted on Count One, Speer was unique in that he did not become one of the top Nazi officials until 1942, after all the aggressive wars had been initiated. In many respects his position in charge of German armament production after February, 1942, was similar to that of Schacht in the rearmament years. The Tribunal found that his "activities in charge of German armament production were in aid of the war effort in the same way that other productive enterprises aid in the waging of war" and were not part of the common plan within

Count One.

Actual knowledge of preparations for a war of aggression would seem even less clearly established on the part of other defendants acquitted under this Count than in the case of Schacht since their positions were less directly related to rearmament. Perhaps the one most nearly implicated was Frick, who with Schacht was a member of the Reich Defense Council and in charge of organizing civilian agencies for war.[88] Frank, the legal expert, made a speech during the war proundly proclaiming that his legal procedures had been designed from the beginning for use in war as well as peace.[89] Von Schirach made provision for Hitler Jugend to receive field training in preparation for Wehrmacht duties.[90] The proof as to Streicher rested largely on his position as Gauleiter.

In formulating the general standards for determining guilt under Count One, the Tribunal laid down two requirements: clearly outlined plans to wage war, close to the time of decision and action; and cooperation with Hitler with knowledge of his aims. It found that such plans existed at least by November 5, 1937, the date of the first "key conference" shown by the prosecution.

The remaining question as to every defendant was whether, having the requisite knowledge, he had cooperated with Hitler. The Tribunal found such knowledge and cooperation only in the case of the eight defendants who had

attended the important conferences at which Hitler had outlined his plans or had conferred with Hitler about specific aggressions. Nowhere in its opinion does it expressly state that the "common plan" is limited to that group and it is not clear that the Tribunal consciously regarded participation at such meetings as the criterion for guilt. But the manner in which it disposed of each defendant seems analytically explicable only on the basis of such a test. Such a limitation of the "common plan" may have been due to the varying quality of the evidence against different defendants: the evidence of the key conferences was so extraordinarily detailed that the insufficiency of proof found as to some defendants, notably Schacht, was perhaps more a matter of contrast than of direct evaluation. It may have stemmed from a dislike of the conspiracy theory in general.

If there is a weakness in the Tribunal's findings, the writer believes it lies in the very limited construction of the legal concept of conspiracy. With a broader construction of the law of conspiracy, the Tribunal may well have found a different verdict in a case like that of Schacht. Or it may have reflected the Tribunal's desire to avoid, as far as possible, such a controversial charge as that of planning Crimes against Peace, and to base convictions on more familiar charges of which there was ample proof.

*NOTE: Page references to the opinion and judgment are to the reprint by the Government Printing Office (1947). Page references to the transcript of the trial are to two sources: first, to the preliminary mimeographed official English transcript; second, where available, with a part and page number, to the British reprint of the proceedings, The Trial of German Major War Criminals, pts. 1-7 (1946), available from the British Information Service, and hereinafter abbreviated as MWC. A detailed statement of the case presented by the British and American prosecution staff appears in the first two volumes of Nazi Conspiracy and Aggression (1946), hereinafter cited as NCA: an eight volume set of documents and other materials. Although that statement is written in essay form, reference is made to it, as well as to the transcript, where the material in both is substantially the same. Documents are referred to by number and cited to the appropriate page of NCA.

The principal addresses of the Trial have been reprinted in three pamphlets The Trial of German Major War Criminals: Opening Speeches of the Chief Prosecuters; Speeches of the Chief Prosecutors At The Close of The Case Against The Individual Defendants; Speeches of The Prosecutors At The Close of The Case Against The Indicted Organizations (H. M. Stationery Office 1946), cited as Opening Speeches, Closing Speeches, and Closing Speeches Against Organizations, respectively.

The Charter of the Tribunal and other basic documents relating to the trial appear in Trial of War Criminals, No. 2420 (Dep't. State 1945) and The Axis in Defeat, No. 2423 (Dep't. State 1945).

A table of those convicted and acquitted on each of the four counts appears in the appendix. The opinion was read in open court on September 30 and October 1. Tr. 16794-17077. Final arguments were heard on August 31, 216 trial days after the trial had opened on November 20, 1945.

CHAPTER III

COUNT TWO: CRIMES AGAINST PEACE

Count One, which embodied the common plan, and Count Two, which charged the defendants with participation in the planning, preparation, initiation, and waging of specific aggressive wars in violation of international treaties, were interrelated and to a large extent overlapping. The Tribunal apparently felt, without expressly so stating, that knowledge of definite aggressive intentions sufficed for conviction under Count One, even if the defendant had no idea who would be the ultimate victim of the aggression. Under Count Two, however, the allegations of the indictment were limited to twelve specific aggressions;[91] therefore, knowledge of the specific plans to invade one of the enumerated countries had to be shown.[92]

As conceived by the prosecution, Count One was the broader; but as interpreted by the Tribunal, Count Two in certain respects covered the wider field. Thus one of the defendants, Funk was found guilty under this count of preparing for two aggressive wars, against Poland and the U.S.S.R., although his activity was not deemed to be at a sufficiently high level to warrant conviction under Count One.

Three other defendants, Doenitz, Frick, and Seyss-Inquart, were found guilty apparently of waging, but not preparing or initiating, aggressive war under Count Two,

although like Funk, each had been acquitted under Count One. While the opinion does not state in so many words that the latter two were convicted of "waging" war, the acts upon which their conviction under this count seems to have been based occurred after the start of hostilities and thus were not planning or initiation.

In the case of Doenitz, the Tribunal pointed out that in the pre-war years he was a "line officer performing strictly tactical duties. He was not present at the important conferences when plans for aggressive wars were announced, and there is no evidence he was informed about the decisions reached there."[93] The Tribunal held him guilty of "waging" aggressive war because he was "solely in charge of submarine warfare," which was "the essential part of Germany's naval warfare."[94] The Tribunal noted that the U-boat arm was a largely autonomous branch and that in March, 1940, Doenitz issued operational orders for the Norway campaign.[95] Apparently such operational orders were not considered to constitute "preparation," either because they were so close to the date of the invasion or because the Tribunal preferred to limit the crime of "preparation" to staff officers and commanders-in-chief. Other orders, particularly after 1943 when Doenitz succeeded Raeder as commander-in-chief of the Navy, served to emphasize Doenitz' importance in the waging of the war.

The Doenitz verdict underscored an objection frequently raised against the trial of enemy officers: that they were doing their military duty in response to orders of the head of state. The American Chief Prosecutor replied that the generals and admirals were indicted not because they conducted the war, but because they led their country into war. The facts of the record fully substantiate this statement as to Keitel, Jodl, Raeder, and other top-ranking officers, but Doenitz was convicted only of "waging" war.[96] It would, perhaps, have been preferable to have placed Doenitz' guilt on the ground of "initiating" a war of aggression while there was still time, if only weeks, to draw back; but perhaps, as in Count One, the Tribunal felt that guilt on such a ground should be limited to top-rank officers.[97]

Neither Frick nor Seyss-Inquart, who were also convicted of waging aggressive war, held military office. Frick had responsibility for establishing administration of the occupied areas; obtaining cooperation with local Nazi officials in Czechoslovakia, Poland, and Norway; supplying German civil servants for all territories; and appointing the commissioners of Norway and Holland.[98] Seyss-Inquart was first appointed Deputy Governor General of Poland and later Commissioner for occupied Netherlands, and the Tribunal said, "In these positions he assumed responsibility for governing territory which had been

occupied by aggressive wars and the administration of which was of vital importance in the aggressive war being waged by Germany."[99]

But the test of whether the function was of vital importance in the war was not the sole criterion. Despite Speer's considerable importance as head of the German armament industry, the Tribunal stated that the type of aid given to the war effort by "productive enterprises" did not constitute "waging" war.[100] Sauckel's activities in supplying labor to these enterprises were similarly held not to be "waging" war.[101] The ultimate test of responsibility under Count Two, then, seems to have been the importance of the activity plus an "aggressive" characteristic of the activity - reaching out into the war zone of occupation.

CHAPTER IV

COUNT FOUR: CRIMES AGAINST HUMANITY[102]

Count Four dealt with crimes against Humanity, which, as defined in the Charter, embraced acts which were also War Crimes. There were, however, significant differences between the two types of crimes. Crimes against Humanity included murder, enslavement, and other inhumane acts against any civilian population, whether before or during a war. It included as well persecutions on political, racial, or religious grounds. Such acts were denounced "whether or not in violation of the domestic law where perpetrated," but none was made a crime unless committed "in execution of or in connection with" some other crime within the jurisdiction of the Tribunal.[103] This qualification was apparently intended to limit condemnation to acts having an international significance, and thus to avoid setting a precedent for interference with what might be regarded as essentially internal affairs.

The indictment alleged the commission of inhumane acts on a vast scale directed against civilians in Germany from 1933 on, and later extended to occupied countries, and the systematic persecution of Jews and opponents of the Nazi regime. These crimes were charged to have been committed in execution of and in connection with the common plan set out in Count One and the War Crimes referred to in Count Three, although not with the planning and preparation of specific wars of aggression covered in Count Two.

The Tribunal's restricted interpretation of the common plan under Count One - that it embraced only eight of Hitler's ultimate advisers from, at the earliest, 1937 - inevitably weakened the case under Count Four. Thus, acts before 1937 were necessarily excluded since they could not have been "in connection with" a plan which, in the Tribunal's view, was not then in effect.

It may be argued that persecution of the Jews and repression of political opponents within Germany after 1937 might have been held to be related to the limited common plan which the Tribunal found. But there was no direct evidence to connect these actions with preparations for war. Although the prosecution argued that the Charter declared criminal such "matters which the criminal law of all countries would normally stigmatize as crimes,"[104] the Tribunal was reluctant to give a broad application to Crimes against Humanity, perhaps owing to the novelty of of the offense. By limiting such crimes to acts committed after 1939 and therefore, in effect, war crimes, it was able to deal with them as analogous to recognized offenses against international law.[105]

The Tribunal noted, however, that after the outbreak of war in 1939, War Crimes, which were also Crimes against Humanity, were committed on a vast scale, and found that insofar as the inhumane acts 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."[106]

Despite the limitations the Tribunal imposed, it convicted 16 of the defendants indicted under this count and acquitted only two, Hess and Fritzsche. Fourteen of the sixteen convicted were also convicted of committing War Crimes under Count Three. For them the additional conviction under this count was largely a reiteration of their guilt under the other charge.

Two defendants, Streicher and von Schirach, were not indicted under Count Three, were convicted only under this count. Streicher was convicted of advocating the extermination of the Jews in his newspaper during the war years, when he and his paper had lost their influence, rather than for his infamous activities as Gauleiter of Franconia and leader of the anti-Jewish crusade prior to 1939. Von Schirach the pre-war leader of the Hitler Jugend, stated at the trial: "This is the crime for which I am answerable before God and the German people...It is my guilt that I educated the German youth for a man who committed murders a million fold."[107] But he was convicted only under Count Four, for his activities as Gauleiter of Vienna. These two men, who did much to consolidate the power of the Nazi regime from 1933 to 1939, were convicted only of relatively minor activity after the outbreak of war - not of the major

offenses for which they are charged before the bar of history.

CHAPTER V

THE ACCUSED ORGANIZATIONS

Punishment of war criminals necessarily involved more than the trial of a handful of Nazi leaders. The few men at the head of the regime were not alone responsible for such crimes as the mass extermination of Jews and the deportation of some 5,000,000 persons for forced labor. Nor did guilt rest only upon the concentration camp guards, operators of gas vans, and lynchers of Allied aviators who committed murders with their own hands. A multitude of enthusiastic collaborators, at all levels of the Nazi hierarchy, had cooperated in organizing and executing the systematic criminal program. But the very scale on which atrocities had been committed and the vast number of persons involved made it impossible to obtain evidence of the nature and extent of each participant's role in any particular crime or series of crimes. Even had such evidence been available, individual trials would have been utterly impractical owing to the multitude and length of the proceedings which would have been required.

To solve these difficulties, the Charter adopted the plan of basing individual criminal responsibility on membership in organizations judicially determined to have been unlawful. Article 9 provided that, at the trial of any individual defendant, the Tribunal "may declare" that a "group or organization" of which that defendant was a member

was "a criminal organization." Article 10 provided that, in case a group or organization was thus declared criminal, "any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts." In such a trial, the criminal nature of the group "is considered proved and shall not be questioned." To assure the group an adequate defense, Article 9 required that at least one member be a defendant before the Tribunal, and authorized a declaration of criminality only "in connection with"[108] an act of which that individual was convicted.[109] The Tribunal was empowered to give such notice as "it thinks fit" to all members and to grant applications by members to be heard "upon the question of the criminal character of the organization."

The enormous difficulties of procedure and proof that precluded separate trials of hundreds of thousands of individuals for specific crimes were overcome by the Charter plan. Organizations which had played a leading part in committing crimes were readily identifiable. Their criminal activities could be established in one proceeding. Subsequent separate trials of all members of a condemned organization, in which the only issue would be the simple one of membership, seemed entirely feasible.

This scheme served not only the requirements of the prosecutor, but furthered the Allied program of destroying the network of quasi-official organizations which were

potential nuclei for attempts to revive Nazism.[110] The Nazi Party, its branches, and groups affiliated with, or supervised by, it - operating outside the regular framework of government - had dominated the state, performed police services, operated concentration camps, carried on psychological and military preparations for war, and participated in the mass deportation and extermination of the inhabitants of occupied territories. In one or more of these organizations were to be found all the prominent and fanatical adherents of the regime. A mere paper dissolution of the aggregations would have served no purpose. It seemed necessary to impose sanctions on their membership.

From the twenty-eight or more organizations affiliated with the Party and a host of governmental or quasi-governmental instrumentalities, the indictment selected six "groups or organizations" against which a declaration of criminality was asked. They were the Reich Cabinet, the Leadership Corps of the Nazi Party, the Gestapo (Geheime Staatspolizei, or Secret State Police), the SS (Schutzstaffeln, or Elite Guard), the SA (Sturmabteilungen, or Stormtroopers), and the General Staff and High Command of the German Armed Forces, collectively representing the State, the Party, the police, and the armed forces.[111]

In most instances the basis for indicting each organization is clear. The Nazi Party was, not unnaturally,

regarded as foremost among the groups responsible for the criminal program.[112] To avoid any imputation that mere political affiliation was criminal, however, the prosecution limited its charges against the Party to a group of active workers and directors, known in Nazi terminology as the Corps of Political Leaders of the Party. Next to the Party itself, the SS[113] and the Gestapo[114] were the most characteristically Nazi institutions, organizations whose names had become synonyms for terror. The SA[115], although numerically the largest, was the least important of the groups indicted, but the evil reputation which the "stormtroopers" had won in the early days of the Hitler regime led the prosecution, with some misgivings, to include it among the accused.

The remaining two organizations, the Cabinet and the High Command, were neither Party groups nor Nazi creations, but instrumentalities of the state, which had been perverted to Nazi purposes. The Reich Cabinet was named in an attempt to reach a group of executive and adminstrative officials and department heads at the level immediately below the leaders of the government. The indictment defined the group as consisting of all persons who had been members of the ordinary Cabinet, the Secret Cabinet Council, or the Council of Ministers for the Defense of the Reich.[116]

The choice of the "Reich Cabinet" was not a fortunate one. On the one hand, the group was too narrow to include

a great number of important department heads, and on the other, it required the prosecution to establish that all the members of the three different bodies named in the indictment had functioned as a "group or organization." A definition of the terms "group" and "organization" had been purposely omitted from the Charter. The prosecution assumed that they meant an "aggregation of persons associated in some identifiable relationship with a collective general purpose."[117]

The sixth accused group, the General Staff and High Command, represented something of a tour de force on the part of the draftsmen of the indictment. The destruction of the "German General Staff" was an aim to which the four powers signing the Charter were pledged.[118] In popular estimation the "General Staff" was a sinister and well-defined group of generals who controlled Germany's long-range military strategy and were responsible for planning both World Wars. Unfortunately, German army organization did not coincide with the popular view. Since 1918 there had been no single branch or department known as the "General Staff."[119] But there was an influential body of military leaders who had played in World War II much the same role as the "General Staff" played in World War I. To satisfy both popular opinion and allied pledges, some method of reaching that group had to be found. Accordingly, the indictment defined a "General Staff and High

Command" group, consisting of individuals who, between 1938 and 1945, had held different classes of appointments at the highest level of the armed forces.[120]

Upon receipt of the indictment, the Tribunal in accordance with Article 9 gave public notice of the right of all members of the several organizations to be heard[121] and appointed counsel to represent each organization.[122] In response to that notice, a flood of applications to present evidence poured in upon the Tribunal.[123] In most cases, the applicant advanced purely personal defenses - that he had been ignorant of the aims of the organization, that he had resigned or attempted to withdraw, that he had been drafted, or that he had not personally participated in any wrongful acts.[124]

In others, the applicant contended that the "organization" named in the indictment in fact consisted of several independent bodies and that the segment of which he was a member was innocent of any wrongful aims or accomplishments. Disturbed by the number of applications, by the confusion of counsel for the organizations as to the scope of their duties, and by the indefiniteness of the Charter provisions, the Tribunal invited argument by counsel on three questions: (1) the tests by which criminality has to be determined and the nature of the evidence to be admitted; (2) the precise time during which each organization was claimed to have been criminal; and (3) what,

if any, classes of persons included within an organization as defined in the indictment should be excluded from the declaration of criminality.[125]

In response to this request, the prosecution submitted that under the Charter plan the sole issue before the Tribunal was the criminality of the organization as a whole and that evidence by way of defense or mitigation on behalf of an individual member was irrelevant.[126] Although the Charter was silent on the point, the prosecution admitted that the organization must have been one in which membership was "generally voluntary," "on the whole, one which persons were free to join or stay out of." But, it contended, proof that "every member was a volunteer" was impossible and unnecessary.[127] If a few individuals had been conscripted, they could defend themselves in subsequent trials on that ground.[128] The prosecution took much the same position with respect to knowledge of the organization's criminal purposes. The group's criminal objectives must have been sufficiently notorious so that all its members could and should have known of them.[129] But lack of guilty knowledge was an individual defense to be asserted by a member in his own trial.[130]

The omission from the Charter of any provision as to the defenses which would be available in trials under Article 10 somewhat embarrased the prosecution. That question should properly have been dealt with by the Allied Control

Council, but the Council's Law No. 10, instead of implementing the Charter, merely "recognized as a crime" membership in organizations found criminal by the Tribunal and authorized punishment ranging from deprivation of civil rights to death. The prosecution, therefore, could point to no specific authority to support its assertion that conscription, lack of criminal knowledge, and other factors[131] would be a defense to the charge of membership. It may be argued that the requirement of mens rea is basic to all legal systems, and that, even without any specific provision, legal compulsion and ignorance of the organization's purposes would necessarily operate as a defense. But there was no assurance that the several courts which might subsequently try members would adopt that view, and it was possible, if not probable, that as the law then stood - an individual who had been drafted into an organization and was ignorant of its purposes might be sentenced to death by a military court if the Tribunal declared that organization criminal.[132] To forestall any such event, the Tribunal, in its judgment, defined each group declared criminal as excluding persons "who were drafted by the state for membership" and as including only those members who had knowledge of the group's criminal purposes or were personally implicated in the commission of such crimes.[133]

The prosecution had foreseen some difficulty in estab-

lishing that the "Reich Cabinet" and the "General Staff and High Command" functioned as integrated groups. But, in the course of the trial, the same difficulty was encountered in connection with some of the other organizations. As the case developed, some organizations, apparently of simple structure, were shown to have been composed of a number of semi-autonomous units whose inter-relations were difficult to trace. The German genius for complexity of organization, the semi-mystical Nazi doctrine of unity of Party and State, and the transfers of authority and jurisdiction in the course of the war made impossible a clear and exact definition of the precise components of each group. Did the Gestapo, for example, include clerical personnel?[134] Did it include such groups as the Secret Field Police, originally under Army jurisdiction but turned over to the Gestapo in 1942?

The Gestapo was a department of the Reich Security Head Office which, in turn, was simultaneously both a division of the Ministry of the Interior and a department of the SS.[135] Was the Gestapo, therefore, a part of the SS? Were the 500,000 members of the Stahlhelm and the 200,000 members of the Reiterkorps (riding clubs), transferred by Hitler to the SA in 1933, to be considered as part of the SA? Such problems as these are not well suited to judicial inquiry. That they were necessarily involved in the Nuremberg Trial raises the question whether

the entire matter of dealing with the Nazi organizations might not better have been left to administrative denazification proceedings.

The prosecution took the position that, with certain minor exceptions,[136] no classes of persons included in the groups as the indictment had defined them should be excluded from the declaration of criminality, and that such groups were criminal for the entire period alleged.[137]

The Tribunal tentatively accepted this theory, and appointed commissioners to take evidence for the defense on three issues: (1) the aims, activities, structure, and component parts of each group and whether it had a general purpose to engage in activity declared criminal by the Charter, (2) whether membership was generally voluntary; and (3) whether its purposes or activities were open or notorious or otherwise generally known.[138] Counsel for the organizations were empowered to interview and select witnesses in any internment camp where members were confined, send out interrogatories, and submit affidavits.[139] Both the commissioners and the Tribunal itself received thousands of affidavits and heard oral testimony from numerous witnesses on behalf of the organizations.

The method provided by the Charter of basing individual criminal responsibility on organization membership was challenged by the defense[140] and has been questioned by critics. The Tribunal described it as a "far-reaching

and novel procedure," which "unless properly safeguarded, may produce great injustice ."[141]

The fundamental principle that a man can be punished only for his own acts is not violated, of course, by making membership in an organization a criminal offense. As Mr. Justice Jackson demonstrated, legislation outlawing various types of organizations and penalizing membership therein is common in most nations.[142] Such legislation, however, is usually prospective in operation. Under Articles 9 and 10 of the Charter, individuals were to be punished for past membership in organizations which would not be officially condemned until the Tribunal rendered its judgment.

While the prosecution did not deal specifically with this problem of retroactivity, it did argue that the Charter was merely an application of familiar principles of criminal law. A party to a combination to commit a crime is responsible for the acts of all parties to the combination. So far as an organization was a combination to commit acts prohibited as War Crimes by the Hague and Geneva conventions, its aims were at all times criminal. The prosecutions charges, though emphasizing War Crimes, also embraced the commission of Crimes against Peace and Crimes against Humanity.[143] Powerful arguments have been advanced that, at least since the Kellogg-Briand Pact, the planning and waging of aggressive war was both illegal and criminal. These arguments were,

however, concerned with the trial of leaders of the Nazi government, individuals who, as the Tribunal said, "must have known of the treaties signed by Germany, outlawing recourse to war" and "must have known that they were acting in defiance of all international law."[144] It would be more difficult to attribute similar knowledge to each of the members of the various accused organizations. Although the Tribunal did not advert to the question of retroactivity, it based its finding of criminality as to each of the three organizations it condemned solely on that organizations participation in War Crimes and Crimes against Humanity connected with the war.[145]

Another ground for challenging the Charter plan was that it denied members of the accused organizations the right to an adequate hearing. One charged with being a party to an illegal combination is entitled, according to traditional notion, to be heard not merely on the question of his own membership but on whether the combination was illegal. Under the Charterthe issue of illegality was conclusively determined in proceedings to which not all members were parties. While there may be a few instances in which civil liability has been imposed on individuals in a class suit, there seem to be no precedents in Anglo-American law for determining an individual's criminal guilt on the basis of a representative proceeding. Any objection on this score, however, seems more technical

than substantial. The procedure followed by the Tribunal in notifying members of the accused organizations and taking evidence offered by them assured the presentation of every significant defense relating to the organization as a whole. It is improbable that a more complete defense could have been made had every member been a party to the proceedings.

The real possibility of injustice lay in the manner in which the Tribunal's declaration of criminality might subsequently be applied by other courts. Theoretically, that was of no concern to the Tribunal. But it declined to take a narrow view of its functions and, by a piece of judicial legislation, insured that its declaration could not be misused. Stating that "membership alone is not enough to come within the scope of these declarations," it limited its finding of criminality to those members of the indicted groups who had not been conscripted and who either had had personal knowledge of, or had personally participated in, the groups illegal activities.[146] Under this ruling, lack of guilty knowledge and legal compulsion became more than mere matters of defense. Apparently, to establish that a defendant was even a member of the criminal group, there must be affirmative proof that he had actual knowledge of the group's criminality or had himself committed unlawful acts. The burden of producing evidence as to each individual's personal status is thus

placed on the prosecution and the whole purpose of Articles 9 and 10 of the Charter in effect nullified.

Subject to these limitations as to conscription and knowledge, the Tribunal declared that portions of three of the indicted groups - the Leadership Corps, the SS, and the Gestapo - were criminal within the meaning of the Charter. Since its finding was expressly based on participation in War Crimes, the Tribunal excluded from the scope of its declaration all persons who had ceased to be members prior to September 1, 1939.[147] In the case of the SS, this restriction is hard to square with the express finding that "SS units were active participants in the steps leading up to aggressive war."[148]

In view of the restrictions imposed by the Tribunal on its finding of criminality, which made its declaration of limited utility, the acquittal of the three remaining groups was not of great practical consequence. In the case of the SA, the acquittal is not surprising. The SA's strong-arm tactics had been an effective Nazi weapon in winning control of the state; as a para-military force, it had aided in training for war; it had served as a source of anti-Jewish and anti-religious propaganda and its membership participated in the pogroms of 1938 and in attacks on the churches.[149] But it had ceased to have any influential position after the purge of 1934[150] and the principal evidence against it related to activities well before the

outbreak of war.[151] The Tribunal's refusal to find such activities a basis for criminality is consistent with its approach to the prosecutions conspiracy theory. The size of the organization, in addition, may have influenced the Tribunal: any court might be reluctant to render a judgment condemning some 1,500,000 individuals.

The converse situation was presented by the cases of the Reich Cabinet and of the General Staff and High Command, which a majority of the Tribunal refused to declare criminal. The majority opinion noted that both these groups included such a small number of persons as to permit the trial of each member on charges of specific crimes. Broader political considerations may also have played a part in the decision in these cases. A cabinet and a general staff are traditional institutions in every state. The Tribunal noted that the efforts at coordination and direction by the General Staff and High Command were similar to those of the armies, navies, and air forces of all countries, matched, for example, by those of the Anglo-American Combined Chiefs of Staff.[152] The Tribunal might have feared that a declaration of criminality would be comstrued as concerning not merely the individuals who at the time had held positions in the Cabinet and General Staff but the institutions themselves. The expressed legal basis for the decision, however, was that the Reich Cabinet had not functioned as a group after 1937[153] and that the General Staff and High Command was

not a "group" or "organization" at all.[154] There can be little quarrel with the finding as to the Cabinet once we accept the Tribunal's basic assumption that to be punishable acts must be connected with war or with a concrete plan for war. The ordinary Cabinet ceased to meet as a body after 1937. The Secret Cabinet Council never met.[155] After 1939, activities of a cabinet nature were carried on by the small Council of Ministers for the Defense of the Reich, but they can hardly be attributed to the whole group named in the indictment.[156]

The ruling with respect to the General Staff and High Command is more debatable. The prosecution contended that evidence of collective action for a common purpose was enough to constitute the officers holding the positions named in the indictment a "group." But to the Tribunal the term "group" meant something sufficiently "tangible" so that an individual could know that he was joining it.[157] Evidence which would establish a conspiracy was not enough. The dissent of the Russian member as to both the Reich Cabinet and General Staff and High Command does not squarely meet the majority's argument in either case: it demonstrates merely that criminal acts were committed by the individuals alleged to constitute those organizations, a point which the majority did not deny.

The effectiveness of the organization trials at Nuremberg, then, appears questionable. The combination of

issues relating to six separate organizations with charges against twenty-two individuals inevitably complicated and delayed the trial. At the time the Charter was drawn, organization trials seemed to offer the only effective means for punishing thousands of Nazi collaborators who might otherwise have escaped justice, and, at the same time, for segregating potentially dangerous elements of the population from a mass of passive or non-Nazi Germans.

The theory that each accused organization was a gigantic criminal conspiracy was an acceptable basis for punishing all those who took an active part in the organization with actual knowledge of its criminal aims. But neither the Charter nor Control Council Law No. 10 differentiated among classes of members, and the Tribunal refused to press the conspiracy theory so far as to make mere membership the basis for future criminal liability. Nor did membership in the six accused organizations furnish a workable basis for discriminating between the dangerous and the passive elements of the population for administrative purposes.

Military government authorities found it necessary to establish detailed categories and sub-classifications of Nazi affiliation, not confined to the few organizations named in the indictment, and to provide varying types of sanctions for persons in each category. Neither so widespread nor so discriminating a selection was possible under the Charter plan. The Tribunal's judgment on organizations

seems to have had little effect either as a basis for punishment or exoneration. The denazification laws, drafted without reference to that judgment, embraced not only groups condemned by the Tribunal but also classes of persons specifically excluded from its declaration of criminality.

CHAPTER VI

HERMANN WILHELM GOERING

Goering, who had been Reichsmarschall, the ranking military officer in the Third Reich, was an art lover, a war hero with the highest German decoration of World War I (Pour le Merité), a narcotics addict and plunderer on a monumental scale. At the trial, with his eye on history, he played the role of the leader of the lost cause, the defeated but faithful paladin of the Fuehrer, true to the end to his liege lord.

When the defendants took their mid-day meals together, he took it upon himself to organize them into some sort of agreement to present a patriotic and united front to the enemy. When he did not like the testimony of one witness, he audibly called him a Schwein as the man left the stand and went by the prisoner's dock.

Most of the defendants thought little more of him than they did of the other top-ranking Party leaders who had brought them all to the shadow of the gallows. Schacht testified that Goering, who had headed the Four-Year Plan for the German economy, was an ignoramous in economics. Other witnesses told of his colossal vanity, his drug addiction, his abnormal habits of behavior and dress. Schacht said he had been told that Goering had appeared at a tea "dressed as a Roman gladiator with painted toenails showing in his sandals, rings on his fingers, and rouge on his cheeks."

In the course of the war Goering had gradually lost favor. His decline began in 1940 when the German Air Force failed to defeat the British Spitfires over London, it accelerated in 1941, when the Luftwaffe failed to repeat the decisive victories in Russia that had been won in the earlier campaigns; it plunged still lower after Goering had promised that he could supply the Sixth Army at Stalingrad; and it hit bottom as the enemy bombers poured destruction on German cities. On April 23, 1945, a squad of SS men arrested him on orders of the Fuehrer, signed by Bormann. On the following day they received orders to shoot the Reichsmarschall and his family if Berlin fell.[158]

He declared Hitler would doubtless have gotten rid of him but for the Reichsmarschall's wide influence with the German people. To shore up what remained of his collapsed world, he romanticized himself as the true hero of a historic cause. He declared at Nuremberg that he had indeed meant his oath of allegiance to the Fuehrer: "I identify my fate with yours for better or worse; I dedicate myself to you in good times and in bad, even unto death." Now he added: "I really meant it and still do."[159]

In conversations with his lawyers he admitted that it would have been better if Hitler had been killed in an automobile accident in 1938 and that the Fuehrer's suicide had been a betrayal of the German people, just as Hitler had called the suicide of the mayor of Leipzig - at the time

the mayor and his family had died together as the American troops approached the city - "a cowardly flight from responsibility."[160]

In his single-minded concentration on the development of German air power he had, when he wanted to, protected Jewish officers who were thrown out of their jobs in the Army. "A Jew is whoever I say is one in Germany," he had declared, and Field Marshal Milch, who testified for him at Nuremberg, was living evidence of this. Milch's legal father was of Jewish blood, but Milch was officially declared to be 100 percent "Aryan" when it was decided that his biological father was a Christian and not the man his mother had married.[161]

It was Goering who called the Wannsee Conference, which planned the manner in which the Jews of Europe were to be destroyed, and who chose one of the most blood thirsty killers in Germany, Reinhard Heydrich, to administer the Final Solution. Goering felt the Versailles Treaty had to be repudiated, the Jews and communists and the Republicans had to be driven from power, a broad mass movement had to be created based on nationalism and socialism.

In 1932, he was elected to the Presidency of the Reichstag and promptly prepared the way for the dissolution of Parliament. He gave up the leadership of the SA and concentrated on Party affairs in the Reichstag and the country as a whole. For Goering, Hitler was the political

genius who could move the masses with the true doctrine. For Hitler, Goering was a warrior of superior middle-class origins who could gain the respect of business people and former Army officers and was, above all, a man of unswerving fidelity.

Goering collected jobs. In addition to Minister President, he was Minister of the Interior for Prussia and in this capacity had the Prussian state police under him. He founded a secret police - the Gestapo - and the first concentration camps, where the enemies of the regime, brought in by his police, could be kept. At the time of the Reichstag fire he headed the roundup of members of the opposition parties, using the emergency as a pretext for getting rid first of the Communists, whom he immediately declared responsible for setting the blaze, and then of the equally hated Social Democrats.[162]

Goering could be as ruthless as anyone when in a rage or when his own notions of justice were flouted. He could order the death sentence when he thought a young man had shown contempt for his leadership. During the Russian campaign three young soldiers who stole some cans of meat were shot by an officer. Goering was incensed. He wanted the officer who had killed them executed, but the Fuehrer refused. Another time, some young Luftwaffe officers returning from a party were stopped by an Army officer who demanded their papers. They handed them over to him, but

when they saw their trolley car coming along, the last one that would run until morning, they snatched them back and ran for it. They were arrested, charged with mutiny, and shot. Goering was enraged. He stormed at the Army general under whose command the trial and execution had taken place, but he went no further, for his authority ran only as far as the Fuehrer permitted and he could take no undue risks.[163]

Witnesses at Nuremberg declared Goering had deliberately plotted the downfall of War Minister (Reichskriegsminister) Field Marshal Werner von Blomberg. They said he had induced the Fuehrer to be a witness to Blomberg's marriage with, as it turned out, a registered prostitute, as part of a plot to get Blomberg's job. The evidence presented was flimsy.

Goering made no secret at Nuremberg of having done all he could to rearm Germany, to retool the economy to this end, to make the Reich blockade-proof, and to build bombers and fighters as rapidly as possible and in as great numbers as the economy and personnel training programs permitted. The prosecution alleged that four-engined bombers were aggressive weapons, and one of Goering's witnesses testified that the Germans had very few of them. On taking the stand, Goering said that he would have been glad to have the four-engined bombers, that he had merely decided against them in favor of other types, and that the decision had nothing

to do with aggression but concerned only the allocation of scarce resources.

He proudly told the Tribunal that he gloried in the Anschluss and that he was the man mainly responsible for it.[164] The records of all his telephone conversations with Seyss-Inquart and the other Nazi officials in Vienna, as well as with Ribbentrop in London, were in the hands of the Allies in any case, but Goering, far from wanting to defend himself, magnified what he had accomplished in engineering the change of government that got rid of Kurt von Schuschnigg and put Seyss-Inquart in his place.

Goering was charged by Mr. Justice Jackson with being chairman of the Reich Defense Council, an organization that clearly sounded ominous to the prosecution and might have indeed aided and abetted rearmament and the wars the Reich fought - had it ever functioned. Goering testified that this first secret body, founded in 1933, was dissolved in 1938 without having met. The second publicly announced Defense Council, founded in 1938, played no important role, apparently because it was too unwieldly.[165] A meeting of November 18, 1938, consisted almost entirely of an address by Goering to a large audience on the aim to triple German armaments, to improve the transport system, and to help the financial situation of the Reich by seizing Jewish property. There was no discussion and no action was taken. The meeting was merely a sounding board for the plans of

its chairman.[166]

Goering testified that he did not even attend another large gathering of this body, and after a year it was converted into a ministerial council. The Defense Council had not much more significance, as far as Goering's guilt was concerned, than the organization Goering said he had invented on the spur of the moment to help Neurath save face. When Ribbentrop was appointed Foreign Minister, Goering proposed to Hitler that Neurath be named chairman of something he thought they should call the Secret Cabinet Council. This, he believed, would sound impressive and be widely thought to have important functions. Hitler objected that Neurath could scarcely be chairman of a nonexistent body, so Goering, as he told the court, drew out a pencil and paper and wrote down the names of the members who would serve under Neurath's phantom chairmanship, naming himself last. Neurath was duly appointed, but the Secret Cabinet Council never met.

The real case against Goering - namely, that as second man in the Reich he bore a major share of responsibility for the murders and exterminations, as well as certain of the war crimes - was developed slowly. Mr. Justice Jackson's first question on cross-examining him was: "You are perhaps aware that you are the only living man who can expound to us the true purposes of the Nazi Party and the inner workings of its leadership?"

Goering: "I am perfectly aware of that."

Jackson: "You, from the very beginning, together with those who were associated with you, intended to overthrow and later did overthrow the Weimar Republic?"

Goering: "That was, as far as I am concerned, my firm intention."[167]

Those were questions that could have been given the same answers by any successful revolutionary leader.

Goering was not vulnerable as a revolutionary or as one who had done all he could to get rid of the shackles of Versailles. What he was criminally guilty of was murder, and the key document in this charge was the order he sent to Heydrich on July 31, 1941 which said:

> Complementing the task that was assigned to you on January 24, 1939, which dealt with carrying out by emigration and evacuation a solution of the Jewish problem as advantageous as possible, I hereby charge you with making all necessary preparations with regard to organizational and financial matters for bringing about a complete solution of the Jewish question in the German sphere of influence in Europe.
>
> Wherever other governmental agencies are involved they will cooperate with you.
>
> I request furthermore that you send me before long an over-all plan concerning the organizational, factual, and material measures necessary for the accomplishment of the desired final solution of the Jewish question.[168]

That order set the extermination process in motion. Goering issued it under his authority as head of the

Four-Year Plan and as the second man in the Reich, who issued directives under a wide ambience, for the Fuehrer did not have time for everything.

Mr. Justice Jackson read out the steps Goering had taken against the Jews: he had proclaimed the Nuremberg Laws; he had promulgated an act in 1936, making it a crime punishable by death to transfer property abroad; in April, 1938, under the Four-Year Plan, he had published the decree requiring the registration of Jewish property, the precursor to its complete confiscation; and then, as the vise tightened, he had published the decree that Jews might not own retail stores or offer goods or services for sale at markets, fairs, or exhibitions, or be leaders of enterprises.[169] Goering remembered issuing all these decrees, and to the last question he answered, "Yes. Those are all part of the decrees for the elimination of Jewry from economic life."[170]

As early as March 12, 1933, Goering had announced that the Jews could not look for protection of life or property in the Third Reich: "Certainly I shall employ the police and quite ruthlessly, whenever the German people are hurt; but I refuse the notion that the police are protective troops for Jewish stores. No, the police protect whoever comes into Germany legitimately but it does not exist for the purpose of protecting Jewish usurers."[171]

In 1938 he said, "We can't let the Jews starve," but he signed the laws and wrote the decrees that took away their livelihood. "These swine," as he called them had to be driven from German economic life and from the German community.[172]

Goering did not want to have to travel with Jews or to see them in public places, but he would let them live, he would even let them use German hospitals, at least for a time. He would move them out of the economic life of the Reich. His directive from Hitler to settle the Jewish question meant, at this point, introducing harsher economic measures; however, Goebbels and Heydrich needled him into taking a harder noneconomic line. It was Goebbels who had ordered the Kristallnacht. At the meeting he and Heydrich represented the Streicher brand of anti-Semitism. Jews were a moral and physical offense to the Germans. As the dialogue continued, the Austrian economist Hans Fischboeck, who had been one of Seyss-Inquart's collaborators, told of the plans for Vienna: 10,000 of the 12,000 Jewish workshops and 4,000 of the 5,000 Jewish retail stores were to be closed finally. The remainder were to be Aryanized. Thus, of these 17,000 businesses, Fischboeck said, 13,500 or 14,000 would be shut down. All that was needed was a short law. Goering said, "I shall have this decree issued today."[173]

Buyers were already on hand, Fischboeck said, for half

of the 3,000 businesses that were to be Aryanized, but if by the end of a year no buyer appeared for the remainder, the Government could decide whether or not to liquidate them. They would be turned over to a trustee (acting for the State) and the visible Jewish businesses would be finished.

Goering: That would be splendid.

Funk: We can do the same thing here. I have prepared a law elaborating that. Effective January 1, 1939, Jews shall be prohibited from operating retail stores and wholesale establishments, as well as independent workshops. They shall be further prohibited from keeping employees or offering any ready-made products on the market; from advertising or receiving orders. Whenever a Jewish shop is operated the police shall shut it down...

Goering: I believe we can agree with this law.[174]

Fischboeck described how Jewish property had been expropriated in Austria, and Funk asked why, when their enterprises were taken over, they should not be able to keep bonds. Goering rejected this idea because in that way they would actually be participating in the economy.[175]

A witness for Goering at the trial, General Karl Bodenschatz, told how he had at times protected individual Jews: at Hans Frank's urging he had stopped the deportation of Polish Jews into the General Government in 1940, and he had allowed the families of Jews working for Reich munitions industries to remain in Germany for a year after the

transports to the East began in 1941;[176] however, when the time came for the order of extermination to be written, it was Goering who, in the transparently veiled language of the Final Solution, wrote it. Individual Jews he may have been on occasion willing to save, but "Jewry" he condemned to death.

Goering became just as ruthless when dealing with the Russians or the Poles. "I intend to plunder," he declared, speaking of Russia, "and to do it thoroughly." He told his assistants on the economic staff, "Whenever you come across anything that may be needed by the German people, you must be after it like a bloodhound. It must be taken out of store and brought to Germany."[177] He told the Reichskommisars for the Occupied Territories on August 6, 1942, "If anyone goes hungry, then it won't be the Germans but others."[178] His Green Portfolio was a plan for the ruthless exploitation of Russian resources prepared before the German attack on Russia, and his economic Staff East on May 23, 1941, foresaw "a cessation of supplies to the entire forest zone (of Russia), including the essential industrial centers of Moscow and Leningrad."[179] On September 16, 1941, he issued an order: "Only these people are to be supplied with an adequate amount of food who work for us. Even if one wanted to feed all the other inhabitants, one could not do it in the newly occupied Eastern areas. It is, therefore, wrong to funnel off food

supplies for this purpose if it is done at the expense of the army and necessitates increased supplies from home"[180]

In pursuit of the goal of making the Reich self-sufficient, he told the Reichskommissars:

> God knows you were not sent out here (to the East) to work for the welfare of the people in your charge but to squeeze the utmost out of them so that the German people may live... This everlasting concern about foreign people must cease once and for all... It makes no difference to me if you say that your people are collapsing from hunger. Let them do so as long as no German collapses.[181]

From the time the German armies invaded Poland he went after forced labor on behalf of his Four-Year Plan. "In a struggle for the existence of the German people one cannot afford to be too scrupulous in the observance of treaties," he said.[182] Goering had undoubtedly acted illegally when he called on Fritz Sauckel, whom he greatly admired for his energy, to recruit the millions of workers needed to carry out the Reich's economic program and when he used prisoners of war in the armaments industry and in the Luftwaffe anti-aircraft companies. Forced laborers for the airplane industry (including concentration camp workers) lived under terrible conditions and died by the thousands of malnutrition and inadequate shelter in the packed transports shuttling to and from the Reich. Goering may have had little directly to do with such atrocities, but he certainly knew of them.

In addition, a series of captured German documents identified Goering with the shooting, without trial of captured enemy "terror fliers."[183] Hitler had already ordered on May 21, 1944, that English and American air crews be executed without trial if they had fired on German civilians, railroad trains, or German airmen bailing out with parachutes or who had been forced to land and were in the immediate neighborhood of downed planes that Allied gunners were trying to destroy. A top-secret note from Warlimont of June 30, 1944, revealed that both Ribbentrop and Goering had approved the proposed measures to be taken against enemy fliers.[184]

The role of number-two man of destiny suited Goering. He constantly referred, even during the trial, to the intimacy of the collaboration between himself and Hitler. Speaking of the charge of conspiracy against the twenty-two defendants, he said there could only be one such charge: against him and the Fuehrer, for no one else could have conspired, no one else was close enough to the throne....He thought of himself as the only man in Germany, aside from the Fuehrer himself, who combined the highest military and political functions and capacity.[185]

CHAPTER VII

HITLER'S SALESMAN: JOACHIM VON RIBBENTROP

Nazi diplomacy as such scarcely existed. In the first years of his power, Hitler concentrated on domestic tasks: the relief of unemployment, reorganizing the state apparatus, getting rid of the known opponents first in the non-Nazi parties and then in 1934 among the National Socialists themselves, priming the pumps of the economy, and starting rearmament. Only with military strength behind him could he begin his systematic destruction of the Versailles system, and then would follow the major expansion. How far it would go would depend on eventual power relations and what use could be made of them. Hitler was to win bloodless, diplomatic victories on an unprecedented scale - even with a particularly ungifted amateur at the head of his Foreign Office - mainly because the seemingly overwhelming superiority of the system of security that France had built up on the Continent was a rope of sand and because Hitler was ready to take risks and his opponents in England and France were not. Up to a point he operated with great brilliance. He also operated with great brutality and had no need of a Foreign Minister in the traditional sense. He merely needed a man who would run his errands and confirm his judgments. For this Ribbentrop was perfectly adapted.

Almost no one had a good word to say for Ribbentrop.

Neither the representatives of the Western Allies nor the representatives of the neutrals or of Germany's allies - or even his fellow defendants at the trial - thought anything of his abilities. Goering, Schacht, Neurath, Papen, all of whom had had to deal with him, thought him incompetent, boastful, and vainglorious.

All those who described him - whether it was Goering, who had competed with him for the ear of the Fuehrer when war threatened, or Neurath, who had been undermined and succeeded by him, or the Allied and neutral diplomats who had listened to his tirades - used the same epithets: arrogant, tactless, humorless, and, above all, incompetent. But because Ribbentrop had only one desire - to say what his Fuehrer wanted to hear - he was precisely the man for Hitler.

Ribbbentrop was industrious and had a sense of order. He worked hard, fourteen and more hours a day. He wore out his secretaries with the avalanche of work he gave them. Since he had so little gift or training for his job, he could only master it by overwork and multiplying his personnel. When he became Foreign Minister there were 2,300 officials in the Foreign Office, and this number he raised to 10,000. He created new departments with hundreds of employees. The former three officers of the Department of Protocol he increased to fifty, the Press Division from seven to two hundred. Both these departments represented

two of his chief interests - who sits next to whom and publicity. With zeal and devotion Ribbentrop tried to cover up his complete lack of qualifications for the job he held. It was a job for which he had not the slightest training or capacity. When he got the appointment it surprised even his wife, who had devoted herself to advancing his fortunes. In fact, Ribbentrop said it surprised him, and this is probably true, too.[187]

Ribbentrop's predecessor as Foreign Minister was Baron Konstantin von Neurath. When that old-school nobleman learned that "Rib" was to replace him, he snorted: "That commoner has always peddled his wares to the highest bidder. May God have mercy on the Reich!"[188]

Foreign Office employees declared maliciously that in addition to the Bismarck herring, German restaurants would soon begin to feature a "Ribbentrop herring" - an ordinary herring with the brain removed and the mouth slit wider.[189]

Curiously enough, he took the side of the old line diplomats against the Party. Under the Reich Civil Service Law, the deputy to the Fuehrer, Rudolf Hess, had the right to veto appointments to the Foreign Office. His representative, E. W. Bohle, was assigned to the Auswaertiges Amt as Staatssekretaer. Bohle was Chief of the Party's Auslandsorganisation, which Ribbentrop saw, and rightly so, as a rival to the Foreign Office, for it dealt directly with Party organizations and German citizens in foreign countries.

Ribbentrop fought against Bohle's influence, and in 1941, after Hess' flight to England, succeeded in getting rid of him. Ribbentrop, who feared more than anything else the invasion of his jealously held domain, had one main requirement for his underlings: unquestioning obedience. He maintained foreign policy was made not by the Foreign Office but by the Fuehrer and himself. The subordinates, he said, had no voice; they were there to carry out orders.[190]

Ribbentrop had been in England at the time Oxford students had publicly declared they would not fight for their king and country. This was enough to convince him that England would avoid war at any cost. In his trial testimony, in the interrogations, and in the posthumous book edited by his widow, Ribbentrop declared that he had always worked for peace with England and that he had always admired and sympathized with the British and French and had never underestimated them. But the testimony against him was overwhelmingly tothe contrary. Goering said that at the time of Munich, Ribbentrop had wanted war and was disappointed by the treaty that divided Czechoslovakia without war.

Ciano maintained that the German Foreign Minister echoed the war plans of his Fuehrer. On August 11, 1939, Ciano's diary entry read: "The decision to fight is implacable. He (Ribbentrop) rejects any solution which might give satisfaction to Germany and avoid the struggle."[191]

Ciano asked him whether Germany wanted the Corridor or Danzig, and Ribbentrop replied, "Not that any more. We want war."[192]

Ribbentrop had convinced himself that the pact with Russia in August, 1939, made English and French intervention impossible. He believed that the pacifism and weakness of both England and France would force them to accept the German conquest of Poland without regard to any guarantees they had given. Britain would never dare oppose Hitler, he told Kordt, and if she did she would lose her empire and France would bleed to death on the Siegfried Line. "If I hear any official express a different view, I will shoot him myself in his office and will be responsible for my action."[193] He liked to demonstrate his National Socialist ardor. He told Weizaecker that he would shoot any subordinates who took a dim view of the foreign situation.[194]

Ribbentrop had one moment of truth, on April 28, 1941. He had Staatssekretaer Weizaecker write a memorandum (the sentiments were Ribbentrop's own) opposing the Russian campaign. It read:

> I can summarize my opinion on a German-Russian conflict in one sentence: if every burned out Russian city was worth as much to us as a sunk English battleship, then I should be in favor of a German-Russian war in this summer; I think though that we can win over Russia only militarily but that we should lose economically. One can

> perhaps find it enticing to give the Communist system its death blow and perhaps say too that it lies in the logic of things to let the European-Asiatic continent now march forth against Anglo-Saxondom and its allies. But only one thing is decisive: whether this undertaking would hasten the fall of England.[195]

The memo said further that either England was close to collapse, in which case she would only be encouraged by the Reich's taking on a new opponent, or, if England was not close to a collapse, one could get the idea that Germany had to obtain its food supply from the Soviet land mass by force.

> That we will advance militarily up to Moscow and beyond victoriously, I believe is unquestionable. But I thoroughly doubt that we could make use of what was won against the well known passive resistance of the Slavs....A German attack on Russia would only give a lift to English morale. It would be evaluated there as German doubt of the success of our war against England. We would in this fashion not only admit that the war would still last a long time, but we could in this way actually lengthen instead of shorten it.[196]

The memorandum showed insight and prescience of a kind that Ribbentrop was not to repeat during his years in office. Perhaps it was as much a product of his dislike for England as of his political forebodings. Otherwise, Ribbentrop lived in a dream world where anything that comported with his wishes could happen.

Ribbentrop got and held the Ministry job only because

Hitler wanted to be his own foreign minister and to feel that he was being supported in his decisions by a man who knew the world better than the professional diplomats the Fuehrer trusted no more than he did his generals. In Ribbentrop, he found the man he needed.

As soon as Hitler became Chancellor, he turned to Ribbentrop for counsel on foreign affairs. In 1933 he made him adviser on such matters to himself and to the Party. Ribbentrop was at home in the languages and politics of two of Germany's chief adversaries and judged them in the same light as the Fuehrer did.

Hitler, using one of his favorite devices for undercutting the established Ministry, permitted Ribbentrop to set up a bureau to advise him on foreign policy. It had small beginnings, using three or four rooms near Hess' offices, and was paid for by Ribbentrop. Hitler was pleased with the results and soon supplied the bureau with funds, of 20 million RM fromhis own treasury. The Ribbentrop Bureau was installed opposite the Wilhelmstrasse. It started with fifteen men in 1934, then rose to fifty, and finally to three hundred. It was made up of amateurs like its founder - young men who spoke foreign languages, who could in many cases place a "von" or flashier title before their names, and who could furnish their chief and eventually Hitler with the oversimplified, well-digested information he wanted. Since Hitler read only German,

their translations were his only means of getting such foreign news.[197]

With the exception of letters addressed to the Foreign Minister and the Staatssekretaer, Ribbentrop was given the correspondence addressed to the Foreign Office before the Wilhelmstrasse got it. Hitler gave him permission to answer it - a situation that would have caused a stronger personality than Neurath to resign as Foreign Minister long before Hitler asked him to step aside in 1938. When Ribbentrop was appointed Special Ambassador, he was not placed under the Foreign Office but was made responsible to Hitler only.[198] In 1934 Hitler made Ribbentrop Special Commissioner for Disarmament Questions, a post in which he could take part in discussions in Paris, London, and Berlin.

Ribbentrop had a success at the Naval Conference in London on June 18, 1935, where he represented Germany as Special Ambassador. Taking place three months after the British note of protest against Germany's rearming, the conference marked a turning point in British policy. It was the first of Britain's efforts to limit Hitler's drive for the domination of the Continent by reasonable concessions. At long last there was recognition of the inevitability of accepting Germany as a power with equal status in Europe.

In the Anglo-German naval agreement reached at the conference, a ratio of 100 to 35 was accepted for the

respective strengths of the two navies. The British government was desperately striving to prevent a war it believed could only be a disaster to Britain. So the British gave countenance to Ribbentrop, who only four or five years back had been selling them champagne. Though they were unimpressed by him as a person or negotiator, he returned to Germany in triumph, announcing the first acknowledgment of Germany's right to rearm.

Hitler, now completely persuaded of the abilities of his adviser, made him Ambassador to Great Britain. There, Ribbentrop made his memorable gaffe when he appeared at the reception of the diplomatic corps and greeted the King with an outstretched arm and a "Heil Hitler."[199]

While Ribbentrop was in London between November, 1936, and November, 1937, he made eleven trips to Berlin, for England was not nearly as much on his mind as were his relations with Hitler.[200] He had no friends at court. Neurath feared and disliked him, as did the rest of the professional diplomats, and the Party regarded him as an interloper who had joined up far too late. For Ribbentrop, everything depended on his relations with Hitler. He did all he could to foster a closeness. He named one of his children Adolf. At Nuremberg, Ribbentrop tried hard to portray himself as Hitler's counselor, as one who had often expressed an opposing view; however, no evidence supports him aside from his expressed doubt of the wisdom of the

Russian campaign.

In all the voluminous records of the Nuremberg trials and in the testimony of his contemporaries, no one had a favorable word for him. Mussolini, although coming more and more under the spell of Hitler in 1939, told Ciano on March 30 that Ribbentrop is "a truly sinister man because he is an imbecile and presumptuous." The German Counselor of Embassy in Rome, Prince Otto bon Bismarck, talking to Ciano, used the same words: " He is such an imbecile, he is a freak of nature." Count Bernadotte called him a man "of very small mental stature, and moreover, rather ridiculous."[201] Many asserted that Ribbentrop had never read either the Versialles Treaty or the Kellogg-Briand Pact.

Ribbentrop had a few pat notions with which to justify the decisions of the Fuehrer. The fact that these "explanations" were often self-contradictory did not disturb him. One such notion was that England in the years before the war was merely trying to gain time to rearm, find allies, and eventually crush Germany. A second was that a decadent England would not fight. Another was the turpitude of the Jews. A fourth, subject to change, was the necessity of a war to the death with Communism. Nevertheless, Ribbentrop eagerly journeyed to Moscow in 1939, to sign the Russo-German Nonaggression Pact and the secret treaty delineating the areas the two countries

would occupy in the Baltic region and in Poland.

The Nazi bureaucrats, like the Russians, had a style derived from the head of State and Party. Ribbentrop aped Hitler's monologues and saw his visions. After disaster had been narrowly averted in the winter of 1941-42, Ribbentrop told Ciano on April 29, 1942, that the ice of Russia that had defeated Napoleon had been conquered by the genius of Hitler.[202] He told Italian Ambassador Alfieri that the Russian offensives after Stalingrad had in reality resulted not in victories but merely in territorial gains, that Russian losses had been enormous, and that the present offensive would be one of the last the Russians would be capable of.[203] Until 1943, according to Ciano, Ribbentrop kept repeating that the war was won. After that he changed the tune a little saying, "We cannot lose this war." Ribbentrop thought everyone but Hitler was to blame for the atrocities and the catastrophe.

Ribbentrop was unable at Nuremberg to tell a straight story even when he had nothing to conceal. In the last years of the war he had taken large doses of sleeping pills, which he thought had affected his memory. He floundered, took refuge in verbiage and in forgetting, and lied when he had to.

At the Nuremberg Trial, he contended he was less foreign minister than a short of diplomatic adviser to the Fuehrer.

He was as strong an anti-Semite as Streicher himself.

The memoranda and notes of his views preserved statements that could have appeared in a Stuermer editorial. At Nuremberg, he assured the Allies that he had been no anti-Semite, that he had opposed the mistreatment of the Jews, that one of his chief adjutants and the wife of another were partyly Jewish, that he had thought of the concentration camps as a kind of prison - some sort of prison, he said, where people worked. Then, turning to his interrogator, in this case Mr. Justice Jackson, he added, "Quite frankly... I was not satisfied with quite a number of things."[204] According to the testimony of General Erwin Lahousen, who had been with Ribbentrop on a private train in Poland, Ribbentrop had wanted to see houses and villages go up in flames and the Jews killed.[205]

Because Ribbentrop insisted on having a voice in everything that had to do with foreign countries, the Foreign Office was deeply involved in the extermination of the Jews and the importing of slave labor. Ribbentrop had not the slightest objection to Himmler's exterminations; he insisted only that he be represented.[206] He appointed Martin Luther, a fanatical anti-Semite whom he had known in his liquor business, to head up the Referat Partei - the section of the Foreign Office that dealt with Party agencies, among them the SO. The section grew to a division with 200 employees, and by 1942 Ribbentrop had made Luther Undersecretary of State. Luther, who was in constant touch with

Eichmann, conducted the negotiations with the satellite countries on the Jewish deportations.[207]

Although Ribbentrop had had cordial relations with rich Jews before he joined the Party, he quickly adopted the Nazi tone. On August 12, 1938, he confided to the French Foreign Minister Georges Bonnet that the Jews were without exception pickpockets, murderers, and thieves. The property they possessed had been obtained illegally in the first place, he said, and should be taken from them; they should be forced to live in criminal districts where they would be under police observation like other criminals.[208] Late in the war he exhorted the Regent of Hungary to move along with the solution of the Jewish problem in Hungary, demanding that he kill the Jews or put them in concentration camps.[209] Nor were his fulminations confined to the Jews. An enemy was an enemy, and he said the Germans in Greece had to be brutal "to show the Greeks in iron fashion who is the master."[210] None of the measures taken by Hitler found him anything but anxious to carry them out. Without Hitler, Ribbentrop was befuddled and lost.

Ribbentrop was a frightened man at Nuremberg, and he had little defense to offer. He attempted to remain true to the Fuehrer and at the same time to appear to have been opposed to the policies - the treatment of the Jews, war with Britain and France, war with Yugoslavia, and the others - he had so loyally and uncomplainingly pursued.

His puerilities and disabilities caught up with him at Nuremberg. His letter to Churchill and Eden; his fatuous attempts to establish a comaraderie with his interrogators; his desire to show that he was no anti-Semite, no war-monger, but a man with peace in his heart toward both East and West who had wisely counseled his beloved Fuehrer and then at the end had borne his last message to Churchill to set aside the results of the war that had cost so many millions of lives - these were part of the disorderly wishful thinking that had characterized his term in the Foreign Service of Adolf Hitler.

In another time Ribbentrop might have lived out his years as a businessman, talking about the need for a strong Germany, just claims to living space, and the wickedness of the Jews. He had the bad luck to find in Hitler someone who took him almost at his face value.

CHAPTER VIII

HITLER'S MYSTAGOGUE: ALFRED ROSENBERG

The chief ideologist of the Party from the beginning was Alfred Rosenberg, a man far more erudite than Steicher and as implacably anti-Semitic, anti-Church, and anti-Slav as Bormann. Rosenberg came into his own on April 20, 1941, two months before the start of the Russian campaign, when Hitler named him Commissioner for the Central Control of Questions Connected with the East European Region. On July 17, after Germany's invasion of Russia, he was appointed Reich Minister for the Occupied Eastern Territories. Rosenberg was defeated in Russia, as he was in the Reich, by ambitions and hopes out of proportion to his talents. He always overestimated himself.

Rosenberg's importance was far more formal than real. In Germany he had resounding titles: Reichsleiter, Chief of the Foreign Office of the Party, Commissioner of the Fuehrer for the Safeguarding of the National Socialist Philosophy. In actual practice, he was elbowed aside. In theory he was to exercise supreme civil authority in the territories won in battle from the Soviet Union and to legislate for the entire area.[211]

The administration of the Occupied Eastern Territories was a rat's nest of competing agencies with overlapping jurisdictions. Goering's staff for the Four-Year Plan was in charge of economic affairs, but the Army too had an

economic staff, and Rosenberg's Reichsministry for these territories had both long and short-range plans for the Soviet economy. Bormann and the Party apparatus, Goebbels and his Propaganda Ministry, Ribbentrop and the Foreign Office, the Army, and the SS - all were empire builders in Russia. Also, Todt and Speer had assignments for traffic and construction that conflicted with what Rosenberg considered his domain.

Rosenberg signed the decree of December 19, 1941, for recruiting forced labor in the Eastern Territories. He approved, on behalf of his Ministry, the so-called Hay Action, which was a plan never carried out for bringing children from ten to fourteen years old from Russia to the Reich so they could work and at the same time reduce the biological potential of the Soviet Union.[212]

On paper Rosenberg was the civilian Czar of the East, but key men were appointed by the Fuehrer and often they were appointed over his head, as was the Gauleiter Erich Koch, who headed the Ukraine. Rosenberg's own men had to compete with appointees of other agencies, including Himmler's SS leaders. Since Himmler, unlike Rosenberg, was always in close touch with Hitler, who made the decisions when authorities conflicted, it was Himmler's men who became the real rulers of the occupied territories.[213]

Some of Rosenberg's theoretical subordinates - the practical men like Koch - could match in their brutality

the SS police officials and the Einsatz commandos, but they were not carrying out Rosenberg's orders. They were merely the logical extension of his basic doctrines.

In 1929 Rosenberg founded the Militant League for German Culture, which became the National Socialist Cultural Community under which the "Strength Through Joy" movement operated. In 1934 he was named Deputy of the Fuehrer for the Supervision of the Entire Ideological Training and Education of the NSDAP.[214] In February, 1940, when Hitler appointed him Commissioner for the Safeguarding of the National Socialist Philosophy for the Party and State, his responsibilities included the indoctrination of the Wehrmacht. A few days before, on January 29, 1940, Hitler gave Rosenberg the job of founding the so-called High School, the Hohe Schule, which was to be established after the war as the Central National Socialist University.[215]

Rosenberg joined the National Socialist Party ahead of Hitler. Later he wrote that when he first met the Fuehrer he was not overly impressed, but he quickly came under Hitler's spell.[216] His unshakable loyalty withstood the severest tests, such as Hitler's neglecting him for his rivals and the signing in August, 1939, of the non-aggression pact with Russia. Rosenberg dreamed intoxicating dreams of a German Reich that would take over its needed living space from the Soviet Union, breaking up for all time the Slav dominion over the vast stretches of the Eastern

marches and the dangerous concentration of Great Russians, who were the main support of the Czar's empire and of the Communist State as well.

Russia had always been essentially an Asiatic power, Rosenberg believed, and with its hordes could only be held in check by German force and guile that would divide and rule. To this end he appeared to want relatively good treatment for the non-Communists and for the minorities of the Soviet Union, who could produce food and goods and serve as an additional line of defense for the Third Reich against any future Russian state. Because of this view he soon came into sharp conflict with the SS and with the administrators Himmler and Bormann sent to the East. These men, like Rosenberg, were single minded in their racial mission. They were also men of action, who were not seeking allies among the natives but obedient slaves who could be liquidated at any time.[217]

He fancied himself as an expert, not only on how to deal with the people of the Soviet Union but on all matters that had to do with foreign countries, and he wished to impress subject nations with German superiority without using a club to do it. In his diary entry of May 22, 1934, he recorded his protest against the manner in which the Jewish question was being handled, noting the bad propaganda effect on the outside world of the attacks instigated by Goebbel's speeches and Streicher's writings.[218]

Rosenberg was as fanatic in racist matters as any members of the SS, but he objected to their methods as well as to their competition. He said that the beatings and killings and needless humiliations they inflicted on the populations were bound to create undying enmity for the Reich, and that Einsatz commandos had alienated even the pro-Germans in the Ukraine, who had first welcomed the German troops as deliverers.[219] Nevertheless, Rosenberg's own instructions to the brown-uniformed representatives of his Ministry in the East were harsh by almost any standard but Himmler's. On June 20, 1941, he told an audience of his closest co-workers, "We see absolutely no reason for any obligation on our part to feed the Russian people with the products of this surplus region (southern Russia and the northern Caucasus). We know this is a hard necessity that lies outside any feelings...the future will hold very hard years in store for the Russians."[220] In 1942, he told an audience of Reichskommissars, "The question is: What spares us most in German men and what brings us best to the political result...that thousands are badly cared for or are badly treated is taken for granted. You don't have to grow grey hairs over that."[221]

Despite such views, he never had in mind the mayhem and wholesale slaughter that took place. When they occurred, he spoke of the superior efficacy of more humane methods and looked the other way. Not that he was more humane than

his rivals. He merely wanted to assert his authority and to impose his own program. Rosenberg hated the Great Russians - the core of Russia as he thought of them. He had no love for the Ukrainians, the White Russians, or the other nationalities of the Soviet Union. These, he thought, should become the peoples of autonomous states, so that the Moscovites, as he called them, could be held in check. The separate nationalities could then be treated well enough to bind them to a German alliance. For this purpose he would use whatever methods were necessary. The problem was only how to convince Hitler that Rosenberg's plans were superior to those of Koch, Goering, Bormann, Himmler, and the others. It would be necessary to take as hard a line as they, and to want what Hitler wanted.

On the stand at Nuremberg, Rosenberg said he had often written "appeasing" letters to Bormann and others and then gone on to issue decrees differing somewhat from their position. It appears that Rosenberg's way was to agree with the extremists like Bormann and Himmler in an attempt to ward off the constant attacks upon him, and to end up by accepting the policies his enemies imposed both on the subject populations and on him.

Rosenberg had vast geopolitical aims: he wanted Great Russia - any Great Russia, whether of the Czars or the Soviet Union - to be forced to remove its center of gravity to Asia. The best means for accomplishing this,

he thought, was to make use of the Slavs' yearning for a firm and masterful hand, and to treat the native populations with the vigor and justice that were essential for asserting German moral superiority.[222] The natives were to be permitted to work for the German overlords, to take part in the anti-Semitic and anti-Bolshevik crusade, and to help keep the Moscovites in their place.

Rosenberg's aspiration to be Foreign Minister of the Reich was so strong that he had brought himself to express his disappointment to Hitler when the post went to Ribbentrop in 1938. He was in fact at least as well qualified for the job as was Ribbentrop, whose ideas on foreign policy were just as clouded as Rosenberg's.

In 1940 Rosenberg sent Quisling to have an audience with Hitler. Rosenberg had met the Norwegian in 1933, and he kept in touch with him, as he did with scores of people in foreign countries he thought might be useful.[223] His appointment as Reichsminister for the Eastern Territories was a compensation for his not becoming Foreign Minister, and it was disappointing to Ribbentrop, whose responsibilities were obviously invaded with this newly created job administering and, as it was then thought, deciding on policies that would concern the Foreign Office.

The rivalry between Ribbentrop and Rosenberg was intense. Rosenberg was head of the Foreign Affairs Office of the Party (the APA, Aussenpolitisches Amt), one of the parallel

organizations designed to provide competition for, and (should the occasion arise) to supplant, the existing State Office. Rosenberg, in fact, had gone to London in May, 1933, not long after Hitler had come to power, to represent National Socialist views in what he regarded as influential British quarters, and no trip (not even any trip made by Ribbentrop) was ever more disastrous. "A ponderous lightweight," Sir Robert Vansittart called him, and the English press saw in him a symbol of Nazi boorishness - something Rosenberg made easy for his critics in his pontifical press conferences (he spoke little English) held in his hotel.

Rosenberg's Foreign Affairs Office of the Party survived all such episodes as well as the steady hostility of the German Foreign Office. He ascribed the success of the Norwegian campaign solely to his department, for it was he who had put Quisling in touch with the Fuehrer and Admiral Raeder, and it was his agents who warned of the imminent Anglo-French intervention in Norway, while the German Foreign Office officials were sending reassuring reports to Berlin. The victory in Norway, Rosenberg wrote, was "a confirmation of the historical task fulfilled by the Foreign Affairs of the Party" and another gratifying proof of Ribbentrop's incompetence.[224]

His early writings were not very different from Streicher's. In 1920, Rosenberg published The Trail of The Jew in the Course of Time and Immorality in the Talmud,

and in 1923 The Protocols of Zion and Jewish World Politics. In these books Jewish depravity and the plan to conquer the world were exposed with the full apparatus of pseudo-scholarship. Rosenberg was the original draftsman of the Party programs that traced the source of German woes to Jewish Bolshevik Marxism and to the Jewish materialist influence on the Christian Church. In his grand synthesis he demanded living space from the Soviet Union and a return in the Reich of the Germanic pagan myth of the blood. His The Myth of The Twentieth Century was in the home of every "decent Party member," as the phrase went. In 1934 he noted in his diary that 250,000 copies had been sold. By the time the war started, the sale figure had gone over a million, although letters in the files of the Party and the testimony of witnesses at Nuremberg often confessed an inability of readers to get through the book. Goebbels laughed at it, Goering said he had never read it; the Fuehrer had only looked at it.[225] What made Rosenberg important was the image he presented of the erudite, dedicated interpreter of the National Socialist mystique.

The German mission, he said, was to defend with its Nordic blood the divine essence of man. Race was far more important than the state and its forms, and when the racist doctrine was combined with the mystical powers of the Fuehrer to express the German soul, it led inexorably to the need for Hitler's assuming complete authority over

the Reich and the Germanic peoples.[226] The Fuehrer possessed the collective will of the people within himself. The true will of the people was the Fuehrer.[227]

In May, 1945, Rosenberg told his British captors that what went wrong with the Nazi State was due to the machinations of the Himmlers and Bormanns; that he believed the ideas of National Socialism to be as sound as ever; that the organization simply had not been up to the ideas. Even in defeat he believed that the Nazi Party had forced the British and Americans at long last to see the necessity for an alliance with Germany.[228]

Despite his mystical devotion to the Fuehrer, Rosenberg had been sorely tried by the pact with the Soviet Union in 1939. The Fuehrer had said four years earlier in Rosenberg's presence, that he could never make common cause with Moscow because it was not possible to forbid the German people to steal and at the same time make friends with the thieves.[229] Rosenberg blamed the whole affair on Ribbentrop and his hatred of England. The German-Russian embrace over which the German press was so enthusiastic, wrote Rosenberg sadly, "is more than painful."[230]

Rosenberg felt race determined everything. The Japanese, the Negro, and the Jew could only be what they were; they could never be European and would thereforehave to pursue entirely different intellectual and political aims, although the Japanese could be useful as an ally against the Soviet

Union.[231]

A report on the activities of the Einsatzstab, Rosenberg for the period between October, 1940, and July, 1944, summed up what had been taken as "ownerless Jewish property": 21,903 art objects of all kinds, brought to the Reich in 29 shipments, including 137 freight cars. Among them were 5,281 paintings, including works by Rembrandt, Rubens, Velasquez, Murillo, Goya, Boucher, Watteau, Cranach, and Reynolds; 684 miniatures; 583 textiles (Gobelins, rugs, embroideries); 5,825 handmade art objects (porcelains, bronzes, faiences, coins); 1,286 East Asiatic art works; 259 art works of antiquity (sculpture, bronzes, vases); also several hundred coins and a collection of degenerate Bolshevik art. Among 2,477 articles of furniture was a collection of French furniture of the seventeenth and eighteenth centuries, which, the report said, "is perhaps even more highly to be evaluated than some of the pictures.[232]

At Nuremberg, Rosenberg defended his confiscation of Jewish and Masonic property by pointing out that German property worth 25 billion marks had been taken by the Allies after World War I, and that now, in August, 1946, all German libraries were in the hands of the Allies.[233] He himself, he said, had never received anything of value from the confiscations.

Many ranged themselves against Rosenberg. Sworn enemies

made alliances to do him in. Ribbentrop and Himmler in 1944 worked out an agreement whereby Himmler would recruit SS units from among the Soviet nationalities and Ribbentrop would have authority over any foreign policy matters connected with these SS legions. Rosenberg was completely excluded under this pact, and Hitler refused to receive him. Rosenberg and the Fuehrer last met in November, 1943. Rosenberg stayed on in his Ministry (as one man said, "of the no longer occupied territories") fighting his battles to the bitter end - not against Bolsheviks and Jews and Moscovites but against his colleagues.[234] His rivals were always closer to the throne than he, for he was dull and verbose and constantly forced Hitler to make difficult decisions.

When the war was lost, he told his captors that he had been right about race and the Jews, whom he had only wanted to send to Madagascar, not to exterminate. This was true. He had opposed an independent Jewish state as too dangerous a center of subversion, but Jews collected on some island under police surveillance seemed to him a proper solution of the problem.

He believed in the necessity for fighting on behalf of the highest manifestation of the human race - the mystical Nordic, represented at his best by the Germans. He had ordered his thinking around this racial myth. Like the Bolsheviks he so detested, he could see in Christianity only the enemy, the sorry survival of a past that had

prevented the Germanic race from attaining its true stature.

Rosenberg still thought Nazism was what he called the European answer to the problems of the twentieth century, "the most noble idea for which a German could use his strength."[235] He stated that Nazism had given the German nation its unity and substance.[236] I have served it faithfully and despite all errors and human inadequacies, I shall also remain true to it as long as I live."[237]

When his British captors asked if he still believed in the Mythus, he said that, although parts of it had been overtaken by events, it was still true on the whole, and if the Fuehrer had chosen him instead of men like Goebbels and Bormann, the outcome would have been different. This he thought was Adolf Hitler's major failure. The court found him guilty on all four counts and sentenced him to hang.

CHAPTER IX

CONCLUSION

There are no conflicting decisions of other international tribunals, nor acts of the international community expressing an opposite opinion, nor an overwhelming practice of nations, that would invalidate the law of Nuremberg. The conditions for the establishment of an international court were met in the case of the IMT, and the law applied by it had a basis in international law. It has been contradicted in international incidents since the Nuremberg trial, where nations acted in violation of its provisions, e.g. in the case of the North Korean aggression against South Korea which was denounced by the United Nations. But regardless of whether it was possible in all cases to apprehend the individuals responsible for such violations, it stands strong and undiminished in its legal significance, constantly reaffirmed by the nations seeking peace in this world.

It can be applied at any time again by an international court properly constituted, like the IMT at Nuremberg (provided, of course, that the conveners have won the war), or eventually, perhaps, by a permanent International Criminal Court as envisaged in the draft statute for an international criminal court prepared by the International Law Commission in 1951. The International Military Tribunal represents an important milestone in the development of international criminal law toward such a permanent inter-

national penal court.

Although the Tribunal convicted a number of defendants on each count of the indictment, a critical reading of the opinion indicates that the Tribunal primarily stressed the defendant's implication in War Crimes. The one offense universally recognized in earlier years.

In future trials for crimes against Peace the prosecution would be handicapped if it were confined to the limits set in the opinion. If industrialists were among the defendants, the prosecution would be faced with the ruling that "production" is no part of the crime of "waging" aggressive war. It would be faced with the need of proof, a fatal omission in the Schacht case, that rearmament was carried out with actual knowledge of aggressive war plans.

As respects the military the opinion is more liberal. It is questionable whether the charge of "waging" aggressive war, for which Doenitz was convicted, would be made the basis for a trial unless accompanied by other charges. The scope of the crime of "preparation" or "initiation" of aggressive war is, moreover, limited with respect to line officers in view of Doenitz' acquittal on this charge. As to high staff officers, however, the Tribunal, in the course of holding the High Command not an "organization," stated that there was convincing evidence that many of the 130-odd officers concerned had participated "in planning and waging aggressive war, and in committing war crimes and

crimes against humanity."[238] But even regarding them, it would not be easy to adduce evidence warranting conviction on the charge of "preparation" of aggressive war. Staff directives, under which specific plans for deployment of men and transport are framed, are often speculative and indefinite in their language and defensive in their terms.[239]

In the case of government officials concerned with internal preparation for war, the difficulty of proving advance knowledge of war plans would be substantial. Even in Germany, where the entire state was openly geared to ultimate involvement in war, official documents often proved of disappointing probative value.[240] There is a difference between the legal definition of evidence in contrast to looser definitions, e.g., the sort of evidence that would satisfy an historian.

Future war planners who may be concerned about the effect of the Nuremberg decision can avoid or limit its consequences by being circumspect. Only a few persons at the top need know concrete plans for war. All others can carry them out innocently by relying upon a hypothetical claim to non-awareness. The convictions at Nuremberg were in large measure a historical accident, the result of the Germanic proclivity for systematic records and the unexpectedly swift final victory which placed files of documents in Allied hands. Without the connecting link of

minutes of secret conferences of the leaders of the state, fortuitously available in the case of Germany, or an extraordinary combination of documentary evidence, impeachment is a difficult matter. Under the standards established at Nuremberg exculpating explanations are difficult to disprove beyond a reasonable doubt.

Despite the practical limitations of the judgment, the Nuremberg Charter has made a distinct contribution in establishing Crimes against Peace and against Humanity as punishable offenses. It has rendered statesmen individually responsible for their official acts. The knowledge that conduct so prescribed is criminal, though it may not give pause to the warmaker, confident of victory, may still have its deterrent effect. It foreshadows the ignominy of felony rather than admiration for the strong. As Professor Wechsler has said:

> ...there are men who, valuing personal survival, will take account of the contingency of failure. It is to them that the threats are addressed. Moreover, the threat of punishment is not limited in the mode of its operation to the weight that it carries as a factor in decision at the climactic moment of choice. It also operates, and perhaps more significantly, at anterior stages in the patterns of conduct, the dark shadow of organized disapproval eliminating from the ambit of consideration alternatives that might otherwise present themselves in the final competition of choice.[241]

Like any precedent the Nuremberg opinion is susceptible

to interpretation and development. Another tribunal may feel that knowledge of aggressive intentions may be inferred from an individual's position and his ability to learn the facts. Or it may distinguish an "open" conspiracy, as in this case, where the German government with its manifold preparations was patently headed for war, from a conspiracy where the leading figures develop programs for aggression in secret.

In the latter case, it may be argued, the customary rules of Anglo-American criminal law should apply. The case of an "open" conspiracy, where the common plan is coextensive with the ruling political group, would seem to be more within the preventive realm of the United Nations Security Council, which can keep informed and take the necessary action, than the province of a criminal court.

Let us now focus on some other considerations. What marked the German slaughter was its cool, impersonal, organizational efficiency, the methodical lists of executions, the Gestapo and SD operations, the complicated State and Party bureaucracy that listed, sorted, catalogued, and kept such accurate files that almost nothing was lost from the plunder. Pogroms, racial murders, lynchings have usually been spontaneous local reactions toward people believed to be inferior. In the Third Reich they were the result of a well-considered, duly codified, and paragraphed public policy. When all the tu quoques are taken into consideration,

it still seems that the crimes of the Nazi regime supported for some twelve years by the sacrifices and Treue of huge sections of the population were a phenomenon not to be matched elsewhere in the civilized world

Hitler came into power because of the failure of the government to provide a solution to the economic crisis. While Hitler appeared to be promising a radical restructuring of the economic sphere, it had become clear within the higher echelons of the party that he had no real intention of doing so.

His policy toward the Jews seemed to be determined by expediency. Anti-Semitism was not allowed to interfere with the basic goals of Hitler and the industrialists. The Jews were used as a spearhead for inaugurating new policies. What began with the Jews was extended to others.

The industrialists supported the Nazi party and gave it the means with which to spread its propaganda and establist its organizational strength. The most obvious use of anti-Semitism by the industrialists was to provide a convenient excuse for expropriating sizable segments of industry with little or no indemnification. The industrialists, unwilling to seek a solution of the economic problems of the country which might curtail their powers or profits, assisted in diverting the mass wrath from the failing system to the Jews. The Jews became, socially undesirable and later economically unnecessary.

It was above all the crime of mass murder that was being tried at Nuremberg, and the persons believed to be implicated in it were not only the men in the dock but millions of their countrymen outside the walls of the Palace of Justice. The smoke of the crematories covered the entire proceedings from the start of the trial to its end and beyond. The other charges might have been dealt with in a purely judicial fashion had it not been for the mass slaughter of these defenseless people.

The defendants were deliberately selected to represent what the Allies regarded as the high command of the Nazi Party and State; however, it was widely believed that their guilt was not entirely unlike that of the individual German in the cross section of the population that served in the armed forces, the bureaucracy, the police, the party formations, the factories, and on the farms. It might be conceded that millions of people knew nothing of the exterminations. It was certain, however, that many knew a great deal about the persecutions and that they nevertheless took arms against the world to keep these men in power.

By 1949, Mr. Justice Jackson himself had come to express some doubts of what had been accomplished at Nuremberg; however, the general revulsion to war all over the globe was such that governments had to justify an armed conflict as a war of defense, a war against imperialism or injustice -

never as a war for Lebensraum or glory. Thus Nuremberg was attempting to say something that was universally felt, was trying to reify, to codify, to make plain in some sense that war for millions of people had another meaning from what it had in past centuries.

The Tribunal was doubtless not the best forum to establish the rules for a new order. The victors judging the vanquished, accusing them of crimes which in some cases had been participated in by one of the countries represented on the bench and which in others (the Katyn murders) had been committed by it, did not have the moral or judicial stature to command the long-terms respect of jurists and public opinion throughout the world. At it's best, in the person especially of the President of the Court, the tribunal could demonstrate a remarkable fairness and a fine show of legal forms, but in the treatment of the defendants and their counsel it was often evident that a long, bitter war had just ended between the countries represented by the prosecution and the judges and the country represented by the defeated. A few months after the end of a war it was humanly impossible to hold trials but would be convincing in their manifest justice to the vanquished as well as to the victors, and to later generations.

Can there be international law operating when you have a system where the victors determine the most effective means for exposing and punishing the losers? Yet what was

to be done? To have added neutrals to the bench would have strengthened the authority of the court, although it might not have affected the verdicts substantially. Everyone knew by 1945 of the mass murders and the war crimes committed by the National Socialist Government. Less was known of the crimes committed by the Allies. But in what never - never land could the men who fought against Hitler's tyranny and his gas chambers be held accountable for the manner in which they had won the war? The bombing of Dresden, to take an example, was undoubtedly an atrocity - but before what court would Winston Churchill be tried for having permitted the attack? Hiroshima, it may be well argued, too, was an atrocity, and if not Hiroshima, then certainly the bomb thrown over Nagasaki when Japan and all the rest of the world knew that the United States had the atomic weapon and the means of using it. In the cases of both Dresden and these Japanese cities, the attacks occurred when the war was won. Could Truman and Stimson be hailed before any court for these acts? If they should have been, before what court? What precedents or principles might have allowed the victors to punish their own leaders, despite the crimes of the enemy?

One thread runs through the trial and binds in a curious way both the victors and the vanquished. It is the power exerted by an ideology. The power was manifested in those on the German side who accepted the fixed ideas of their

society, in their Russian opposite members who could in cool fashion accuse the Germans of a crime they knew the defendants had not committed (the Katyn massacre), in the American and British who could swallow almost any legal nostrum as long as it made them see a postwar society of their imagining. Small things were rescued at Nuremberg (although they meant in some cases the difference between life and death), such as the unspoken principle that no one be convicted of the same crime the Allies conceded their side had committed; that no one be hanged for the crime of having waged or plotted to wage war. For the deeper answers we must look to history and its meaning for ourselves.

APPENDIX I

VERDICT OF TRIBUNAL

Defendant	Count 1	Count 2	Count 3	Count 4	Sentence
Hermann Goering	G	G	G	G	Hanging
Rudolf Hess	G	G	I	I	Life
Joachim von Ribbentrop	G	G	G	G	Hanging
Wilhelm Keitel	G	G	G	G	Hanging
Ernst Kaltenbrunner	I	..	G	G	Hanging
Alfred Rosenberg	G	G	G	G	Hanging
Hans Frank	I	..	G	G	Hanging
Wilhelm Frick	I	G	G	G	Hanging
Julius Streicher	I	..	..	G	Hanging
Walther Funk	I	G	G	G	Life
Hjalmar Schacht	I	I	..	..	Acquitted
Karl Doenitz	I	G	G	..	10 Years
Erich Raeder	G	G	G	..	Life
Baldur von Schirach	I	..	..	G	20 Years
Fritz Sauckel	I	I	G	G	Hanging
Alfred Jodl	G	G	G	G	Hanging
Martin Bormann	I	..	G	G	Hanging
Franz von Papen	I	I	..	..	Acquitted
Arthur Seyss-Inquart	I	G	G	G	Hanging
Albert Speer	I	I	G	G	20 Years
Constantin von Neurath	G	G	G	G	15 Years
Hans Fritzsche	I	..	I	I	Acquitted

*Where there is no symbol in the table, the defendant was not charged.

APPENDIX II

THE NUREMBERG TRIALS: AUGUST VON KNIERIEM

The significance, value, and implications of the Nuremberg Trials have been debated extensively since 1945. The legal controversy seems to have continued unabated. Much of the challenge against the Nuremberg Trials has been of a negative, fault-finding nature; the critics have seldom come forward with feasible alternatives.

Many years after the termination of the Nuremberg Trials an unwilling participant has come out with a significant literary contribution. Dr. August von Knieriem did not go to Nuremberg because he believed in the supremacy of international law or in the theory that certain acts of individuals connected with the war constituted international crimes subject to punishment under international law.

Dr. von Knieriem was arrested after the war by the United States Army and was brought forcibly to Nuremberg to stand trial there on the charge of being guilty of various crimes, including complicity in criminal acts of spoliation and use of slave labor.

For many years prior to and during World War II, Dr. von Knieriem was the general counsel of I. G. Farben, Germany's mammoth enterprise. It was due to his professional status that he was indicted as one of the leading figures in the criminal use of slave labor and complicity in wars of

aggression.

Dr. von Knieriem was found innocent of the charges set forth in the indictment. Unlike many non-German critics, he does not negate the principle of criminal responsibility and punishability for many of the acts which formed the basis of the Nuremberg Trials. He also regards the German State as having been a criminal state in many of its activities in the later period. The fact that these premises are conceded does not mean that Dr. von Knieriem approves the particular law applied, the procedure of the trials, or the evidentiary rules.

This unwilling participant does not attack the whole edifice of the Nuremberg Trails. Instead, very methodically and purposefully he analyzes the primary issues connected with the trials; its "substantive law"; its judicial organization and procedure of law.

After the closing of the case against the major Nazi war criminals, the respective individual occupying powers (France, Soviet Union, the United Kingdom, and the United States) tried a large number of other war criminals. The jurisdiction for these trials was based on the Allied Control Council Law No. 10.

Twelve additional trials at Nuremberg were organized and conducted by the United States alone. These trials dealt with some members of the German Government, generals, industrialists, concentration camp officials, Nazi judges,

physicians, and leaders of the SS charged with master-minding mass murders, slave labor, and spoliation.

In subjecting to minute scrutiny subsequent trials organized by the United States, the author reviews the underlying legal (criminal and international) texture of the whole war crime process. He fails, however, to distinguish sufficiently between war crimes in the stricter sense and crimes against humanity, or between war crimes and crimes against peace (planning, preparing, continuing, and waging aggressive wars) in violation of international law.

Dr. von Knieriem contends that: (1) There was no law in force in Germany, international or otherwise penalizing many of the acts charged the German defendants at the time these acts were committed. (2) Persons charged with war crimes should have been tried under their national law. (3) Individuals are not subject to international law and may not be punished thereunder for any crime by any international tribunal. (4) An order from a superior authority may confer immunity on the actor.

He is no less critical about the procedural law applied by the American judges appointed by the President to preside at the twelve subsequent trials. To him the twelve special Nuremberg Tribunals were American tribunals of occupation, without jurisdiction founded in international law, and not international tribunals. It should be remembered that

while the members of these courts were appointed by the President of the United States from among members of the judiciary in the United States, the authority of these tribunals derived from Control Council Law No. 10, a law of the Supreme Authority in Germany from June 5, 1945, until the turning over of its sovereign attributes to the post-war German Government. In the "Justice Case" Tribunal III sitting at Nuremberg regarded itself international in character.

The four judges of the International Military Tribunal were appointed by their respective governments (United States, United Kingdom, France, Soviet Union). While other United Nations members adhered in great numbers, gave their consent and recognized the principle of international war crime trials, these four powers exercised the sovereign power over Germany. It was on this basis that the International Military Tribunal stated in the judgment that the making of the charter was the exercise of sovereign legislative power, the expression of international law existing at the time of its creation, and to that extent itself a contribution to international law.

Dr. von Knieriem regards the London Agreement of August 8, 1945, the charter attached to it, and Control Council Law No. 10 objectionable examples of ex post facto law, even when applied to war crimes and crimes against humanity. His principle target is this law No. 10. He claims

that this was an ad hoc and ad personam statute because it applied only to German Nazi war criminals. It should not be forgotten that German sovereignty resided in the Control Council in 1945 and that it would have been presumptious indeed if this Council had tried to exercise the legislative function of a universal international body such as the United Nations. Dr. von Knieriem's legal argument fails to take into account that judicial decisions are precedents and amount to judicial-legislative osmosis.

The sources of international law are general conventions, general customs, general principles, judicial precedents and juristic analysis. To deny the validity of these sources of law and to insist on the exclusivity of statutory law is tantamount to denying the existence and justification of international law in a society which does not have an international legislative authority.

After denying international law, its efficacy and validity, Dr. von Knieriem proceeds to analyze certain acts charged to the Nazi defendants, to wit, war crimes and crimes against humanity, which could be punishable by national law. He reaches the conclusion that only German law should have been applied, even though by virtue of the Potsdam Agreement of June 5, 1945, Germany was deemed to have ceased to exist and the governmental power and supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and state,

municipal or local government or authority, were assumed by the Allied Powers.

Dr. von Knieriem champions the supremacy of national law and conditions punishment for international crimes on the existence in the lex loci, i.e. German law, of a provision for punishment. It would follow from this that the instigators of international crimes could fashion their laws in such a way as to exclude their criminal acts from the applicability of the national penal law. Then there would be no international nor national law under which even the most horrendous crimes and mass murders could be punished.

It is amply clear that the national laws of the state, which waged an illegal war under international law but carried it out according to the law and practice of the state concerned, do not provide punishment for those who perform the acts of such a war. There was no national criminal law in Germany under which "crimes against peace" could be punished.

Dr. von Knieriem believes that German law, either with or even without The Hague Convention of 1907, contained sufficient provisions for the punishment of common criminal acts. He regards the German Code as a sufficient source of law for the punishment of such common crimes as murder, mayhem, rape, pillage, etc.

Dr. von Knieriem is a partisan of the superiority of

national criminal law over international criminal law. He is not alone in holding that rules of international law do not apply to individuals who need not obey them, unless the international law rules have been integrated into the national system of law. Under this theory the Nuremberg accused could have been adjudicated by

(1) German law, or (2) the law of the German-occupied or German-injured country or countries with the qualified proviso that the act charged to be criminal must have been also punishable by German law.

Dr. von Knieriem charges that the judgments of the Nuremberg tribunals tend to create conflicts between international law and national law at the expense of the individual, and confront the individual with the dilemma "either to obey the laws of his country and become an international criminal, or to obey international law and so incur predictable punishment under national law" (page 45).

Dr. von Knieriem claims that since international law does not address itself to individuals, there can be no true international law and no punishment can be prescribed by it. He states that "if international law does not forbid certain acts to individuals, it cannot punish them for these acts; if international law does not oblige certain persons to a certain conduct, it cannot hold them criminally liable for omitting such conduct" (page 47). He claims that international illegality is incompatible with individual

punishability.

For more than fifty years The Hague Convention of 1907 prescribed the rules of land warfare and contained precepts for certain acts of individuals. Thus The Hague Convention, an expression of international law, could be violated by individuals. Sanction against individuals imposed by a tribunal applying international law is warranted for the violations of the pact. Germany ratified that convention but refused to enforce it and apply sanctions for its violations.

Dr. von Knieriem concedes that Hitler's Germany breached scores of international treaties, agreements, and a number of non-aggression pacts with her neighbors; for example, the Kellogg-Briand Pact signed by Germany, contained a prohibition against waging war in violation of its provisions. Therefore, a forbidden war can be called illegal, even according to the learned author. At that point, however, he halts and comes to the empty conclusion that "a forbidden war can be called illegal, but this does not mean that waging it can be punished." Nor is our author persuaded by the 1924 Protocol of Geneva for the Peaceful Settlement of International Disagreements and the Resolution of the Eighth Assembly of the League of Nations which make the waging of war in violation of international law an international crime. He still insists that unless there is a clause in the international agreement or other

source of international law prescribing individual punishment sanction as in the national penal law, the proscription against international crime does not apply to the individual.

A student of federal-state relations is able to accept the practicality of different spheres of law regulating the conduct of the individual in different spheres of activity. Professor Hans Kelsen, for instance, is able to accept a situation in which international law attaches a sanction to an act and thus makes the act internationally illegal, while national law does not attach sanction to the same act.

Society's concern about criminal infliction of injury by one or several individuals, or groups of them, against another individual, or groups of them, is serious enough to justify an urge for development of the law in the international sphere. The desire of prevention of irreparable international crimes and of sanctioning the punishment is an objective superior to the dilemma of one who is not threatened by penalty from one side (national) while he is threatened from the other (international), in case he commits acts against the life or limb of human beings in violation of certain prescribed rules of conduct. It was on these premises that international law was applied directly to the individual actor who was punished for violations of international law.

As to the individual's responsibility under inter-

national law, the International Military Tribunal cited Ex parte Quirin, 317 U.S. 1 (1942), the German saboteurs' case. Chief Justice Stone, speaking for the Court, said:

> From the very beginning of its history this Court has applied the law of war, as including that part of the law of nations which prescribes, for the conduct of the war, the status, rights, and duties of enemy individuals.

The International Military Tribunal, after citing Ex parte Quirin, rules that "crimes against international law are committed by men and not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."

Dr. von Knieriem is not one of those who could justify any criminal act on the pretext of following a "superior order" or "state of necessity" and absolve high and low ranking military as well as SS officials, for the commission of any crime when these defenses are invoked. Thus, he writes, that if in a territory behind the front lines the subordinates receive and carry out an order for a massacre of civilians, then they commit a crime.

The pre-Hitler Military Code of Germany in its Section 47 provided that the subordinate by whom such an order is obeyed is punishable as an accessory of the superior "if he knew that the order of his superior referred to an action which aimed at the commission of a civil or military felony." While no precedent is known in the German legal

practice for prosecution and conviction under this statute, the principle was there; this was a principle to be taken note of by those who are willing to bestow immunity on anyone who could show a written order or prove the receipt of an oral one.

Article 8 of the London Charter of August 18, 1945, for the prosecution of Naci criminality, stated:

> The fact that the Defendant acted pursuant to order of his Government or if a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

One of the twelve American Tribunals at Nuremberg tried the leaders of the so called Einsatzgruppen (Attached Squads) who belonged to Himmler's SS Empire. These persons were subject to the German military and were in charge of executing the diabolic orders of Hitler, Himmler, and Eichmann aimed at the extermination of the Jewish part of the population in the occupied territories. The actual carrying out of the order was an admitted fact; the squad leaders pleaded in vain that they had followed superior orders and had acted in a state of necessity. These pleas were rejected by the Nuremberg Tribunal.

The Tribunal, in weighing the plea of superior order, stated that the squad leaders faced no imminent, real, and inevitable danger if they had refused to carry out Hitler's, Himmler's, or Eichmann's orders. As the court

correctly stated, the test to be applied is merely whether the subordinate acted under coercion or whether he himself approved of the principle involved in the order. If the second proposition be true, the plea of superior order fails. "It is a noteworthy fact, not to be easily overlooked, that over sixty Nuremberg defendants, perhaps one third of those who stood trial in the twelve subsequent trials, were full time officers of the Himmler's dreaded SS. In addition, a number of defendants in the "I. G. Farben," "Justice," and "Medical" cases held high SS rank although their principle occupations were unconnected with the SS hierarchy.

Field Marshal Keitel, the former Chief of the High Command of the Armed Forces, during his deposition in 1945, prior to the opening of the trial at Nuremberg, frankly admitted that he gave and signed orders for the liquidation of thousands of civilians during the retreat of the German forces from the East. His plea of superior orders from Hitler and the state of necessity were not accepted as an excuse for the mass extermination of civilians, for orders for shooting at hostages, commandos, resistance fighters and for the repeated violations of The Hague Convention of 1907. The IMT was unanimous in finding him guilty on charges such as this, and sentenced him to death by hanging.

Had such a contention that he acted upon the orders of

Hitler been accepted as a valid defense, the rule respondeat superior would serve merely as a reductio ad absurdum for the purpose of frustrating the law.

The independence of the German judiciary was abolished by a resolution of the Reichstag on April 26, 1942, and the judges, who retained their positions, were made into agents of the Hitler regime. The law was held to cover criminal acts charged to these judges or judicial officers. The indictment by the United States Prosecution Staff charged the accused members of the judiciary and of the Ministry of Justice with perverting the judicial system into an instrumentality of dictatorship, using these words:

> The charge, in brief, is that of conscious participation in a nation-wide governmentally organized system of cruelty and injustice, in violation of the laws of war and of humanity, and perpetuated in the name of law by the authority of the Ministry of Justice, and through the instrumentality of the courts. The dagger of the assassin was concealed beneath the robe of the jurist.[1]

The defendants argued that they were bound to enforce the decrees of Hitler, even if they violated international law. Military Tribunal III, composed of high court justices from Ohio, Oregon, and Texas, refused to accept the defense of superior order and held that in a tribunal authorized to enforce international law, "Hitler's decrees were a protection neither to the Fuehrer himself nor to his subordinates, if in violation of the law of the community of

nations."[2]

Accordingly, such high officials as the presiding judges of the so-called Special Courts, were sentenced to life imprisonment for commission of crimes against humanity. The tribunal found, that in the zeal of carrying out the Hitler program, they passed sentences of death with the intention of killing innocent people - and that the judges even induced expert witnesses to give false testimony against Jews and Poles. Dr. von Knieriem finds these sentences passed on the Nazis "unobjectional" but qualifies his conclusion with the skeptic remark: "Assuming that the findings were correct (page 286 of his book), the sentence of the tribunal is unobjectionable under any one of the several legal systems in question."

Dr. von Knieriem suggests constructively that an inquiry should be had whether a particular act is of such a kind that individual countries are bound by international law to forbid it to their citizens. The development of international law in this spirit should be pursued not only in the international sphere but in domestic codification as well. Resolutions and declarations by national legislatures adopting rules of international law are desirable for the acceptance of international law.

It is still too early to state whether an "international common law" has been established in Nuremberg. It is significant that the General Assembly of the United Nations

on December 11, 1946, unanimously adopted a resolution affirming the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the International Military Tribunal.

In The Nuremberg Trials Dr. Von Knieriem, the former defendant, sits in judgment over his former judges and prosecutors. Disclaiming to have had any spiritual affinity with the horrendous crimes of the Hitler era, he used his monumental knowledge and ability to discredit the judicial inquiry which acted sincerely in branding as criminal the many acts of violence of the Nazi regime. Yet, he appears to have labored in the illusion of objectivity in trying to tear down, stone by stone, the house built in Nuremberg.

Footnotes

1. Whitney R.Harris. Tyranny On Trial. Dallas, Methodist University Press, 1954, p.xxxi.

2. Ibid.

3. History of the United Nations War Crimes Commission, compiled by the United Nations War Crimes Commission. London, H. M. Stationery Office, 1948, pp. 46-51. (Hereinafter referred to as History of UNWCC).

4. Sheldon Glueck. War Criminals: Their Prosecution and Punishment. New York, Alfred A. Knopf, Inc., 1944, p. 53.

5. Nazi Conspiracy and Aggression (hereinafter referred to as NCA), Supp. A, M-161. Washington, US Government Printing Office, 1946-47, p. 1225.

6. History of UNWCC, pp. 107-8. Also Documents on United States Foreign Relations 1943-1944. Washington, US Government Printing Office, 1945, pp. 231-32.

7. Eugene Davidson. The Trial of the Germans. New York, The Macmillan Company, 1966.

8. Robert H. Jackson. Report to the International Conference on Military Trials? London, 1945, Department of State Publication 3080 (Washington: US Government Printing Office, 1949), p. 17 (Hereinafter referred to as Jackson Report.)

9. Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-10 October 1946, vol. 3. Nuremberg, 1947-49, p. 403. (Hereinafter referred to as N I, N II, N III, etc.)

10. N II, pp. 102-03.

11. Jackson Report, pp. 299, 383-84.

12. Ibid., p. 335.

13. Ibid.

14. N I, p. 95.

15. Ibid.

16. Davidson, op. cit., pp. 18, 19.

17. Edward F. Carter, "The Nuremberg Trials: A Turning Point in the Enforcement of International Law" (Nebraska Law Review). 1949, p. 371.

18. N II, p. 150.

19. Robert H. Jackson. "Nuremberg in Retrospect" (Canadian Bar Review XXVII). 1949, p. 769.

20. Ibid.

21. Indictment, IV, (A) and (B).

22. Tr. 14344 (July 26), Closing Speeches 11.

23. "...in the future our people will not obtain territory, and therewith the means of existence, as a favor from any other people, but will have to win it by the power of a triumphant sword." Mein Kampf. quoted in Tr. 2278 (Jan. 8), 4 MWC 55.

24. Mein Kampf, quoted in Doc. 2760 - A - PS, 5 NCA 407-08.

25. Tr. 13650 (July 16).

26. Opinion 6.

27. Ibid., at 18.

28. Doc. 789 - PS, 3 NCA 572.

29. The aggressive war case is set forth in detail in INCA 370-874.

30. "A mere handful of captured documents...which prove the essential elements of the case on aggressive war up to the hilt." Tr. 319 (Nov. 23), IMWC 147.

31. Doc. 386-PS, 3 NCA 295.

32. Doc. 388-PS, 3 NCA 305.

33. 7 NCA 847, 849.

34. 3 NCA 581, 665.

35. 3 NCA 572. Immediate preparations for the invasion of the Low Countries were ordered on October 9, 1939. 6 NCA 880. Orders signed by Keitel and Jodl originally fixed this attack for November, but for a variety of reasons it was postponed fourteen times during the winter and early spring. 6 NCA 893.

36. Opinion 16, 34.

37. Ibid. at 55.

38. Ibid.

39. Ibid.

40. Opinion 56.

41. Tr. 14360-61 (July 26), Closing Speeches 21-22.

42. Tr. 14599 (July 29), Closing Speeches 152.

43. Raeder asserted he had always opposed war with England and had obtained Hitler's assurance that he would reach an agreement which would settle the Polish issue in a peaceful way. Tr. 13653 (July 16).

44. Opinion 21.

45. Tr. 12976 (July 4).

46. Tr. 14355-58 (July 26), Closing Speeches 17-19.

47. Tr. 12970 (July 4). Mr. Justice Jackson argued that it was the defendants who put the dictator in power and established the Fuehrer principle; that the head of a state must have others to be his eyes and ears and make their specialized training available. Tr. 14367, 14375 (July 26).

48. Opinion 55-56.

49. Ibid. at 54-55.

50. Tr. 5147 (Feb. 28).

51. See Opinion 48-54, in which the Tribunal reviewed the provisions of international law prior to the Charter.

52. "The concept of conspiracy, as used by the Prosecution, is entirely unknown to German law." Tr. 12968 (July 4).

53. Such a doctrine, the defense suggested, might be an outgrowth of American lawlessness. Tr. 12968-75 (July 4).

54. Tr. 13128 (July 8).

55. Tr. 13126 (July 8).

56. Tr. 13516, 13531 (July 15).

57. Ibid.

58. "...the defendants either knew or are chargeable with knowledge that the war for which they were making ready would be a war of German aggression ." Tr. 13343 (July 26).

59. Opinion 112.

60. Ibid. at 133.

61. Robert H. Jackson. The Nuremberg Case. New York, Alfred A. Knopf, Inc., 1947, pp. 199-200.

62. Opinion 135.

63. Ibid. at 137.

64. Ibid. at 136. The wars charged as aggressive under Count Two were the attacks on Poland and subsequent invasions, in which Schacht concededly was not implicated.

65. Opinion 136.

66. 3 NCA 868.

67. 7 NCA 471.

68. Tr. 8891 (May 3).

69. Opinion 136.

70. At least until October, 1936, when Goering was appointed head of the Four Year Plan Office, Schacht was the undisputed leader of the German economy. 7 NCA 567. After Goering encroached on Schachts province, the military sided with Schacht and submitted proposals which would have assured Schacht, as against Goering, the responsibility for "unified preparation for the war economy as heretofore." 7 NCA 465.

71. 7 NCA 565.

72. 7 NCA 879.

73. Schacht's participation in the financial operations incident to the occupation of Austria and the Sudetenland, however, was found by the Tribunal to be "on such a limited basis that it does not amount to participation in the common plan charged in Count One." Opinion 136-37.

74. 7 NCA 499.

75. After The Anschluss he said that the Reichsbank would always be Nazi as long as he was connected with it and led his Austrian listeners in the oath to the Fuehrer. 7 NCA 394; see also 7 NCA 589.

76. 7 NCA 426.

77. 7 NCA 438; Tr. 9071 (May 6).

78. Opinion 137. Factual statements in the Schacht opinion appear to be consistent with a finding of either guilt or innocence; it is possible that these portions of the opinion were written before the Tribunal determined its verdict.

79. Opimion 112.

80. Ibid. at 126-27.

81. Ibid. at 129.

82. Ibid. at 163.

83. Ibid. at 131-32.

84. Ibid.

85. Ibid. at 164.

86. Ibid. at 153.

87. Ibid. at 156.

88. 5 NCA 684, 688.

89. 6 NCA 153.

90. 5 NCA 66.

91. Count Two charged the defendants with initiating war against Poland, the United Kingdom, and France in September, 1939, and other wars thereafter, ending with the war against the United States. Reference was made to Count One for allegations that the wars were, in fact, aggressive and the proof as to this was offered under Count One. The proof under Count Two was thus limited to setting forth the treaties, agreements, and assurances breached by the aggressions. These are set forth in Appendix C of the indictment and discussed in The Opinion at 46-54. The Tribunal made no finding on the initiation of war against the United Kingdom and France.

92. Acquitted under Count Two were Schacht, Sauckel, von Papen, and Speer. In passing on the cases of Schacht and von Papen, whose roles had become minor by 1939, the Tribunal apparently did not even consider the possibility of their guilt under this Count.

93. Opinion 137.

94. Ibid. at 137-38.

95. 6 NCA 695.

96. There is a suggestion in the opinion that another factor may have been weighed in the determination of Doenitz' guilt: that in 1944 and 1945 he could have urged, or brought about, the cessation of the aggressive wars, at least when he knew continued waging was hopeless and, therefore, morally indefensible.

97. Elsewhere the Tribunal castigated German officers of the High Command. Opinion 107.

98. Ibid. at 126-27.

99. Ibid. at 154.

100. "His activities in charge of German armament production were in aid of the war effort in the same way that other productive enterprises aid in the waging of war; but the Tribunal is not prepared to find that such activities involve..waging aggressive war as charged under Count Two." Ibid. at 156.

101. Ibid. at 147. The prosecution did not indict Fritzsche under Count Two, and the Tribunal was thus not faced with the decision of whether the use of propaganda in the form perfected by the Germans, constituted "waging" war.

102. Since war crimes are well-recognized offenses, defined in the Charter in orthodox terms, Count Three of the indictment, which charged the commission of such crimes, raised no new or significant problems of construction or proof. Discussion of the Tribunal's disposition of that count seems unnecessary as the Tribunal noted, the evidence relating to war crimes was "overwhelming in its volume and its detail.... The truth remains that war crimes were committed on a vast scale, never before seen in the history of war.... They were for the most part the result of cold and criminal calculation." Opinion 56-57.

103. Charter Article 6 (c).

104. Tr. 14457 (July 26).

105. The Tribunal conceded that the proof left no doubt of the ruthless persecution carried out in Germany from 1933 on. Opinion 84. It stated, however, that it had not been satisfactorily proved that the crimes committed were done "in execution of, or in connection" with any crime within the Tribunal's jurisdiction. Ibid.

106. Ibid.

107. Tr. 10295 (May 24).

108. The meaning of the phrase "in connection with" an act of which the defendant was convicted is not clear. The defense contended that the act must have been committed in his capacity as a member, and that criminality of the organization was limited to that act. See, e.g., Tr. 16126-27 (Aug. 23), 16226-27 (Aug. 24), 16257 (Aug. 27). The prosecution argued that an act "relating to his position as a member" was enough and that the organization could be declared criminal on the basis, not only of that act, but also of other acts. See, e.g., Tr. 16471, 16594. The Tribunal seems to have adopted the prosecution's view.

109. It was thought that self-interest on the part of the defendant-member might result in his adequately defending the organization. The Nazi leaders at Nuremberg were, however, too occupied with their personal fate to pay much heed to the charges against the organizations.

110. The Yalta Conference expressed an "inflexible purpose" to "wipe out the Nazi Party, Nazi laws, organizations and institutions, remove all Nazi influences from public office and from the cultural and economic life of the German people."

111. Indictment, II and app. 8.

112. Hitler had in fact stated: "The greatest guarantee of the National Socialist revolution lies in the complete domination of the Reich and all its institutions and organizations, internally and externally by the National Socialist Party." 5 NCA 377.

113. See Opinion 97-101; Tr. 1787-1884 (Dec. 19,20).

114. See Opinion 91-96; Tr. 1889-1962 (Dec. 21-Jan. 2).

115. See Tr. 1732-86 (Dec. 18,19); 3 MWC 98-127.

116. Indictment, app. 8.

117. Tr. 5155 (Feb. 28); 2 NCA 115.

118. The Yalta Conference expressed determination to "break up for all time the German General Staff."

119. Tr. 2106 (Jan. 4); 3 MWC 304; Tr. 16297 (Aug. 27).

120. Tr. 2111-13 (Jan. 4); 3 MWC 307.

121. Tr. 5161 (Feb. 28); 2 NCA 19.

122. Opinion 2.

123. Tr. 5161 (Feb. 28); 2 NCA 19. Also see Tr. 5702-07 (Feb. 28); Tr. 16128 (Aug. 22).

124. Tr. 5162 (Feb. 28); 2 NCA 20.

125. Tr. 2678-80 (Jan. 14); 4 MWC 244-45.

126. Tr. 5156, 5159 (Feb. 28); 2 NCA 16, 18.

127. Tr. 5155-56 (Feb. 28); 2 NCA 15.

128. Tr. 5156 (Feb. 28); 2 NCA 16.

129. Tr. 5155-56 (Feb. 28); 2 NCA 15.

130. "Even then, the test would not be what the man actually knew, but what, as a person of common understanding, he should have known." Tr. 5156-57 (Feb. 28); 2 NCA 16.

131. Tr. 5154 (Feb. 28); 2 NCA 7-8.

132. This point was made by the defense. e.g., Tr. 5188, 5199 (Feb. 28); 16075 (Aug. 22); 16130 (Aug. 23); 16361 (Aug. 28). And it was specifically referred to by the Tribunal. Opinion 85.

133. Ibid. at 86.

134. The prosecution felt it necessary to exclude "persons employed in purely clerical...or similar unofficial routine tasks." Tr. 5160 (Feb. 28); 2 NCA 18.

135. Tr. 1823-25 (Dec. 19); 3 MWC 146-47. This was a typical example of the "unity of Party and State."

136. Clerical personnel of the Gestapo and certain reserve and fringe organizations of the SA. Tr. 5160, 5176 (Feb. 28); 2 NCA 18, 19.

137. Tr. 5158 (Feb. 28); 2 NCA 17. The prosecution admitted the power of the Tribunal "to condition its declaration so as to cover a lesser period of time than that set forth in the Indictment." Ibid.

138. Unpublished order announced by the Tribunal on March 13, 1946. Tr. 5735.

139. Unpublished order of April 2, 1946.

140. The principal arguments were: (1) Collective punishment was a denial of fundamental justice and prohibited by international law. Tr. 16074 (Aug. 22); 16136 (Aug. 23); 16308-09 (Aug. 27). (2) The Charter was retroactive in punishing membership in organizations which at the time were lawful. Tr. 16127-28; 16137-38 (Aug. 23). (3) Individual members were being condemned without a hearing. Tr. 16128 (Aug. 23), 16361-63 (Aug. 28).

141. Opinion 85.

142. Tr. 5147-51 (Feb. 28); 2 NCA 9-12.

143. Indictment, app. 8.

144. Opinion 48-52.

145. Opinion 91, 97, 102.

146. Opinion 86.

147. Ibid. at 91, 97, 102.

148. Ibid. at 99. But perhaps the activities of these units were not deemed sufficiently typical or notorious to serve as a basis for a finding against the entire SS.

149. Ibid. at 103; 3 MWC 106-11; 113-15; 116-25.

150. The prosecution conceded that "the evidence will show that after 1934 the SA started a rapid decline in its importance." Tr. 1755 (Dec. 19); 3 MWC 109-10.

151. Opinion 104-05.

152. Ibid. at 106.

153. Ibid. at 104.

154. Ibid. at 105.

155. Ibid. at 104.

156. The Council of Ministers consisted of only six members.

157. Opinion 107.

158. Davidson, op. cit., p. 60.

159. Roger Manvell and Heinrich Fraenkel. Goering. New York, Simon and Schuster, 1962, p. 19.

160. Ibid., p. 21.

161. Davidson, op. cit., p. 62.

162. At Nuremberg, he was accused of having set the fire himself, but the evidence for this is as flimsy as that which Goering used to try to convict the Bulgarian Communist Georgi Dimitrov and two of his countrymen for their alleged part in causing the fire.

163. N XXXII, pp. 289-90.

164. N XXX II, pp. 289-90.

165. N XXXII, p. 411.

166. 6 NCA 367-70.

167. N XXVI, pp. 266-67.

168. 3 NCA 525-26.

169. Ibid.

170. N IX, p. 523.

171. N IX, p. 526.

172. Ibid.

173. N XXVIII, p. 524.

174. Ibid., p. 525.

175. Ibid., p. 529.

176. Ibid., p. 534.

177. N IX, p. 634.

178. N XXXIX, p. 170.

179. N IV, p. 5.

180. Ibid., p. 551.

181. N XXXIX, p. 170.

182. Manvell and Fraenkel, op. cit., p. 174.

183. N IX, p. 569; N XXVI, pp. 276-78.

184. Ibid., (N XXVI), pp. 279-80.

185. Davidson, op. cit., p. 86.

186. William D. Bayles. Caesars in Goose Step. New York, Harper and Brothers, 1940, p. 134.

187. Ibid.

188. Ibid., p. 133.

189. Ibid., p. 144.

190. Davidson, op. cit., p. 152.

191. Count Galeazzo Ciano. Ciano's Hidden Diary 1937-1938. New York, E.P. Dutton and Co., Inc., 1953, p. 119.

192. Ibid., p. 582.

193. Davidson, op. cit., p. 154.

194. Ibid.

195. Ibid., p. 154-55.

196. Ibid., p. 155.

197. Ciano, op. cit., p. 138.

198. Ibid., p. 139, 140.

199. Writing in his cell in Nuremberg, Ribbentrop declared Hitler had ordered him to give the Nazi salute; however, in an interrogation of September 20, 1945, he said he had not been instructed to give it but had intended it as an honor to the British sovereign.

200. Davidson, op. cit., p. 158.

201. Ciano, op. cit., p. 151.

202. Ciano, op. cit., p. 477.

203. N XXXV, pp. 458-61.

204. N II, p. 448.

205. Ibid.

206. N XXXV, p. 423.

207. Ibid.

208. Ibid., p. 428.

209. Ibid.

210. Ibid., p. 462.

211. 2 NCA 609.

212. Ibid.

213. Davidson, op. cit., p. 126.

214. I NCA 176.

215. N XXV, pp. 229-30

216. Ibid.

217. Davidson, op. cit., p. 129.

218. N XV, p. 176.

219. N XVI, p. 622.

220. Ibid.

221. N XXXIX, p. 421.

222. I NCA 187.

223. N XI, p. 455.

224. Ibid., p. 459.

225. Bayles, op. cit., p. 206-09.

226. N XXVIII, pp. 435-39.

227. Ibid.

228. 5 NCA 99.

229. Davidson, op. cit., p. 135.

230. Ibid.

231. 5 NCA 99.

232. N XXVI, pp. 524-30.

233. Ibid.

234. Ibid.

235. N XLI, pp. 185-94.

236. Ibid.

237. Ibid.

238. Opinion 107.

239. Preparations for the occupation of Czechoslovakia after Munich were ordered "if her policy should become hostile towards Germany." 6 NCA 947, 948. One of the orders for the Polish attack was conditioned on Poland adopting "a threatening attitude" towards Germany. 6 NCA 918. Even the basic order for the campaign against the U.S.S.R., the most thoroughly prepared offensive, was likewise conditioned on a "change of attitude." 3 NCA 407, 409.

240. The secret minutes of the Reich Defense Council on June 25, 1939, at which 25 high officials were present, disclosed detailed preparations for the classification and use of workers in the event of war. But there was no specific statement that a war had been decided upon, much less a war against Poland. 6 NCA 718.

241. Herbert Wechsler. "The Issues of The Nuremberg Trial" (Political Science Quarterly). 1947, p. 16.

Footnotes to Appendix II

1. Tr. 10, 649.

2. Tr. 10, 687.

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