HOW WERE THE NAZIS PUNISHED ?

War Crimes Trials and
Denazification in the
U. S.Zone of Germany.

By

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The news that during last December and January sixty German war criminals were released on probation from Landsberg prison, that all of the prisoners there would now be eligible for a "good behavior" credit of five days per month, that Ilse Koch was released last October, that former members of the Nazi party are now back in great numbers in public office, in private industry, in positions of responsibility, and the cynical rumor that it is easier for a former party member than for a former denazifacation official to get a job in Western Germany, all give rise to some bewilderment. The American people had thought that at least in the U. S. Zone of Western Germany the war criminals were to be severely punished and that the Nazis were to be kept out of public life. Justice Jackson had accurately stated their feelings in his report to President Truman on the plans for the Nurnberg trials:

> "After we entered the war, and as we expended our men and our wealth to stamp out these wrongs, it was the universal feeling of our people that out of this war should come unmistakable rules and workable machinery from which any who might contemplate another era of brigandage would know that they would be personally punished. Our people have been waiting for these trials in the spirit of Woodrow Wilson, who hoped to 'give to international law the kind of vitality which it can only have if it is a real expression of our moral judgment.'"

Naturally, this attitude was even more strongly prevalent elsewhere. As early as 1942 nine countries already under the Nazi heel had announced in London that among their principal war plans was the "punishment, through the channels of organized justice,

of those guilty or responsible for these crimes." It was in the same mood that President Roosevelt announced a few months later that the United Nations Commission for the Investigation of War Crimes would be established with the cooperation of the United States. Likewise pledging just retribution was the Congressional Joint Resolution of March 11, 1943.

In November 1943 the momentous meeting of Roosevelt, Churchill and Stalin took place in Moscow. There on behalf of their governments and "speaking in the interest of the thirty-two United Nations", punishment of the guilty ones was promised. Then in sonorous Churchillian phrase the declaration warned:

> "Let those who have hitherto not imbrued their hands with innocent blood beware lest they join the ranks of the guilty, for most assuredly the three Allied powers will pursue them to the uttermost ends of the earth and will deliver them to their accusers in order that justice may be done."

These three met again at Yalta, in the Crimea, in February 1945, and made a further pledge: not only will the war criminals be punished but the Nazis will be rooted out from positions of influence in Germany. Then when the war was won, Truman, Atlee and Stalin met at Potsdam. Now the pledges were brought to full expression:

> "War Criminals and those who have participated in planning or carrying out Nazi enterprises involving or resulting in atrocities or war crimes shall be arrested and brought to judgment. . . . .
>
> "All members of the Nazi Party who have been more than nominal participants in its activities. . . . . shall be

removed from public and semi-public office, and from positions of responsibility in important private undertakings. Such persons shall be replaced by persons who, by their political and moral qualities, are deemed capable of assisting in developing genuine democratic institutions in Germany."

Such were the goals. Have they been achieved? ~~in the U. S. Zone?~~

What has happened since 1945? ~~What is the meaning of these recent news reports?~~

I.

At the outset there were serious and far-reaching problems to be solved, for nothing on this scale had ever been attempted before. Could every wrong be righted? Where should the trials be heard? Could they be held within a reasonable time? Which Nazi should be tried? Each one said, "Not me!" and piously pointed one finger towards a neighbor and another toward Hitler--now dead and safely beyond worldly retribution. Would it be enough to try only the leaders who had planned the war, the enslavement of conquered peoples, the plunder of their property and the deliberate and diabolical murder of millions? Yet, what about the thousands of "Little Men" in the SS, in the Gestapo, the Nazi Party?

Upon consideration, it was evident that there were four main catagories of war crimes to be dealt with: 1). There were the offenses against Allied Military personnel, the "conventional" war crimes, the violations of international conventions, such as mistreatment of prisoners of war, the Malmedy Massacre, and the murder of captured flyers who had bailed out of flaming planes. There were also the offenses in Germany against Allies--the operation of death camps. These cases could be handled by the Armies in the field in

military courts. 2) There were the localized atrocities, such as the destruction of Lidice, the mass murders in Poland and Russia, and other conquered countries. The perpetrators of these crimes could be sent back to the scene and tried by the local courts for violation of the laws of the particular country. Murder was murder everywhere. 3) There were the traitors, quislings and collaborators. Obviously, the countries they betrayed could handle them best. 4) Then there were the crimes which, as it was said, had no particular geographical location. These were the offenses of the leaders who planned the war and the atrocities. The trial and punishment of these men was regarded as an international problem and only an international court was considered to be the proper forum.

The United States had proposed to England, France, and Soviet Russia a specific plan for the formation of such an international tribunal. From this resulted a momentous legal document, the London Agreement of 1945 (a four power agreement which was later ratified by nineteen other nations), containing the Charter of the International Military Tribunal to be established in Germany for the trial of the major war criminals. The International Military Tribunal was to later describe the charter as embodying "the expression of International law existing at the time of its creation". Most notable was the catalogue of offenses therein, the essence of all of the learned treatises and treaties, never before set down so succinctly:

> (a) Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in 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: namely, violation of the laws or customs

of war. Such violations shall include, but not be limited to, murder, ill-treatment of or deportation to slave labour or for any other purpose of civilian population of or in occupation 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; namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."

With minor changes, this was incorporated into Law 10 of the Allied Control Council for Germany which was the law under which the "subsequent" Nurnberg cases were brought.

There had been a notable precendent for the idea of an international war crimestribunal, as well as for the trials before military courts of a single nation. The Treaty of Versailles at the end of World War I had provided that an Allied Tribunal might sit in judgment on Kaiser Wilhelm II "for a supreme offense against international morality and the sanctity of treaties" but the trial was never held, for the Kaiser had found sanctuary in Holland and that country refused to extradite him. The treaty also recognized the right of the Allies to try other German war criminals before

Allied Military Tribunals, thus affording a basis for the trials of the "little men" as well. Curiously enough, it was this last provision that led, not to Allied trials but to the farcical German exhibition in 1921 known as the Leipzig Trials. The memory of this shameful experience determined the Allies of 1945 to refuse to permit the Germans to try their own war criminals.

In 1921 when the Allies submitted a list of nearly 900 persons, and demanded their surrender for trial pursuant to the treaty, the Germans opposed it and instead suggested a compromise: they would try these war criminals themselves. The Allies agreed; afterall, they did not have custody of the men. Thereupon an abridged sample list of 45 was submitted but only 12 could be found! of these only 6 were convicted, and the others were not made to serve their short sentences. convicted? Two were allowed to "escape." The Allies were furious, but as a practical matter could do nothing.

But in 1945 things were different. The Allies had custody of the culprits, and international and zonal machinery was set up in Germany and procedures for extradition between Allies was established. Most important, the Charter had been adopted and the International Military Tribunal had been created. The U. S. member of this four-man court was former Attorney- general Francis Biddle, with U. S. Circuit Court Judge John J. Parker as his alternate in case of illness of absence from other causes. Other members were from England, (Lord Justice Lawrence) France, (Professor Donnedieu de Vabres) and the Soviet Union(Major General Nikitchenko, the only military member). The prosecution staff was also quadriparite, with the U. S. delegation headed by Justice Jackson(on leave from his Supreme Court post as Associate Justice). England had planned to have their Attorney-general,Sir David Maxwell Fyfe,head their pro-

secution team. However, the defeat of the Churchill government had resulted in his stepping down in favor of the new Attorney-general, Sir Hartley Shawcross. Nevertheless, the brilliant Sir David graciously agreed to serve as Deputy Prosecutor before the IMT. France was represented by M. Francois de Menthon and the Soviet Union by General R. A. Rudenko.

The trial commenced on November 20, 1945 and continued for nearly a year until August 31, 1946, when the judgment of the IMT was rendered. Adjudging twelve death sentences, three life imprisonment sentences and four sentences varying from ten to 20 years' imprisonment, and three acquittals, it also declared that groups within the following organizations were criminal in character (thus laying the foundation for the trials of their party members): the Leadership Corps of the Nazi Party, the SS (Die Schutzstaffeln Der Nationalsozialistichen Deutschen Arbeiterpartei) and the Gestapo (Die Geheime Staatspolizei); the SA (Die Sturmabteilungen Der N.S.D.A.P.), however, it declined to declare criminal and, with the Russian member dissenting, it made a like ruling in favor of the Reich Cabinet, the General Staff and the High Command.

Although a second international trial to involve German industrialists was favored by France and the Soviet Union, a lukewarm attitude was displayed by England. The U.S. had been willing to try them in the first trial but it opposed a second one on an international scale. Instead, the U.S. set up its own tribunals to try the "second rank" of the high Nazis, and during the period from October 1946 to April 1949 twelve lengthy trials were prosecuted in Nurnberg. Accused were 185 persons among whom 24 were sen-

tenced to death, 20 to life imprisonment, and 98 to prison terms ranging from 1½ to 25 years. Of the remainder, 35 were acquitted, 4 committed suicide, and 4 had proceedings dropped due to illness.

The largest war crimes operation in the U. S. Zone was not in Nurnberg, however, but was to be found in Dachau, a little community near Munich, Germany, proceeding under the supervision of the U. S. Army's Judge Advocate. In administration buildings of the former infamous Dachau concentration camp, the courtrooms were set up. The now cool crematorium ovens, the empty lethal gas chamber, the gallows, the savage dog kennels, the mass graves, the cynical motto, "Arbeit macht frei" in the wrought-iron gate to the horror barracks--all but a few yards from the courtrooms--made it impossible for anyone to forget the reason for the trials. The selection of this site for the proceedings was a fitting sequel which gave some small measure of consolation to the French and other Allied pilgrims who yearly jouneyed to the mass graves there. For these trials were concerned not with those high Nazis who had sat in their offices and planned the crimes but rather with those men whose hands were actually "imbrued with innocent blood." These were the men who were guilty of carrying out the orders from higher headquarters, and then added their own whit of sadism, identifying themselves completely with the whole evil program. These were the men who were guilty of the mistreatment and murders of Allied soldiers and flyers, of slave laborers, of concentration camp inmates.

The Dachau trials began within a month after VE Day and continued until the end of 1947. Within this period the prodigious number of 489 trials were held, involving 1672 defendents. Of this total, 1347 were finally convicted:288 death sentences were approved and by the end of 1949 all but 13 had been executed, 229 sentences to life imprisonment were approved, and 830 were given prison terms

varying from nine months to 35 years. The remaining 325 were either acquitted (256) or had their convictions set aside (69) by General Clay for lack of evidence.

More than one-half of the trials were concerned with offenses against American soldiers. To some extent efforts had been made even earlier to bring this type of offender to trial befroe the military courts during combat. However, the plan was largely abandoned because of the fear of retaliation through the execution of captured Allied soldiers by the Germans. The surrender ended this danger and the trials quickly commenced.

When it was foreseen that there would be as many national trials relating to a particular concentration camp as there would be nationalities of the inmates, it seemed more logical to hold one big trial for each camp. The Americans had the evidence and the leaders of the camps liberated by them and therefore agreed to also try these cases at Dachau. The interested nations, however, sent representatives to observe and assist in a liaison capacity.

Thus there were three separate war crimes court systems in the U.S. Zone, one international and two of the U.S. Justice Jackson's office, known as the Office of United States Chief of Counsel for Prosecution of Axis Criminality, was a purely American organization and a large staff had been assembled. It had developed a familiarity with its subject, it had files of evidence collected and it had large and spacious offices and equipment assigned to it--a great advantage in bombed-out Germany. When he returned to the Supreme Court it was anticipated that thousands of members of the SS and the Gestapo and other criminal organizations would yet have to be tried by the U.S. It was regarded as preferable

to let this organization assume those responsibilities for the War Crimes branch of the Judge Advocate's office (already embarked on the cases involving American soldiers and camp atrocities) did not appear geared for the mass production job that seemed to be looming ahead. However, as events developed, the U.S. ultimately abandoned the "membership trials", and the Office of Chief of Counsel began to concentrate on the prosecution of Nazi leaders instead.

The two separate American war crimes organizations presented some differences to the Germans, whereas one uniform system might have been more impressive. The scope of his cases and the singleness of his mission enabled the new Nurnberg Chief of Counsel(the youthful and able Brigadier General Telford Taylor) to display a more purposeful attitude towards exposing German guilt than was possible for the Occupation Army officers who were responsible for the Dachau trials (the late and well-beloved Brigadier General Edward C. Betts, succeeded on his death by Brigadier General (then Colonel) Claude B. Mickelwait, and later by Brigadier General (then Colonel) James L. Harbaugh, Jr.). These officers had other normal Judge Advocate duties as well, thus the brunt of the supervision fell to their Deputy (Colonel C. E. Straight).

Both operations were very large. At peak strength the twelve long "subsequent trials" in Nurnberg required the services of nearly 900 Americans and Allies and about as many more Germans. At Dachau, where nearly 500 shorter trials were held, there were also about 900 American and Allies on duty plus about 200 Germans.

In Nurnberg the thirty-two men who sat as Military Government judges (or as alternates) in three-man panels in the "subsequent trials" were all American civilians, drawn from the

ranks of prominent state court judges and attorneys, and had been especially requested to serve on these courts. On the other hand, the Dachau courts were staffed by some fifty Army officers, many of high rank, who happened to be on duty in Germany. They sat in three-man or five-man panels, depending upon the gravity of the offense. (Not mystifying to anyone familiar with Army terminology was the fact that the Nurnberg Military Government civilian-staffed courts were called "military" tribunals, whereas those at Dachau with military members were known as "military government" courts!)

The Nurnberg judges were required to state the reasons for their decisions (which they did in learned and precedent-making opinions) and no review thereof was authorized. Although the Commander-in-Chief retained the power to lessen the sentences, he had no occasion to. But in Dachau, conformably to military practice, no opinions were rendered but complete revision was permissible on review by General Clay assisted by his Judge Advocate and staff. Yet when he found what he considered to be error he could not order a new trial because of the Washington pressure to finish up with the program. Overwhelmed with petitions on behalf of the convicted ones (whose imaginations were now unrestrained and who felt that they had nothing to lose by complaining), and anxious that no injustice be charged to the American record, the reviewers became extremely critical. To resolve the doubtful cases without ordering a new trial, the rather unorthodox and makeshift practice grew up of reducing the sentences or commuting death sentences to life imprisonment. In the extremely doubtful cases an order of complete disapproval was entered and the men were freed. In this manner, General Clay altered 326 sentences out of 1416 convictions, including 69 which he cancelled altogether.

Ilse Koch was one who profited by this procedure and the Senate Committee which investigated her case thought the Judge Advocate had/become unduly influenced by the defense point of view, because tended to that is all he had before him. Another factor, less apparent, is the tendency of the Army to "equalize" punishments. Thus a low sentence for a given offense may sometimes mechanically bring down others of like nature.

The Nurnberg opinions are ~~being~~ published but unfortunately the historical value of the Dachau reviews has not been realized and they lie buried in Army files--a great loss to the development of international law.

II.

In thousands of pages of testimony and exhibits, the foul tale of cruelty and depravity has been set down in an enduring and uncontrovertible court record, to authenticate history. The decision to proceed with trials, instead of summary execution as some advocated, was the only course consistent with our standards of civilization, and the opportunity to eliminate all possible taint of propaganda from the reports of German activities was too valuable to forego. Once and for all the mirror would be held up to the German nation so that it might see what it had been, and so that all mankind might see and never forget. All could profit by the lesson.

So overwhelming was the proof, based largely upon captured German documents, that there was practically no denial of the facts. Some few Germans were even brave enough to go further and to admit them. Thus did Hans Frank, the Governor-General of Occupied Poland. So too did Bohle, the Chief of the Foreign Department of the Nazi Party. Frank, who ultimately was condemned to death by the IMT, had taken the stand in his own defense. Asked by his own counsel if he had ever participated in the destruction of Jews, he replied, that

although he personally had never installed or requested the installation of a concentration camp, nevertheless the responsibility must be his as a leader, as well as Hitler's:

> "It is my duty--my only duty, therefore, to answer your question with 'yes'. A thousand years will pass and this guilt of Germany will still not be erased."

Bohle, one of the defendants in the "Ministries Case" also candidly assumed the responsibility of leadership; only thus could the blot on the German name be cleared:

> "We know that a low estimate of human life and carelessness to human misery is not and never has been a trait of the German character, and for that very reason I think that we should frankly admit the atrocities that have been committed and that have defiled the German name in the world. I do not think that we should attempt to vindicate our own national honor solely by referring to crimes and misdeeds committed by others, some of which are undoubtedly on a par with what National Socialism is accused of."

But even without the confessions the record stands unchallengeable. In an opinion of nearly two hundred pages the IMT traced the rise of Nazi power and its choice of the path of agression. It showed the basis in international law for the London Charter which established the tribunal and then in swift analysis, avoiding mass condemnations, it established the part each defendant played. These men must be punished not only because of their offenses against the Allies, but also because of the wrongs they had done to their own people--deceiving them and bringing death and ruin to them. To determine complicity of all these, was the function of the Nurn-

berg trials. On the other hand, the degree of participation of the "little men", the village officials, the local police, those who engaged in the mistreatment of Allied soldiers, and those who were responsible for the cruelties of the concentration camps, was determined by the Dachau courts.

At the top were the planners of the war--the military and civilian leaders. About them were the diplomats and civilian functionaries of the government, who implemented the plans. Here were the chiefs of manpower and production and armament--men who were charged with the building up and maintenance of the economy geared for war. Assisting them were the financiers, the bankers, the industrialists. Under the cover of the war the Nazis were enabled to indulge their insane obsession concerning the Jews, not only in Germany as they had been doing before the war, but now in all of Europe. To carry on this secondary "war" to its "final solution" as they called it, the SS and affiliated organizations were available. They operated the concentration camps, the gas chambers, and they sponsored the units that roamed through Europe with the specific mission to shoot down every Jew they found. They also carried out the program which had for its goal the destruction of the Polish people. While awaiting death the camp inmates were hired out to the industrialists, others were placed at the disposal of the SS doctors for cruel, fatal and worthless experiments. Then, to leave no one to whom suffering humanity could appeal, Justice herself was perverted to the ends of Nazi ideology.

Upon the death of Hitler, the remaining chief destroyer of the world's peace was Goering, his deputy. Still cocky, assured and unrepentent, he was the leading defendant before the IMT. He heard himself sentenced to be hanged: "His guilt is unique in its enormity. The record discloses no excuses for this man." Then he committed suicide.

Next in line was Hess. He acted queerly at the trial, wild, staring eyes, his outstanding characteristics. But he was examined by psychiatrists at the court's request and was held to be sane. Thus the court felt free to pass upon his guilt and declared him to have been an active supporter of preparations for war and an informed and willing participant in German aggression against Austria, but not responsible, however, for the atrocities charged to him. Although the Russian member of the court disagreed and voted for death, he was sentenced to life imprisonment.

Close to Hitler was Bormann, his secretary, unaccounted for at the trial and tried in absentia. The evidence against him, the court felt, did not show that he attended the war conferences and therefore he was not to be held guilty of conspiring to wage aggressive war. But it was determined that he had been active in the persecution of the Christian churches and the Jews; that he participated in the plans for enslavement and annihilation of the population of the occupied territories in Russia; that he signed the order turning over prisoners of war to the SS; and that he was responsible for the lynching of Allied airmen inasmuch as he prohibited any police or court action against persons who took part in such lynchings. He was sentenced to be hanged, but was never found. Later, he was reported dead by his brother.

Rosenberg, also sentenced to death, was Hitler's deputy for spiritual and ideological training and the leading spirit for the neo-pagan movement which was to dispense with Christianity as the dominant religion of Europe. But he was also high in policy making circles and was minister for the occupied territories of Eastern Europe. He had

". . . . . helped to formulate the policies of Germanization, exploitation, forced labor, extermination of Jews

and opponents of Nazi rule, and he set up the administration which carried them out."

Not the least of his exploits was his activity as organizer and director of the "Einsatzstab Rosenberg", the organization which plundered museums and libraries, confiscated art treasures and collections and pillaged private homes.

Goebbels was dead, a suicide of the last days of the war, but representing the propaganda machine which he headed, were two men, Streicher and Fritzsche. Streicher was perhaps the most loathsome, personally as well as morally, of the defendants in the IMT dock. As early as 1938, it found, Streicher had begun to call for the annihilation of the Jewish people through his newspaper, "Der Stuermer" and this continued throughout the war;

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

For his crimes the court decreed the death penalty. But Fritzsche came off considerably better; he was completely acquitted.

The acquittal of Fritzsche has been a source of puzzlement to many. Foremost among them was the Soviet member of the court, who dissented. Although a member of the propaganda ministry he was best known as a radio commentator. As such, the court did not believe that he was high enough in the hierarchy to be held for guilty participation. However, "Fritzsche sometimes made strong statements of a propagandistic nature in his broadcasts. But the Tribunal is not prepared to hold that they were intended to incite the German people to commit atrocities on conquered peoples.....

> His aim was rather to arouse popular sentiment in support of Hitler and the German war effort."

The fine line between incitement to kill and merely arousing support of Hitler (who was committed to a course of killing) has not been easy to discern. Perhaps the difference was conceived to depend upon intent; perhaps Streicher's intent was undiluted evil, whereas Fritzsche was just doing a job, with little thought of ultimate goals. This view finds some support from the fact that in the later "Ministries Case", Fritzsche's superior in the propaganda ministry, Deitrich, was on trial, and by contrast his complicity brought a sentence of imprisonment for seven years.

Von Schirach had been the "fair-haired boy" of the Nazi Party. Handsome, able, and a typical "Aryan", he rose to the cabinet post of Leader of Youth in the German Reich. However, as such he had not

> ". . . . . participated in the planning or preparation of any of the wars of aggression."

But he had also been Gauleiter of Vienna. There, while he had not originated the plan of deporting Jews from Vienna, he carried out the existing policy. "He knew that the best the Jews could hope for was a miserable existence in the ghettos of the east. Bulletins describing the Jewish exterminations were in his office." Thus on this and other grounds he was found guilty and sentenced to twenty years' imprisonment.

III.

Among Hitler's ministers standing before the IMT were von Neurath and von Ribbentrop, his successive foreign ministers, and von Papen, his minister to Austria. Whereas other diplomats were tried in the "subsequent" United States handled "Ministries Case". Von Neurath had served as "Protector" for Bohemia and Moravia, in western

Czecho-Slovakia, "when the administration of this territory played an important role in the wars of aggression which Germany was waging in the east, knowing that war crimes and crimes against humanity were being committed under his authority." However, in mitigation, was the fact that when Hitler sent the merciless Heydrich in to combat Czech resistence, von Neurath tried to resign. This resignation was not accepted so he went on leave and refused to act any longer. These factors impelled the court to sentence him to imprisonment for only fifteen years.

Von Ribbentrop, Hitler's chief foreign policy adviser, was sentenced to death. His participation in Nazi crimes was thought to be complete. He had

> "participated in all of the Nazi aggressions from the occupation of Austria to the invasion of the Soviet Union. . . . . In the administration of territories over which Germany acquired control by illegal invasion, von Ribbentrop also assisted in carrying out criminal policies particularly those involving the extermination of the Jews...It was because Hitler's policy and plans coincided with his own ideas that von Ribbentrop served him so willingly to the end."

Von Papen was also in complete sympathy with the Nazi creed. So much so that it was he who was sent as minister to Austria to undermine its regime and prepare the way for the Anschluss. But although it was clear that he laid the groundwork for annexation, a majority of the court did not believe that he had gone so far as to plan aggressive war as a means of accomplishing it. Causing great surprise, and with the Soviet member dissenting, the Tribunal acquitted him.

The "Ministries Case", the last, longest and largest of the "subsequent trials" was concerned with high-ranking diplomats and government officials of the next level below those just mentioned. Chief among them was von Weizsaecker, a career diplomat. Among other things he had been von Ribbentrop's deputy in the foreign office, the minister to Switzerland, and ambassador to the Vatican. To his support came friendly evidence from these sources. In Switzerland, where he has relatives, there was something of an inspired campaign in his behalf, bitterly attacking the entire basis of the war crimes trials. Not withstanding, the evidence convinced a majority of the court of his guilty participation in the unlawful invasion and occupation of Bohemia and Moravia and of complicity in the deportation of Jews from several European countries to extermination camps. He was sentenced to seven years' imprisonment. This brought renewed protests, now from England, and the U.S. Senator Mc Carthy vehemently disparaged the intelligence of a court which could not see that von Weizsaecker had really been the Allies' "spy" and not their enemy!

Convicted with him were the diplomats, Keppler, Woermann, and Lammers who were given sentences of ten, seven, and twenty years respectively. Convicted also was von Moyland (the successor to von Weiszaecker in the Foreign Office), Ritter (the Ambassador for Special Assignments) and Bohle (Chief of the Foreign Department of the Nazi Party) who were given sentences of seven, four, and five years, respectively. One of the heaviest sentences in this case--twenty years imprisonment--was given Veesenmayer, the Minister to Hungary, who was found to be deeply implicated in the deportation of Hungarian Jews to concentration camps. Acquitted were von Erdmannsdorff (Ministerial Director of the Political Division of the Foreign

Office), and Meissner (Chief of the Presidential Chancellory). Found guilty, but not required to serve more time following the trial, because of illness, was Stuckart, the State Secretary of the Ministry of the Interior.

To the majority opinion a strong dissent was filed on all but two counts by the third member. He would have acquitted most of the defendants, whereas, the majority could see no difference in culpability between those who issued the orders and those who carried them out in the concentration camps and elsewhere: if those who carried out orders and committed atrocities were convicted and punished

> "then those who in the comparative quiet and peace of ministerial departments aided the campaign by drafting the necessary decrees, regulations, and directives for its execution are likewise guilty."

IV.

Although it was hoped that the judgments of history and the judgments of Justice would coincide in Nurnberg, this may not have happened in every instance. History may assess guilt in a moral sense, based upon the influence of men, upon their ideas, upon the place they occupy in their nations. Justice, however, is much more prosaic for she judges only according to deeds. What did this man do? That is always the question. Consequently the trials have not satisfied everyone, for the courts were looking for overt acts. When not established, the defendants were acquitted or received relatively light sentences.

This circumstance has resulted in a curious paradox. Although Germany has been universally condemned for her militarism, her military men have come off relatively well on the charges of aggression. Only four military men were before the International

Military Tribunal: Keitel, Jodl, Doenitz and Raeder. They were all found guilty of waging aggressive war and (except for Doenitz) also of conspiring to wage it. As for the members of the General Staff and High Command, the court thought that many of them should be tried for it was they who have been

> ". . . . .responsible in large measure for the miseries and suffering that have fallen on millions of men, women, and children. They have been a disgrace to the honorable profession of arms. Without their military guidance the aggressive ambitions of Hitler and his fellow Nazis would have been academic and sterile. . . . ."

Despite these strong words the court refused to go further and declare these staffs, as such, to be criminal groups. The view prevailed that most high officers were just good public servants and not conspirators planning to ruin the peace of the world. They received ordered to fight, they implemented them, they passed them down, but they did not conceive the policies of invasion, devastation and killing. True, they may have drawn up plans, but all armies have plans. There is nothing wrong in that:

> "According to the evidence, their planning at staff level, the constant conferences between staff officers and field commanders, their operational technique in the field and at headquarters was much the same as that of the armies, navies and air forces of all other countries. . . . .To derive from this pattern of their activities the existence of an association or group does not, in the opinion of the Tribunal, logically follow. On such a

theory the top commanders of every other nation are just such an association rather than what they actually are, an aggregation of military men, a number of individuals who happen at a given period of time to hold the high-ranking military positions."

With this point of view paramount the outcome could be foreseen if any of these other "responsible" but "disgraced" military staff officers were to be charged with crimes against peace. Nevertheless, fourteen of them were so charged in the "High Command Case" but the American court ruled:

"Under the record we find that the defendants were not on the policy level and are not guilty under Count I of the Indictment."

Even Allied military men were relieved. They wanted no principle established that would interfere with staff planning, to them no more aggressive than target practice.

Nevertheless, the four military leaders convicted by the IMT were really top level and in the policy making field. Two were sentenced to death, Keitel and Jodl. Keitel, who was the Chief of the High Command, was found to have participated in the major military planning of the various attacks against the countries overrun by the Nazis; to have issued the orders that Allied paratroopers were to be turned over to the SD and Allied commandos "slaughtered to the last man" but not treated as prisoners of war; and to have had signed the notorious "Nacht und Nebel" decree--the "Night and Fog" order that authorized the German occupation armies to deliver resistance groups to the Gestapo to be shipped to Germany. Pursuant to this order thousands upon thousands were spirited away in the "night and fog", to be made slave labor, with never a word to their

terrified familes, and most, never to return.

Of Jodl the court said:

" In the strict military sense, Jodl was the actual planner of the war and responsible in large measure for the strategy and conduct of operations."

Although his military superior was Keitel, he reported directly to Hitler on operational matters. To the clear proof he pleaded: as a soldier he had to obey orders. This excuse the court rejected:

"There is nothing in mitigation. Participation in such crimes as these have never been required of any soldier and he cannot now shield himself behind a mythical requirement of soldierly obedience at all costs as his excuse for commission of these crimes."

For Raeder, life imprisonment, and for Doenitz, a sentence of imprisonment for ten years were deemed adequate punishment. They were both navy men; Doenitz had followed Raeder as head of the German navy and at the time of the German debacle and Hitler's suicide, had become the Head of State for the one week between 1 May 1945 and unconditional surrender. But it was his conduct as Commander-in-Chief of the navy and leader of the U-boat arm, that was brought into question at the trial. His sinking of neutral merchant vessels was declared to be a violation of treaty but the Tribunal exonerated him for the sinking of British armed merchant ships. Admiral Nimitz of the U.S. Navy had testified by deposition that the United States had carried on unrestricted warfare against enemy shipping in the Pacific from the first day in the war. Hence, the Germans could not be punished for doing likewise. This same defense was accorded Raeder. However, on other aspects of the case, it was established that he had been one of the select few present

when the attack on Poland was planned and it had been he who had first conceived of the idea of an invasion of Norway.

Although in the "High Command Case" the field marshal, Von Leeb, and the thirteen other officers were exonerated of the charges of waging aggressive war, some of the other charges of war crimes were sustained. Such offenses as mistreatment of prisoners of war and of the conquered civilian populations, the carrying out of the order to kill Allied commandos without quarter, the execution of all "commissars" accompanying the Soviet troops, summary execution, without trial, of civilians accused of offenses against German troops, arrests pursuant to the "Night and Fog" decree, and violations of the rules of land warfare generally, were proved against these defendants in varying degree. Generals Reinicke, head of the prisoner of war department, and Warlimont, the Wehrmacht Deputy Chief of Staff, were sentenced to life imprisonment. Generals von Kuechler, von Salmuth, and von Roques were given twenty years, Hoth and Reinhardt fifteen years, and the remainder were ordered to serve terms of imprisonment varying from three to eight years. In imposing only a three year sentence upon von Leeb the court said:

"We believe that there is much to be said for the defendant von Leeb by way of mitigation. He was not a friend or follower of the Nazi Party or its ideology. He was a soldier and engaged in a stupendous campaign with a responsibility for hundreds of thousands of soldiers, and a large indigenous population spread over a vast area. It is not without significance that no criminal order has been introduced in evidence which bears his signature or the stamp of his approval."

But absence of one's name from a criminal order was no absolute indication of non-culpability. The lawyer who had merely drafted some of them at the direction of his superiors was sentenced to imprisonment for seven years. Such was the fate of General Lehmann, the Judge Advocate General of the Wehrmacht, for his hand was seen in the "Night and Fog" decree, among others.

The other big case involving military men did not even refer to the offense of waging aggressive war. In this "Hostage Case" the principal charges related to war crimes committed in the course of one Norwegian campaign and during the German occupation of Yugoslavia, Albania and Greece. Although the court's decision aroused much criticism (Norway protested its justification of General Rendulic's savage devastation of Finnmark in 1944 and the Balkan countries were bitterly angered by its conclusion that execution of many of its partisans had been legal), in it was revealed the full brutality of the German occupation armies.

The Germans may well give thanks that they ~~are~~ experiencing ED and Allied occupation instead of one according to their own techniques, which the court described as follows:

> "The evidence in this case recites a record of killing and destruction seldom exceeded in modern history..... Mass shootings of the innocent population, deportations of public and private property, not only in Yugoslavia and Greece but in many other countries as well, lend credit to the assertion that terrorism and intimidation was the accepted solution to any and all opposition to the German will..... The guilt of the German occupation forces is not only proven beyond a reasonable doubt but it casts a pall of shame upon a once highly respected nation and its people."

This type of occupation the Greeks and Yugoslavs were determined to resist. Their guerrillas were brave, resourceful, and effective. Among them were Tito and his partisans. When Field Marshal List appealed to Berlin for more troops to subjugate them he received, instead of troops, new orders from Keitel: stamp them out with terrorism--kill 100 for 1:

> "One must keep in mind that a human life frequently counts for naught in the affected countries and a deterring effect can only be achieved by unusual severity. In such a case the death penalty for 50 to 100 communists must in general be deemed appropriate as retaliation for the life of a German soldier."

Shocking though the facts were, this court was a court of law. Were the Germans justified under present law for this conduct? To arrive at an answer the court entered upon a remarkably clear and dispassionate (some think, reactionary) discussion of the legal problems involved. Although it called for a revision of the law it reached the conclusion that under existing rules

> "It cannot be denied that the shooting of hostages or reprisal prisoners may under certain circumstances be justified as a last resort in procuring peace and tranquility in occupied territory and has the effect of strengthening the position of law abiding occupants. The fact that the practice has been tortured beyond recognition by illegal and inhuman application cannot justify its prohibition by judicial fiat."

Applying the principles it decided that some of the executions were justified although many more were not. But these fine-spun distinctions seemed outrageous to all countries where

recourse to partisan warfare was the only way in which they could resist. So legalistic were they that the court in the "High Command"/(Which followed the "Hostage Case" in point of time) carefully avoided approving them, and in British circles they were actually criticised.

Then the court turned to the Finnmark campaign because it was concerned with the activities of General Rendulic, who after serving in the Balkans under Field Marshal List was transferred to Norway in 1944. There, pursued by the Russians, he adopted a "scorched earth" policy to delay them, destroying villages, bridges, highways and ports. But the Russians did not press the attack, and all these precautions later seemed unnecessary. Although Rendulic was found guilty on other charges and sentenced to twenty years imprisonment, on this particular charge he was exonerated. The court believed that

> ". . . . . the conditions as they appeared to the defendant at the time were sufficient, upon which he could honestly conclude that urgent military necessity warranted the decision made. This being true, the defendant may have erred in the exercise of his judgment but he was was guilty of no criminal act."

Chief among the twelve indicted in this case was Field Marshal List, commander of the invasion troops in Greece and Yugoslavia. Named also was his successor, General Kuntze. Both were held responsible for the excesses and were sentenced to life imprisonment. Six other generals were found guilty of various war crimes and given sentences varying from seven to twenty years imprisonment, and two were acquitted because it was believed that they lacked "command authority". Two other accused were not tried. Boehme

committed suicide before trial and von Weichs was too sick and was excused during the trial.

V.

It is a truism that modern warfare requires the full economic power of a nation. Without its help there can be no real military achievement. To mobilize the economic life of the German nation the financiers and industrialists were at hand and ready--awaiting a beckon from Schacht. He had been an active Nazi long before the Party's grasp of power in 1933. Thereafter he played an important role in the vigorous rearmament program which was adopted, but by 1936 he began to be superseded by Goering when it became evident that Hitler regarded Schacht's policies as too conservative. Thus he withdrew as Minister of Economics and Plenipotentiary-general for War Economy in 1937, as President of the Reichsbank in 1939, and in 1943 Hitler dismissed him as Minister without Portfolio because of his "whole attitude during the present fateful fight of the German Nation." Schacht later explained that he had participated in plans to rid Germany of Hitler. In any event, he was arrested in 1944 and confined in a concentration camp until the war's end.

Schacht was charged before the IMT only with conspiring to commit crimes against peace and participating in the planning and waging of the wars of aggression. Of these charges he was acquitted and went free. That he was one of the chief architects of Germany's rapid rearmament was abundantly clear. "But", said the court,

> "rearmament of itself is not criminal under the Charter. To be a crime against peace under Article 6 of the Charter it must be shown that Schacht carried out this rearmament as part of the Nazi plans to wage aggressive war.

". . . The case against Schacht therefore depends on the inference that Schacht did in fact know of the Nazi aggressive plans. On this all important question evidence has been given for the prosecution, and a considerable volume of evidence for the defense. The Tribunal has considered the whole of this evidence with great care, and comes to the conclusion that this necessary inference has not been established beyond a reasonable doubt."

In other words, although Schacht may have helped forge the weapon, it was doubtful if he helped to point it.

Not only did the Russian member of the court protest the acquittal but a large portion of the German population did also. If a man so closely connected with the Nazi party could be acquitted of all complicity then how could one justifiably hold the "small fry" guilty? Denazification trials were just getting under way and many visualized themselves punished while Schacht was free. This challenge the denazification authorities seized, and charges were filed against him, but after several years of farcical proceedings nothing happened to Schacht.

Not so fortunate was Funk, the man who followed Schacht as Minister of Economics and President of the Reichsbank. One of the things he had done was to work out an arrangement with the SS that the bank was to receive gold, jewels and currency from it with no questions asked. Consequently, the property of the concentration camp victims began to flow into the Reichsbank. In sentencing him to life imprisonment, the court regarded as a mitigating circumstance the fact that he was never a dominant figure in the various programs in which he participated.

Other financial men, later tried in the "Ministries Case" were von Krosigk (Minister of Finance) Puhl, (Vice-president of the Reichsbank Board of Directors) and Rasche (head of the Dresdner Bank), who were convicted and sentenced to ten, five and seven years imprisonment, respectively. Rasche was held to have participated actively, not only in the confiscation of Czech banks and industries, but also in the "Aryanization" program in Czecho-Slovakia and Holland. However, for his help given to the slave labor program by the loan of money he was not considered culpable:

> "Loans of sale of commodities to be used in unlawful enterprise may well be condemned from a moral standpoint and reflect no credit on the part of the lender or seller in either case, but the transaction can hardly be said to be a crime."

VI.

Money was ready to finance the war, but manpower was needed badly. Hardly a man could be spared from the military service so other sources must be found. By fair means or foul, they were found. Speer, who was Hitler's personal architect and confidant, was in charge of military and civilian production. He would estimate the number of laborers needed and Sauckel would order them dragged in by the millions. Although Speer was not directly concerned with the cruelties of the program, he knew the details. Nevertheless, the IMT saw mitigating circumstances in his case, for by planning to keep certain industries working in the occupied countries, he kept many laborers in their home communities. Then, in the closing days of the war, he had had the courage to tell Hitler that the war was lost and urged him to take steps to prevent the senseless destruction of production. Not withstanding, his complicity brought a sentence of twenty years' imprisonment. But

of the separate charges of waging aggressive war he was acquitted. The court's comments on this phase foreshadowed the difficulties of proving a case against the Nazi industrialists:

> "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 engaging in the common plan to wage aggressive war as charged. . . . ."

In Sauckel's case there was no mitigation. Associated with slave labor procurement entirely, in 1942 he was appointed Plenipotentiary-general for the Utilization of Labor. The IMT found that he had instituted "a program which involved deportation for slave labor of more than five million human beings, many of them under terrible conditions of cruelty and suffering." Although he asserted that foreign workers were treated humanely and that the conditions in which they lived were good, the court found that

> "the conscription of labor was accomplished in many cases by drastic and violent methods. The 'mistakes and blunders' were on a very great scale. Manhunts took place in the streets, at motion picture houses, even at churches and at night in private houses. Houses were sometimes burnt down, and the families taken as hostages. . . . ."

And the horrors of the camps were preordained in the light of his instructions:

> "All the men must be fed, sheltered, and treated in such a way as to exploit them to the highest possible extent, at the lowest conceivable degree of expenditure."

He was sentenced to death.

With Speer on the Central Planning Board was the Luftwaffe Field Marshal, Erhard Milch. For his participation in the slave labor program he was sentenced to life imprisonment in the first "subsequent trial". Also on the Central Planning Board was Kehrl, its Chief Planning Officer. He and several other officials in the field of production planning were tried in the subsequent "Ministries Case" and found guilty of participation in the slave labor program. Kehrl, Koerner (Goering's Deputy under the Four-Year Plan), and Pleigner (Chairman of the Reich Coal Association) were all sentenced to life imprisonment. Darre, (Minister for Food and Agriculture) was sentenced to seven years imprisonment for his part in the atrocities and the plundering as well as membership in a criminal organization.

VII.

The slave labor having been recruited, they and the concentration camp inmates were put to work in the great German factories. Were not the industrialists responsible for their participation in this program? They participated in the economic plunder of the occupied countries. They also had their agents throughout the world, acting as eyes and ears of the Nazi Party, and critical students of Germany had often pointed to the inordinately predominant role played by her industrialists in war planning. There were strong grounds for believing that more than a relationship of buyer and seller existed between the government and the armament makers; there was the suspicion that the sellers actually helped to plan aggression.

Although all of German industry could not be haled into court, the leading officials of three large firms were called before three separate "subsequent" tribunals in three distinct cases. In the "Flick Case" the steel magnate, Friedrich Flick, and five

of his leading officials were in the dock. In the "Farben Case" twenty-three of the officials of the giant, world-wide I.G. Farbenindustrie chemical firm were charged. In the "Krupp Case" the brains and master-mind of the great armament firm, Gustav Krupp, was still absent on account of illness. In his place appeared his son, Alfried, and eleven other top officials. In each case the principal charges were similar: plunder and spoliation of property in the invaded countries, participation in the use of and ill-treatment of slave labor, concentration camp inmates and prisoners of war, and planning and waging wars of aggression. On this last point, in the Krupp and Farben cases, even as in those of the military men, the judgments of history may not completely coincide with those of the courts. These industrialists were cleared of this charge because the courts thought that they had not been informed of Hitler's warlike intentions when they were asked to produce armaments and also rubber, gasoline, ammunition and poison gas in quantities far surpassing any conceivable defensive needs! It may be surmised that these judges silently looked over their shoulders at U.S. industrial production and mobilization plans and thought they perceived a similarity. Regrettably, the real difference--the difference of a spirit--could not be captured in legal terms.

In the IMT case it had been established that for each country invaded the Germans had a definite plan to convert its industry to German control and ownership. This was brought into sharper focus in the later trials. The court in the "Krupp Case" graphically described the process:

> "This huge octopus, the Krupp firm, with its body at Essen, swiftly unfolded one of its tentacles behind each

new aggressive push of the Wehrmacht and sucked back into Germany much that could be of value to Germany's war effort and to the Krupp firm in particular."

As for participation in the planning for the war, no circumstance seemed more clear to the prosecution than that old Gustav Krupp had decided to evade the disarmament provisions of the Treaty of Versailles from the very beginning. He had later publicly confessed to as much in 1941. But the court remembered what the IMT had said: "Rearmament in itself is not criminal." Furthermore, Hitler had not revealed his secret war plans to the Krupp people. Just as the whole world had been deceived by Hitler, the Krupps had right to be deceived also! It was even quite possible to view Krupp's decision as not preparation for war but just good business:

> "Considered objectively and in the proper context, it is at least plausible that Gustav Krupp's decision made in 1919 was a calculated business risk. Here was a man faced with the loss of a large part of what doubtless was a profitable business that had been built up over a large period of years. . . . .When in 1933, his calculation proved to be correct, the Krupp firm was ready to begin the production of arms at once. . . . ."

In the "Farben Case" the court viewed the firm's avid cooperation as patriotism, not planning to wage aggressive war:

> "We would not require the citizen, at the risk of becoming a criminal under the rules of international justice, to decide that his country has become an aggressor and that he must lay aside his patriotism, the loyalty to his homeland, and the defense of his own fireside at the risk of being adjudged guilty of crimes against

peace on the one hand, or of becoming a traitor to his country on the other, if he makes an erroneous decision based upon facts of which he has but vague knowledge."

However, in the Farben Case, one judge, Paul M. Hebert, Dean of the Louisiana State University Law School, had his doubts. In a separate opinion he said:

> " The issues of fact are truly so close as to cause genuine concern as to whether or not justice has actually been done because of the enormous and indispensable role these defendants were shown to have played in the building of the war machine which made Hitler's aggressions possible."

Farben was also charged with complicity in the preparation and sale of the death gas used in the concentration camps, but the court concluded that neither the volume of production, nor the fact that large quantities were consigned to concentration camps, were in themselves sufficient to impute criminal responsibility. Farben was entitled to think it was only used as an insecticide! A less naive view was taken by a British war crimes court which imposed death sentences on two members of a gas supply firm for similar activities.

But before death in the camps there was the squeezing out of the last spark of human energy in these great industries. All of the sordid details of this process were shown to the judges in the industrialist cases. The prosecution demanded, should not the industrialists who used this illegal labor source in this illegal manner be punished too? In the Flick and Farben cases the court thought not: these business men had been too

frightened to do otherwise than they did. They lived in the Reich, under strict and detailed orders; when the government said to use slave labor, they had no choice. They did not like to use it but they were forced to; had they refused they themselves might be punished, so they just accepted the situation. Consequently, thousands upon thousands of men, women, and even children, were worked to death in their factories. Yet this version seemed persuasive to the courts hearing the Flick and Farben cases. Said the Flick court (in language later quoted with approval by the Farben court):

> "This Tribunal might be reproached for wreaking vengeance rather than administering justice if it were to declare as unavailable to defendants the defense of necessity here urged in their behalf. . . ."

As for the Krupp court, whatever its naivete in the field of planning aggressive war, here it was on firmer ground. It repudiated such apologetic reasoning--no one was "forcing" the powerful Krupp people to do anything, what they did they did willingly, even "ardently":

> "Assuming for the present purposes the existence of the tyrannical and oppressive regime of the Third Reich which is relied upon as basis for the application of the rule of necessity, the competent and credible evidence leaves no doubt that in committing the acts here charged as crimes , the guilty individuals were not acting under compulsion or coercion exerted by the Reich authorities within the meaning of the law of necessity."

The possible loss of the plant, or the officials' loss of their jobs, or the possible internment in a concentration camp, were not threats sufficient to justify this criminal use of slave labor.

To the prosecutors of these cases the sentences were disappointing. Almost apologetically the court sentenced Flick

to imprisonment for seven years and his principal associate, Steinbrinck, for five years, and another official for two and one-half years. Three others it acquitted. In the "Farben Case" thirteen officials were sentenced to imprisonment for terms varying from one and one-half to seven years. Ten defendants were acquitted. The Krupp court, less impressed with the helplessness of such men, sentenced Alfried Krupp and two other men to imprisonment for twelve years, and eight others to terms varying from two years and ten months to ten years. In addition, the forfeiture of all of Krupp's property was ordered. Only one was acquitted.

VIII.

The evil in the Nazi spirit found free rein in the SS. This organization was imbued with a fanatical belief in German superiority and in the inferiority of all other peoples. With such motivation it was not hard for it to embark upon a course of murder and brutality unparalleled in any age. Well aware that his crimes as head of the organization would merit no less than a death sentence, Himmler, its guiding spirit, committed suicide when captured in 1945. Originally it was an elite section of the storm troopers, organized by Hitler in 1925 ostensibly to protect his speakers at public meetings. By 1939 it had become a vast organization, with its work subdivided into twelve main offices and with over a half million men in the field under the tactical control of the army. The IMT declared it to be a criminal organization, holding that

> "The SS was utilized for purposes which were criminal under the Charter involving the persecution and extermination of the Jews, brutalities and killings in concentration camps, excesses in the administration of occupied territories, the administration of the slave

labor program and the mistreatment and murder of prisoners of war."

Dealing with some of these purposes were the "subsequent trials" of the "Einsatzgruppen Case", the "Pohl Case", the "Medical Case" and the "RUSHA Case".

The most important of the twelve branches of the SS were the Reich Security Head Office (RSHA) and the Economic and Administrative Department (WVHA). After Heydrich was assassinated in Czecho-Slovakia and the crime of Lidice perpetrated in his memory, Kaltenbrunner was designated as head of the Security Office. Although he denied his signature on many of the orders issued by the RSHA and pleaded that he seldom knew what was going on, the IMT refused to believe him and sentenced him to death.

So vast an operation as the concentration camp system obviously required a huge administrative staff. Although the doomed inmates may have been starved, their guards certainly had to have their regular meals and warm clothing and barracks. Someone had to supervise the building of the gas chambers and crematoria. Someone had to keep accounts of the gold teeth and jewelry taken from those massacred. This was the function of the WVHA. It administered the camps and the mines, quarries and factories operated by the SS in conjunction with the camps. In the "Pohl Case" eighteen of the SS officials who headed the various offices in the organization were charged with criminal responsibility for the murders and other acts committed in the camps and with membership in the SS, a criminal organization. This case also brought to the fore the problem of the complicity of the bureaucrats who sat miles away from the horrors, who were just administrators and bookkeepers. Could their distance and physical non-involvement

in the atrocities exculpate them? The court decided that it could not and sentenced three of the defendants to death and twelve to prison terms varying from ten years to life. Three were acquitted.

Pohl, the chief of the WVHA, was sentenced to death for his complicity in the operation of the camp system. Those in positions of leadership must bear the responsibility for the work of their organization:

> "The fact th at Pohl himself did not actually transport the stolen goods to the Reich or did not himself remove the gold from the teeth of dead inmates, does not exculpate him. This was a broad criminal program, requiring the cooperation of many persons, and Pohl's part was to conserve and account for the loot. Having knowledge of the illegal purposes of the action and of the crimes which accompanied it, his active participation even in the after-phases of the Action make him particeps criminis in the whole affair. . . . ."

But the fact that a man is connected with the camp system does not of itself bring all of the crimes on his head. There must be some relationship between his position and the offenses with which he is charged with complicity. This was brought out in the case of Frank, the Chief Deputy of Pohl:

"Any participation of Frank's was post facto participation and was confined entirely to the distribution of property previously seized by others. Unquestionably this makes him a participant in the criminal conversion of the chattels, but not in the murders which preceded the confiscation."

Descending down the chain of command of the SS, at the bottom, under the jurisdiction of the WVHA, were the concentration

camps themselves. The details of these operations have become all too well known since Allied troops overran them in 1945 and were struck dumb by what they found. Only the Einsatzgruppen massacres can remotely approach the cold, callous bestiality of these murders.

But not all were killed immediately. If healthy, their strength was utilized until lost through starvation and ill-treatment. Then to the extermination chambers. The American judges tried to gain some insight into the German motivations, for despite the mountains of evidence there appeared no general feeling of guilt or regret or repentance. One such effort is seen in the "Pohl Case":

> "The concept that slavery is criminal per se does not enter into their thinking. Their attitude may be summarized thus: 'We fed and clothed and housed those prisoners as best we could. If they were hungry and cold, so were the Germans. If they had to work long hours under trying conditions, so did the Germans. What is wrong in that?' When it is explained that the Germans were free men working in their own homeland for their own country, they fail to see any distinction. The electrically charged wire, the armed guards, the vicious dogs, the sentinel towers--all those are blandly explained by saying, 'Why of course. Otherwise the inmates would have run away.' They simply cannot realize that the most precious word in any language is'liberty". . . . ."

IX.

In the first frenzy of liberation many of the inmates ran amok in their desire to avenge themselves on their torturers. Thus some camp guards were summarily executed. However, the Allied

troops arrested all of the others they could find and ultimately proceedings were commenced against them in the Dachau courts. Altogether more than 175 of these atrocity trials were held during 1945, 1946 and 1947 involving hundreds of members of the camp staffs. Many were found guilty. Many were not. Many, against whom no witnesses could be found, were not even tried.

The policy of the United States Army was to try staff members of every camp it had liberated. Thus it was concerned with Dachau, Flossenburg, Buchenwald, Mauthausen, Nordhausen, and Muehldorf camps together with their respective sub-camps or by-camps. Measured by the number of defendants involved, these were the largest trials held by the U.S. In the Dachau chief or parent case and its "subsequent" cases some 150 persons were involved; in the Flossenburg parent case, 45, in the Buchenwald parent case about 30; in the Mauthausen parent case about 61. The auxiliary or subsequent trials were generally smaller and were held when it was not practicable to try all of the staff of a particular camp at one time. These had been made simple to handle by the device of declaring that once a camp had been judicially established to have been a criminal operation this fact was to be considered as already proved in the later cases involving the same camp.

That there were sadists among these accused men is beyond question. But there were also many good family men with good reputations in their communities; that was what was so hard to understand. Some defendants even gave evidence that they had tried to ameliorate conditions. But most had grown cynical and callous. To them the inmates from every country in Europe were nothing but vermin. That mental conditioning made it easy to kill them, for it is no reproach to a man if he kills vermin.

Among the defendants were also some of the dreaded "capos", inmates themselves who had gained favor and authority as camp trusties and who, to hold their positions and save their own lives, became as brutal as the most remorseless SS guard.

The big Nazis had shown the Nurnberg courts their unsullied hands: they personally had not killed a soul. But what could these camp men say for themselves? Their hands were bloody and they could not plead ignorance. Yet, alibis and excuses they produced: executions were according to Nazi "law"; they had orders to give "special treatment" to so many inmates; the camp commanders would protest overcrowding, but still the trainloads of victims would arrive; when beatings were heard about, orders against mistreatment were issued; plenty of food was served but "higher headquarters" forced the quantity down to starvation level; medical experiments were performed mostly on "habitual criminals", not innocent civilians from Poland; if any inmate was beaten by the guard, it was really a "favor" to him, for if the inmates's infractions had been reported officially it would have gone on his "record" and things would have been worse for him; the capos only beat fellow inmates because the SS beat them in turn and forced them to; death injections were given only to those already dying in order to make room for the living; the death rate was due not to camp treatment but to the poor physical condition of the arriving inmates. It was all a complex web of interrelations and because each defendant may have not been the sole creator of the conditions he felt secure and self-justified; he could point his finger to someone else.

What were the courts to do in the face of this sort of evidence? Should they free these men, since they were obviously all but part of a system bigger than themselves and singly could not have changed it? Or should they order them all hanged, refusing

to try to apportion guilt in such an uncharted morass of depravity? In the earlier cases, the courts could see little good in any of the defendants and the sentences were uniformly severe. However, as time went on the initial world-wide revulsion at the atrocities had somewhat subsided. Then the army began to be besieged by thousands of petitions from Germans as well as Americans requesting clemency for these men and praising their previous good conduct and family devotion. By now, their victims who had survived had become silent, believing their battle had been won when the prosecutions started. Thus, the army, sensitive of its role as the exemplar of democracy, began to wonder if it had been too harsh. Thus, in the course of the automatic review of the cases greater efforts were made to gauge the extent of each individual's complicity. In general, the guards and block-leaders who were most brutal, were sentenced to death; others, where evidence of brutality was doubtful, despite their official positions, might have received sentences of life imprisonment. Sometimes proof of kindly acts to some inmates was considered in mitigation and the sentence might be for but twenty or thirty years. If guilty of mistreating and beating inmates, where no proof of subsequent death was involved, a sentence of five or ten years might be imposed.

It was in the company of the thirty men who were found guilty of administering the Buchenwald camp that the celebrated Ilse Koch was tried. Ultimately, the Commander-in-Chief approved thirteen death sentences, nine life sentences, four for twenty years, two for fifteen years, one for five and one for three years in this case. Some of these sentences had been reduced from those decreed by the court, based upon careful analysis of the evidence

This same practice prompted him to reduce her life sentence to four years. Although no two men would agree on the precise sentence she should have served, this episode supplies the finest proof of the impartiality and earnest consideration that General Clay and his advisers brought to the entire war crimes problems. Whatever her true character might be, and whatever barbaric acts she may have performed, the credible evidence produced in court did not, in General Clay's opinion, establish that Ilse Koch, the wife of the camp commander, had ordered inmates converted into lampshades to adorn her fine home on the grounds of Buchenwald. Convincing to him and his advisers, was only the proof that she had reported inmates for infractions on several occasions, knowing that they woudlbe severly punished, and that she personally beat an inmate. This, in their view, did not justify life imprisonment. Completely overlooking the several hundred death sentences already imposed in other cases against camp officials and even forgetting the thirteen so condemned in this Buchenwald case, public criticism of the war crimes program was violent. Upon the announcement of the decision, The furore aroused was perhaps the first expression of public opinion since 1945 in support of stern retribution, as opposed to the numerous pleas for leniency arriving daily. But the army could not go back to the indiscriminating atmosphere of the war years. There was now ample time to deliberate. The memory of the dead was becoming blurred. Germany was peaceful and was even being wooed by America.

A Congressional Committee investigating the case criticised the reduction and blamed it on one-sided reviewing procedures (where only the defense is heard to complain) and upon a shift in legal theory (charging participation in a common design at trial time

trial time, but requiring proof of specific acts of cruelty at review time). It learned that some of the reviewers had even favored complete exoneration because, in their judgment, the facts established did not jibe with the formal charge or indictment. However, it agreed with the Army that a further trial would run counter to American principles of justice.

Taking the hint, the German authorities took her into custody when she was released in October 1949, and promised to try her for offenses against Germans, whereas the Americans had tried her only for offenses against Allied prisoners.

X.

It was in connection with the administration of the camps that the SS embarked upon a series of experiments on human beings, exploring reactions to high altitude, freezing, malaria, mustard gas, sulfanilamide, seawater, jaundice, sterilization, spotted fever, and poisons. So accustomed had the doctors become to the "normal" extermination of millions of people by their government that they thought that "science" might just as well use some of these doomed victims as "humas guinea pigs." Their experiments, said the court," were the product of coordinated policy-making and planning at high governmental, military, and Nazi Party levels, conducted as an integral part of the total war effort". . . . . No one had troubled to ask the victims' consent, an absolute essential in civilized communities where human experimentation is to be undertaken. Nor were any thoughts given to their welfare.

> "In many cases experiments wereperformed by unqualified persons; were conducted at random for no adequate scientific reason, and under revolting physical conditions. . . . . In every one of the experiments the subjects experienced extreme pain of torture, and in

most of them they suffered permanent injury, mutilation, or death, either as a direct result of the experiments or because of lack of adequate follow-up care. . . . . .Manifestly, human experiments under such conditions are contrary to 'the principles of the law of nations as they result from usages established among civilized peoples, from the laws of humanity, and from the dictates of public conscience.'"

Before the "subsequent" Nurnberg court hearing the "Doctors' Case" were twenty-three defendants, all but two of whom were physicians. The principal accused was Karl Brandt, the Commissioner for Health and Sanitation. He had supervision over all military and civilian medical services in Germany. With him in the dock were such eminent men as Handloser (the chief medical officer of the German army), Schroeder (who occupied a similar post in the Luftwaffe), Gebhardt (the head of the German Red Cross who was also Chief Surgeon of the SS), Rostock (dean of the medical faculty of the University of Berlin) and Rose (an eminent specialist in tropical medicine). Upon Brandt and Gebhardt and five others the sentence of death was imposed. Five men (including Handloser, Schroeder, and Rose) were sentenced to life imprisonment, and upon four others terms varying from ten to twenty years were fixed. Seven of the defendants were acquitted as the court did not feel that their complicity had been sufficiently established.

But the court in condemning these men took particular pains to distinguish between their conduct and lawful experimentation. These distinctions it set down in ten principles that will undoubtedly become classics of the medical profession. Already

the case has prompted the World Medical Association to adopt a new vow to be added to the ancient Hippocratic oath:

> "I will not permit consideration of race, religion, nationality, party politics or social standing to intervene between my duty and my patient. I will maintain the utmost respect for human life from the time of its conception. Even under threat I will not use my knowledge contrary to the laws of humanity."

XI.

While millions of human beings were being herded into the concentration camps and to their death, a speedier technique had been devised for use within conquered Soviet territory, and the Baltic states, and by virtue of their remoteness was not as well known as the concentration camp horrors. By this method most of the problems of transport and supervision were eliminated--no small problems in these vast areas--and at least one million men, women and children were rounded up and summarily and pitilessly massacred by firing squads, by gas-vans, or by burning alive. Weeks and sometimes months after the advancing German armies had moved eastward there followed a unique "army of occupation". Its mission was not to restore order and protect the conquered peoples. Its mission was to kill and only to kill. On it came, in village after village, city after city, rounding up all Jews (the principal targets), all Gypsies and all Communist functionaries--lining them up and shooting them down.

> "Whole categories of people were to be killed without truce, without investigation, without pity, tears or remorse. Women were to be slain with the men, and the children also were to be executed because, otherwise, they would grow up to oppose National Socialism and

might even nurture a desire to avenge themselves on the slayers of their parents."

Thus the court described the satanic orders, handed down from Himmler, Chief of the SS, through Heydrich, Chief of the RSHA.

The several thousand troops performing this function were known as the "Einsatzgruppen" (Special Action Groups) and twenty-four of their officers were before the Nurnberg court in the "Einsatzgruppen Case."

> "They are not charged with sitting in an office hundreds and thousands of miles away from the slaughter. It is asserted with particularity that these men were in the field actively superintending, controlling, directing, and taking an active part in the bloody harvest."

Although may of these leaders were (or had been) men of education, culture and refinement, they had joined the SS, SD or Gestapo and were so far gone in their fanatic adoration of Hitler and the desire to follow him that their crimes were truly beyond all human experience. Time and again the court was confounded by the incredible barbarity revealed by the evidence:

> "In this trial, one was constantly confronted with acts of men which defied every concept of morality and conscience. One looked in on scenes of murder on so unparalleled a scale that one recoiled from the sight as if from a blast of scalding steam."

The wild insanity of the program was apparently not evident to those who were involved in it. But when a German Armament Inspector had completed his tour of the Ukraine, he wrote to his chief and expressed the opinion that the project was a great mistake, even from the Nazi point of view. He explained that in the Ukraine the Jews represented almost the entire trading class and a substantial part of the manpower. In dismay he asked:

> "If we shoot the Jews, let the prisoners of war perish, condemn considerable parts of the urban population to death by starvation and also lose a part of the farming population by hunger during the next year, the question remains unanswered: WHO IN ALL THE WORLD IS THEN SUPPOSED TO PRODUCE ECONOMIC VALUES HERE?"

But there was no change. The men of the Einsatzgruppen must march on, continuing with their noble task. Thus, in sentimental self-satisfaction one member wrote to a superior:

> "You are right. We men of the new Germany have to be hard with ourselves. Even if it means a longer separation from our family. Now is the time to clean up with the war criminals, once and forever, to create for our descendants a more beautiful and eternal Germany. We don't sleep here. Every week 3-4 actions, one time Gypsies, the other time Jews, partisans and other rabble. It is very nice that we have now a SD unit with which I

can work excellently."

They showed pity--but only for their hard working fellow executioners. One of the officers testified:

". . . . .I must say that our men who took part in these executions suffered more from nervous exhaustion than those who had to be shot.

Q. In other words, your pity was more for the men who had to shoot than for the victims?

A. Our men had to be cared for.

. . . . . .

Q. And you felt very sorry for them?

A. Yes, these people experienced a lot, psychologically."

Although there was no doubt about the vastness of their operation, the defendants quibbled about the number of dead chargeable to them. When the prosecution claimed that SS-Colonel Paul Blobel was responsible for the killing of 60,000people, his defense counsel argued that the absolute maximum that Blobel's unit could have executed was only 10,000 to 15,000! And when SS-Colonel Sandberger was charged with 1000 deaths in one operationhe protested:

". . . . . but they were not shot on my own responsibility. I am only responsible for 350."

Fourteen of the defendants were sentenced to death, two of them to imprisonment for life, three for twenty years, and two for ten years. One was given a short sentence and was released after the trial. One had committed suicide before trial and one had been dropped due to sickness.

Before the IMT a witness had been asked how men could perform such deeds as the Einsatzgruppen had been accused of. He replied:

"I am of the opinion that when, for years, for decades, the doctrine is preached that the Slav race is an inferior race, and Jews not even human, then such an outcome is inevitable."

XII.

The extermination program was not haphazard, but in Poland it took another form. Not only were all the Jews to be killed, but the Polish people were to be destroyed. Part of Poland was incorporated in Germany. Here, those who could be "Germanized" were to live. The rest were to sent to Central Poland to be killed or die off. To Americans the German picture of a Teutonic super-race seemed a bit fanciful. But to millions of people in eastern Europe the idea meant death. For them these ideas had been translated into "programs", all leading to their destruction. It meant the loss of nationhood, loss of property, loss of children, and loss of their lives. To describe this process the United Nations had a newly-coined word: "genocide", the destruction of a people.

The administration of these programs was a function of another branch of the SS, headed by Greifelt, the "Reichscommissioner for the Strengthening of Germanism". His principal organ was the Main Race and Settlement Office (RUSHA--to be distinguished from RSHA, the Reich Security Head Office run by Heydrich and Kaltenbrunner). This office and the "Office for the Repatriation of Ethnic Germans" and the "Lebensborn Society" were the subject of consideration in the Nurnberg trial known as the "RUSHA Case". These, the court found, were operating with

". . . . .the two fold objective of weakening and eventually destroying other nations while at the same time strengthening Germany, territorially and biologically, at the expense of conquered nations."

The basic policy, it learned, had been expressed in a diabolically simple directive to Himmler, dated 25 November 1939:

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

The development of the program,in the part of Poland chosen to become Germanized, required the elimination of political rights of all Poles not selected to be Germans and the prohibition of all Polish cultural life. Polish children regarded as "racially valuable" were ruthlessly torn from their parents and taken to Germany. All land was to be expropriated without compensation in favor of German settlers--six hundred thousand farms were taken away in one area alone.

In Central Poland, which was not yet ready to be Germanized, the Polish race was to kill itself off. The "unassimilable" Poles were to destroy themselves as a people: birth control and abortions were to be encouraged, homosexuality was to be declared not punishable, and "hygienic measures from a racial point of view should not be encouraged in any way." "It will be the task of the German administration to play up the Poles and Jews against each other." Then, "to strengthen Germanism and in the interest of the defense of the Reich" there were confiscated all historical articles, documents, books, objects of art, and jewelry and furnishings made of precious metal. To curtail marriages and to reduce the number of children in Poland, marriage ages were raised to 28 for men and 25 for women, and certain categories of Poles were prohibited from marrying other Poles not in their same category.

Charged with criminal responsibility for carrying out this "racial" program stood SS Generals Greifelt, Hofmann and Hildebrandt, and 11 others of their staffs and the staffs of the two other racial organizations. The court acquitted the one woman defendant completely, and it exonerated five others of all charges of crimes against humanity and war crimes. However, these five were found guilty of membership in the SS, only to be immediately freed on the ground that their confinement pending and during trial had been sufficient punishment (less than three years). But convicted on all counts were Greifelt, who was sentenced to life imprisonment, Hofmann and Hildebrandt, given terms of twenty-five years, and five others, who were sentenced to terms of imprisonment varying from ten to twenty years.

XIII.

Thus the record of the SS and its subordinate organizations was revealed. Although they operated somewhat autonomously, the various German occupation authorities knew of, tolerated, and even encouraged these activities in the countries they governed for Hitler. Some of these men appeared before the IMT: Frank, Governor-general of Poland, Frick, "Protector " of Bohemia and Moravia, and Seyss-Inquart, Governor of Austria and later of Holland. For their deeds all three were sentenced to death.

Frank's announced policy in Poland was that "Poland shall be treated as a colony; the Poles will become the slaves of the Greater German World Empire." He told his cabinet, "We must annihilate the Jews, wherever we find them and wherever it is possible, in order to maintain the structure of the Reich as a whole." Although confessing in court his feeling of "terrible guilt", he tried to show that the excesses which took place were due to activities not under his control and that he never even knew of the

activities of the concentration camps. The court recognized the merit of some of his contentions but concluded:

> "But it is also true that Frank was a willing and knowing participant in the use of terrorism in Poland; in the economic expoitation of Poland in a way which led to the death by starvation of a large number of people; in the deportation to Germany as slave laborers of over a million Poles; and in a program involving the murder of at least 3 million Jews."

Of Frick the court said:

> "An avid Nazi, Frick was largely responsible for bringing the German Nation under the complete control of the NSDAP. . . . .He was largely responsible for the legislation which suppressed the trade unions, the church, the Jews. He performed his task with ruthless efficiency. . . . .Always rabidly anti-Semitic, Frick drafted, signed, and administered many laws designed to eliminate Jews from German life and economy. . . . .he signed a final decree in 1945, after the mass destruction of Jews in the east, which placed them 'outside the law' and handed them over to the Gestapo. . . . ."

In occupied Holland most of the crimes committed were in fulfillment of the policies of Seyss-Inquart. It was he, for example, who ordered the deportation of nearly 120,000 Jews from Holland to Auschwitz in Poland for the "final solution." Although the IMT conceded that he had actually opposed some of the extreme measures used by other Nazi agencies, it concluded that he

> "was a knowing and voluntary participant in war crimes

and crimes against humanity which were committed in the occupation of the Netherlands."

XIV.

How many American and Allied soldiers suffered indignities, torture and death upon capture by the Germans will perhaps never be known. The American authorities alone received reports of over 3,000 incidents but not all could be confirmed and proved. By the time the war crimes program terminated, 311 cases of this sort had been brought to trial by the U.S. Army's Judge Advocate. Considering that the names and identities of the victims was often unknown and that the prosecution generally had to depend upon German witnesses testifying against fellow Germans before an American court, it is perhaps notable that the trials were as successful as they were.

To those Germans who shot Americans in combat there could come no punishment. In those circumstances the law recognizes that it is a "you or me" situation. "The law becomes silent amidst the noise of arms." But once a soldier had ceased fighting or an aviator had bailed out, and surrendered, he was entitled to treatment as a prisoner of war--to be unharmed, to be fed, clothed and protected until the end of the war. The many prisoner of war camps in America were quite tangible evidence of U.S. complience with the rule. Nor can it be gainsaid that the Germans often afforded similar treatment to Allied prisoners. Nevertheless, it was indisputable that in some quarters the rule was not obeyed and Allied soldiers were placed in concentration camps and mistreated or killed. Most flagrant of the violations was the deliberate execution of Allied flyers. Although entitled to the protection due their status as prisoners of war, the Nazi authorities had let it be known that such men were to be "rendered harmless" and if shot or lynched no action would be brought against the offending Germans. Thus secure in their "protec-

village
tion" the local/ Nazis had a chance to become "heros", for the airmen often bailed out over small communities in the countryside. This policy was justified on the ground that the bombing raids were illegal and that the flyers were in effect war criminals. The Germans had chosen not to recall who started the city bombings.

Such a situation was revealed in the "Borkum Island Case." When an American bomber crew made a forced landing on Borkum Island, in the North Sea, it surrendered to the German inhabitants. Although there were rail facilities to the place where/they could have been confined as prisoners of war, the commander of the local military unit ordered the men marched through the most densely populated portion of the nearby town. Furthermore, he telephoned the chief of police and directed that there should be no interference if the civilian population should attack the Americans. The Acting Mayor, for his part, exhorted the populace to beat and kill the American "murderers", and they did. Of the fifteen who stood trial for this atrocity, death was decreed for five, including the Acting Mayor. However, for the military commander, Kurt Goebell, there were so many strong letters appealling for clemency, submitted by prominent German laymen and clergymen, that General Clay was induced to commute his death sentence to life imprisonment. As a result, and in the interests of justice, it was likewise necessary to commute the death sentence of a subordinate officer who had merely passed on Goebell's illegal order. Except for two who were acquitted, the remaining defendants were sentenced to imprisonment for terms varying from five to twenty years.

In other cases perhaps only one or two Germans were implicated. But in all there was a similar pattern. Often it was the local police force that was involved, for having received the "flyer-

killing orders" they conceived it to be their duty to be in the forefront of the "defense" of the local population. Perhaps even without such an order many of the aviators might have been shot. With an air raid just passed, a bombed community still burnign, a lone, unarmed American aviator floating to earth was a natural object of the civilians' anguish and anger. International law to the contrary notwithstanding, they wanted immediate vengeance. For these brief moments of violence the participants paid dearly, much to the dismay of their families, friends and clergymen, who besieged the American Army with pleas that their deeds be condoned. Generally death sentences were decreed, although some, depending on the extent of their complicity, were given life imprisonment.

It is likely that most of the violations of the rules of war occurred right in the combat zone and to some extent, no army was guiltless. But to punish the offenders was not easy for these offenses were often hard to detect and even harder was the task of finding the guilty ones. The outstanding case of this kind was the "Malmedy Massacre Case."

In a field near Malmedy, Belgium, on 17 December 1944, the second day of the abortive Ardennes Offensive, which the Americans called the "Battle of the Bulge", some 150 unarmed American prisoners of war were lined up and then wantonly and mercilessly mowed down by the machine guns of the SS Panzer unit, bearing the name of its youthful leader and expert on tank warfare, Joachim Peiper. The events leading to the identification and the conviction of these men furnish one of the most dramatic and controversial chapters of the war crimes program. When the members of the unit were rounded up they refused to talk, having been sworn to secrecy. Inducing these hardened SS men to admit their guilt, challenged the resourcefulness

of the war crimes investigators, but eventually some 74 participants were charged and placed on trial. Their sentences, as finally approved, were six sentenced to death, twenty to life imprisonment, and the others to terms varying from seven to twenty-five years.

Another celebrated case arising in the same area involved the fabulous character, SS-Lieutenant Colonel Otto Skorzeny, and nine of his men. Shortly after his daring liberation of Mussolini from Allied imprisonment in 1944, he was commissioned directly by Hitler to organize a special brigade of Germans who spoke English and knew American mannerisms. They were to infiltrate through the U.S. lines, wearing American uniforms and using American equipment, and capture specified objectives. Later this mission was abandoned and they were used as regular infantry in the attack towards Malmedy. At Dachau they were charged with the offense of entering into combat disguised in American uniforms but when the prosecution was unable to convincingly prove that they actually fought in those uniforms the military court acquitted them. Merely wearing such disguises when not in combat was no offense under the laws of war. Although the prosecutors were somewhat shamefaced about the outcome it should have served to demonstrate to the Germans the essential fairness of the U.S. court system.

Other trials may not have involved such spectacular events or personages but were of great interest to many grieving American parents--such as the case in which a German medical officer severed the head of a dead American soldier and used the skull as a desk ornament. For this outrage he was given a sentence of imprisonment for ten years. Like the case in which a German fired upon Americans from a German ambulance bearing the Red Cross

insignia. This improper usage of the emblem brought him a six months sentence. Or like the one where a badly wounded U.S. soldier had been captured in France and after first aid treatment was taken to the edge of the village and shot to death. For this the medical officer and his assistant who had done the shooting were sentenced to imprisonment for life. Or like the cases where captured Americans were forced to "escape" and were then shot.

XV.

The Germans who killed the Allied flyers were not prosecuted because the Ministry of Justice deliberately refused to indict them, thus cooperating with the Nazi policies. So complete had been the Nazi capture of the government that even Justice had been prostituted. In the "Justice Case" the court agreed with the prosecution's charge that

"The entire judicial system was transformed into a tool for the propagation of the National Socialist ideology, the extermination of opposition thereto, and the advancement of plans for aggressive war and world conquest."

To accomplish this transformation willing hands had been needed. A few of their prototypes were before court and their techniques were revealed:

> "Some of the defendants took part in the enactment of laws and decrees that purpose of which was the extermination of Poles and Jews in Germany and throughout Europe. Others, in executive positions, actively participated in the enforcement of those laws and in atrocities, illegal even under German law, in furtherance of the declared national purpose. Others, as judges, distorted and then applied the law and decrees against Poles and Jews as such in disregard of every principle of judicial behavior.

The overt acts of the several defendants must be seen and understood as deliberate contributions toward the effectuation of the policy of the Party and State. The discriminatory laws themselves formed the subject matter of war crimes and crimes against humanity with which the defendants are charged."

Those who took part in the enactment of these laws were to be found in the Ministry of Justice. Most implicated had been the Minister of Justice, Guertner, and his successor, Thierack. However, both were dead; Thierack by his own hand when he heard of the charges against him. Nevertheless, the Ministry was well-represented by the defendants Schlegelberger (Under-secretary and later Acting Secretary of the Ministry), Rothenburger and Klemm (Under-secretaries), and four other leading officials (Alstoetter, von Ammon, Joel and Mettgenberg). Representative of those who took part in the enforcement of these laws were the Chief Public Prosecutor of the People's Court in Berlin and his assistant (Lautz and Barnickel). and of the judges who distorted and twisted the law, several who served on the Special Courts in Stuttgart (Cuhorst) and Nurnberg (Rothaug and Oeschey) were indicted.

"The dagger of the assassin was concealed beneath the robe of the jurist."

Prosecuted by the former Congressman from Indiana, Charles M. LaFollete (who later became the Military Governor of Wuerttemberg-Baden) before a court composed of James T. Brand, of the Supreme Court of Oregon, Mallory B. Blair, of the Texas Court of Civil Appeals, and Justin W. Hardin, Assistant Attorney General of Ohio, the case was not as spectacular as some of the other trials but the fundamental problems it dealt with make it one of the most important

of the "subsequent" cases.

But as depraved as the judicial system had become, the court could not condemn it in its entirety. Harsh though the Nazi laws were and harsher were the interpretations, yet there were some laws that were reasonable. Those concerning habitual criminals, looter, hoarders, and spreaders of anti-war propaganda were not unlike those enacted by other nations at war; even America had them. But where it was apparent that the ordinary demands of law and order had been exceeded the court had no hesitancy in condemning the laws and their implementation. Insofar as the system of justice became involved in carrying out the Nazi policies, such as the wiping out of the Polish nation and the extermination of the Jewish people, it had become involved in crimes against humanity. Whenever the tribunal discovered that punishment had been decreed primarily because a man was a Pole or a Jew, it saw evidence of the corruption of the system. Illustrative of this complicity was its implementation of the Nacht und Nebel decree.

With barbarism and lawlessness so rampant it may be a matter of surprise to discover any Nazi activities that involved such institutions as trials. However, the Nazi program cannot be visualized as one all-encompassing technique, accomplishing all objectives at once. Although the occupation armies had no hesitancy in killing guerillas outright, other offenders against the security or dignity of occupying forces were subject to military trial, according to traditional practice. It is here that the Nazis changed the rules: if the local commander in Poland was not certain that a sentence of death would be decreed he could not try the offenders but was required to send them secretly to Germany for trial; under no conditions should the neighbors or relatives ever hear of them again, for this would

so terrorize them that the offense would not be repeated by others.

> "An efficient and enduring intimidation can only be achieved either by capital punishment or by measures by which the relatives of the criminal and the population do not know the fate of the criminal. This aim is achieved when the criminal is transferred to Germany."

Such was the Nacht und Nebel (Night and Fog) decree, issued by Keitel. When the condemned reached Germany they were given civilian trials which were a travesty:

> "The trials of the accused NN persons did not approach even a semblance of fair trial or justice. In many instances they were denied the right to introduce any evidence, to be confronted by witnesses against them, or to present witnesses in their own behalf. They were tried secretly and denied the right of counsel of their own choice, and occasionally denied the aid of any counsel. No indictment was served in many instances and the accused learned only a few moments before the trial of the nature of the alleged crime for which he was to be tried. The entire proceedings from beginning to end were secret and no public record was allowed to be made of them."

Inasmuch as these Polish deportees were not soldiers it would be reasonable to suppose that an attempted escape would be treated no more seriously than if they had been military personnel: an escaped prisoner of war may receive only disciplinary punishment for, not to exceed thirty days. But Nazi justice stepped in and called these men traitors. Obviously, such a term could be applied only to those who owe allegiance to Germany. These men were foreigners. But the legalists had an answer: Poland had been "annexed" to

Germany by conquest, therefore it became "Germany", therefore these men were guilty of treason to Germany and death was their punishment. The American tribunal not only rejected any such theory of annexation but condemned the whole line of reasoning:

> "Prosecution in these cases represented an unwarrantable extension of the concept of high treason, which constituted in our opinion a war crime and a crime against humanity. The wrong done in such prosecutions was not merely in misnaming the offense of attempting to escape from the Reich; the wrong was in falsely naming the act high treason and thereby invoking the death penalty for a minor offense."

Not only were many of the procedural rules found to be criminal but many of substantive laws also. Outstanding was the Law Against Poles and Jews, of 4th December 1941. Under this decree the death penalty could be imposed upon any Pole or Jew who assaulted a German, manifested anti-German sentiments, or committed an act of sabotage. Most objectionable was the incorporation of German laws into the statute and the provision for trials by "Special Courts" or "Peoples Courts". As the court said:

> "....German criminal law was thereafter applied by German courts in the trial of inhabitants of occupied countries though the inhabitants of those countries could have no possible conception of the acts which would constitute criminal offenses."

To all these accusations the defendants had a uniform reply: what we did was lawful; it was all in accord with German law, therefore we did no wrong. The Tribunal reminded them that Allied Control Council Law 10 provided for punishment whether or not the acts

"...were in violation of the domestic laws of the country where perpetrated.....The argument that compliance with German law is a defense to the charge rests upon a misconception of the basic theory which supports our entire proceedings. . . . .The very essence of the prosecution case is that the laws, the Hitler decrees and the Draconic, corrupt, and perverted Nazi judicial system themselves constituted the substance of war crimes and crimes against humanity and that participation in the enactment and enforcement of them amounts to complicity in crime. It can scarcely be said that governmental participation, the proof of which is necessary for conviction, can also be a defense to the charge."

The Tribunal saw "no merit in the suggestion that the Nazi judges are entitled to the benefit of the Anglo-American doctrine of judicial immunity" for

"The doctrine that judges are not personally liable for their judicial actions is based on the concept of an independent judiciary administering impartial justice. Furthermore, it has never prevented the prosecution of a judge for malfeasance in office".

Schlegelberger interposed yet another defense, in which he was joined by most of the others: he feared that if he were to resign, a worse man would take his place. The Tribunal discounted it:

"The evidence conclusively shows that in order to maintain the Ministry of Justice in the good graces of Hitler and to prevent its utter defeat by Himmler's police,

> Schlegelberger and the other defendants who joined in this claim of justification took over the dirty work which the leaders of the State demanded. . . . .That their program of racial extermination under the guise of law failed to attain the proportions which were reached by the pogroms, deportations, and mass murders by the police, is cold comfort to the survivors of the "judicial process" and constitutes a poor excuse before this Tribunal. . . . ."

Schlegelberger, Rothaug and Oeschey were sentenced to life imprisonment. Mettgenberg, Joel and Lautz were sentenced to 20 years' imprisonment, Rothenberger was sentenced to 7 years, and Alstoetter to 5 years. Barnickle and Cuhorst and two others were acquitted.

The basic defense in the "Justice Case" ran through all the other cases as well: no wrong had been done, no law had been violated, everything was in strict accord with Nazi "law." Moreover, ran the argument, certainly waging aggressive war was no crime for no nation had declared it to be an offense prior to World War II. It had not been defined, no penalty had been fixed, and no court had been created to try and punish offenders. To declare now that it was a crime was to create an ex post facto law and to violate the principle that no one could be punished unless his act was in violation of a preexisting law.

This insistence upon the citation of chapter and section of some statute book was of the essence of the German position. Unless "somebody" had issued a "law" or a "command", why then, anything goes! The response of the IMT to this fallacious argument was later brilliantly elucidated by Justice Jackson:

> "If no moral principle is entitled to application as a law until it is first embodied in a text and promulgated as a command by some superior effective authority, then it must be admitted the world was without such a text at the time the acts I have recited took place.....The fallacy of the idea that law is found only in such a source appears from the fact that crimes were punished by courts under our common-law philosophy long before there were legislatures. The modern law of crimes may largely be traced to judicial decision of particular cases earlier than it appeared in statute.....Unless international law is to be deprived of this common-law method of birth and growth, and confined wholly to progression by authoritarian command, then the judges at Nuremberg were fully warranted in reaching a

The Germans had overlooked one thing: if they proved their point then the Allies would legally owe them no consideration in the course of their occupation. The courts could be scrapped and the entire nation shot, in accord with Nazi "principles."

The idea that there are "laws" of warfare seems mockingly cynical to many men. What laws can possibly authorize such killing and maiming and destruction? What rules can possibly justify such barbaric abandonment of religion and morality? The realists maintain that, pending the millenium, anything that alleviates some of the horrors of warfare is all to the good. In the military philosophy the submission of the enemy is the only object of war, hence any activity that does not contribute to that end could reasonably be eliminated, or at least so it seemed in times of peace. Consequently it became customary to expect combatants to avoid all killing or maiming not in the course of armed conflict and all unnecessary cruelty towards the civilian inhabitants of a country or the wanton devastation thereof. These customs in time became rules of warfare, whatever their origin or motivation, whether chivalry or fear of reprisals. Then, in recent years, the civilized nations of the world had removed some of them from the uncertain field of customary law and made them more clear and binding by such agreements as the "Convention Respecting the Laws and Customs of War on Land," the"Convention Relative to the Treatment of Prisoners of War," and the"Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field." These all had to do with rules <u>during</u> war; the fundamental evil of making war had not been touched.

But in 1928, culminating years of work by the Chicago lawyer, S.O.Levinson ("The greatest credit for this entire

movement belongs to Mr. Levinson"--wrote Senator Borah) one of the great peaks in the history of civilization was reached. In the Kellog-Briand Treaty sixty-three nations (including Germany) solemnly condemned "recourse to war for the solution of international controversies and renounce it as an instrument of national policy." It truly seemed that the prayer of ages was in process of being answered and that the world was entering upon an era of permanent peace. But the world had not reckoned with Hitler, who, taking advantage of the universal yearning for peace prepared for war. Only eleven years later, with the excuse that his war was "total", he flung aside all treaties and disregarded all the underlying moral ideas.

It was not until Nurnberg that the opportunity arose for the other nations to reassert the validity of the Kellog-Briand Treaty. Not only had Germany violated all agreements concerning humane warfare but the Nazi leaders had committed the supreme offense recognized by that Treaty--the crime of waging a war of aggression. That was the judgment of the International Military Tribunal:

> "War is essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime, it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."

The Treaty was seen to involve two propositions: "That such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing."

Such international crimes "are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." No longer could an official authorize such terrible deeds and then plead that the "State" did it--not he. Henceforth that reasoning "cannot be applied to acts which are condemned as criminal by international law." The establishment of these two principles--that aggressive war is a crime and that personal responsibility exists--are undoubtedly the greatest achievements of the IMT.

In all of the trials other defenses were insistently raised. Perhaps none was more frequent than the plea of "superior orders": "We had to do it. Those were our orders and we had no recourse." This plea is well-known in military circles for it is of the essence of military discipline that orders must be obeyed. The subordinate is not given the opportunity to debate whether the command is right or wrong or whether he will obey or disobey. "Act first, argue later" is the dictum. But the courts ruled that if moral choice were possible the subordinate must debate it and make the right decision. Unless he disobeys an immoral order he may be later called to account before a court of justice. The London Charter as well as the similar Allied Control Council Law had provided that such order "shall not free him from responsibility, but may be considered in mitigation of punishment," and this principle was followed by the courts. Thus said the IMT:

> "That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality...."

The most penetrating analysis was made by the court in the "Einsatzgruppen Case." In its opinion the plea was carefully examined and found wanting:

"Despite the sustained assertion on the part of the defendants that they were straight-jacketed in their obedience to Superior Orders, the majority of them have, with testimony and affidavits, demonstrated how on numerous occasions they opposed decrees and orders handed down by their superiors. In an effort to show that they were not really Nazis at heart, defendant after defendant related his dramatic clashes with his superiors. If one concentrated only on this latter phase of the defense one would conclude that these defendants were all ardent rebels against National Socialism and valiantly fought against the inhuman proposals put to them. . . . .Thus the defendants could and did oppose orders when they did not agree with them. But when they ideologically espoused an order such as the Fuehrer Order they had no interest in opposing it."

Perhaps unique among the defenses offered was that of von Weiszaecker of the Foreign Office who had been sentenced to seven years' imprisonment. In the "Ministries Case" he had been found guilty of complicity in the aggression against Bohemia and Moravia and participation in the transportation of Jews to the death camps. This was in spite of his plea that he was secretly opposed to such measures and had retained his post so that he could covertly fight against them. He testified that

"In order to retain that sphere of activity, in order to gain that final and ultimate objective, I had to permit documents to pass my desk which in normal times I would have hesitated to touch with my own hands. You would not even touch them

with a pair of pliers."

In support of his position he called a witness named Schlabrendorff, but in a tour de force of cross-examination this defense was exploded:

> "Q. As an expert on the resistance movement, I shall now ask you, in conclusion, how many Jews is it permissible to murder if one's final goal is to do away with Hitler--how many million?"
>
> "A. I would say nobody."

On the facts one of the most frequent defenses asserted was what Americans call "passing the buck." In the "Pohl Case", in the course of discussing the extermination of the Jews, the court explored this plea:

> "As may be expected, we find the various participants in the program tossing the shuttlecock of responsibility from one to the other. The originator says: 'It is true that I thought of the program, but I did not carry it out." The next in line says: 'It is true I laid the plan out on paper and designated the modus operandi but it was not my plan and I did not actually carry it out." The third in line says: ' It is true I shot people, but I was merely carrying out orders from above.' The next in line says: 'It is true that I received the loot from this program and inventoried it and disposed of it, but I did not steal it nor kill the owners of if. I was only carrying out orders from a higher level.'

It reminded the court of four bank robbers. One draws the sketch for the entry and escape, one drives the others to and away from the scene, one actually enters the bank and steals, and a fourth

hides the loot. "Under these circumstances, the acts of any one of the four, within the scope of the overall plan, becomes the act of all the others."

As for the bland and brazen evasion: "Ah, but we knew nothing of these terrible things you now tell us." it was generally given scant credence. In the "Justice Case" the court gave it a devastating answer:

> " A large proportion of all of the Jews in Germany were transported to the East. Millions of persons disappeared from Germany and the occupied territory without a trace. They were herded into concentration camps within and without Germany. Thousands of soldiers and members of the Gestapo and SS must have been instrumental in the processes of deportation, torture, and extermination. The mere task of disposal of mountainous piles of corpses (evidence of which we have seen) became a serious problem and the subject of disagreement between the various organizations involved. The thousands of Germans who took part in the atrocities must have returned from time to time to their homes in the Reich. The atrocities were of a magnitute unprecedented in the history of the world. Are we to believe that no whisper reached the ears of the public or of those officials who were most concerned? Did the defendants think that the nation-wide pogrom of November, 1938, officially directed from Berlin, and Hitler's announcement to the Reichstag threatening the obliteration of the Jewish race in Europe were unrelated? At least they cannot plead ignorance concerning the decrees which were published in their official organ, the

Reichsgesetzblatt.....They read Der Stuermer. They listened to the radio. They received and sent directives. They heard and delivered lectures. This Tribunal is not so gullible as to believe these defendants so stupid that they did not know what was going on. One man can keep a secret, two men may, but thousands never."

The necessarily objective and detached atmosphere of the courtrooms could have only aroused the impatient exasperation of those who could not forget the cries of the dying--bereft and helpless, with avenging armies yet hundreds of miles and several years from victory--the millions who had had as much right to live as any German but caught in the foul clutches of the Nazi beast and throttled one by one as it ran amok through the world. Words could not express the unspeakable horrors yet here in the courts these fiends in the shape of men were asking to be excused.

Yet, although all had bloody hands, elemental justice detected degrees of guilt. All could not be weighed in the same scale as Hitler and Goering. Hitler's order to invade Poland was an international crime, but the first German soldier who killed the first Polish soldier was not guilty of any offense in law. Although performed in the course of an illegal, aggressive war, his act as a soldier had become "lawful" combat!

Death was a permissible punishment for war crimes, but unless the courts were to adopt arbitrary German methods or decree mass guilt allowances had to be made for some, defenses and alibis had to be recognized for others. Thus not all could be condemned to death although about 21% of those convicted received such a sentence. The rest were given terms of imprisonment varying from a few months to life. There lies the trump of the lawless ones. No matter what their crimes they count on the humanitarian consideration of organized society--a humanitarianism never shown their victims.

From the trials in the U.S.Zone there were about one thousand convicts to be dealt with. At one time there was the thought that war criminals could be no more suitably employed than in rebuilding some of the cities they had destroyed but this was rejected

as "slavery". Consequently, the alternative was to let them sit out their terms in their cells.

Remembering the convenient "escapes" following the Leipzig war criminal trials of 1921, it was unthinkable that these prisoners tried by the Allies should be confined under German control. The Spandau Prison, near Berlin, was selected as the place of confinement for those sentenced to prison terms by the International Military Tribunal. For those tried under U.S. jurisdiction at Nurnberg or Dachau, the large modern prison at Landsberg was selected, about an hour's drive southwest of Munich. This was the place of Hitler's confinement after the 1923 Munich "putsch" and here "Mein Kampf" was written. It is maintained by the U.S. Army but the guards are selected from the Polish Labor Battalions employed by the Army. These Poles are either Displaced Persons or from the army of the "London Poles", men who choose not to return to Poland. They made much better guards than American soldiers who were too casual in their attitude towards the war criminals. The Poles had much to remember and took their jobs seriously.

As prisons go, it is a comfortable place, with opportunities for learning a trade. The inmates publish their own newspaper, they receive mail and visitors, and have a fine chapel for religious services. Ample opportunity is provided for them to register their greivances, and although all pleas may not be answered in the manner they would like, they are certainly given careful attention.

What disposition will be made of these Landsberg prisoners ~~when the Occupation is over,~~ cannot be foreseen. In the meantime, a "clemency program" has been adopted, similar to those in use in United States prisons. The prisoners are to receive "good conduct credits" of five days per month, and their sentences will thus be

shortened by one-sixth. Already sixty have been released as a result. The applicability of this concept to war criminals may not be too readily apparent, for their good conduct may practically be taken for granted now that the war is over. In large part, they are not truly anti-social types and they do not have to prove themselves "worthy" to live in their society by their behavior in prison--this they substantially established by the very acts that brought them there! However, as early as 1944, so eminent a scholar as Professor Sheldon Glueck foresaw that such a program might be inevitable, especially for "worthy and promising cases."

It would be more understandable if the test were not just "good conduct" but the reaching of an attitude of genuine repentance coupled by a sincere attachment to peaceful ways and a desire to actively fight against the evil spirit latent in so many of their countrymen. This is of doubtful attainment, for the Army has provided no positive educational program such as was made available for German prisoners of war in the U.S. Worse, in the summer of 1949, Bohle, who had called for a confession of German responsibility and the only man to plead guilty to any charge at Nurnberg, complained that his life was unsafe at Landsberg because of his views. (His transfer was made unnecessary, however, by granting him probation on his five year sentence in December 1949.) Yet the formal good behavior of the inmates who created this atmosphere will be their key to liberty.

Less in the public eye than the executions of the major war criminals at Nurnberg were the later hangings at Landsberg under U.S. auspices alone. Over 300 had been sentenced to death by the Nurnberg and Dachau courts and by now all but 13 have been executed. Although all plans contemplated expeditious

executions, many delays resulted when petitions began going to the U.S.Supreme Court, requesting the writ of habeas corpus. More than one hundred of the convicted ones explored this avenue but all applications were denied by four to four decisions (except one which was unanimous) with Justice Jackson taking no part. Quite understandably, while these were pending and while the investigations in the Malmedy matter were under way, the Army postponed all executions. Their resumption in 1948 was a great blow to the Germans who, by that time, had begun to view the American occupation as largely benevolent. The very delays, ordered only in the interests of justice, were then decried as a refined cruelty towards the condemned men who sat in the death cells for month after month not knowing whether they would live or die.

Some people have been troubled because the trials were held by the victors. The charge has been made by many of the defendants and their friends that this has introduced an element of vengeance into the whole program. But unless the war criminals were to be free outright there was no other way. Moreover, if it be recognized that the individual nations could try, in their own national courts, the German officials who had come out to rule them and had harmed their people contrary to their national laws, then surely these same nations could agree to act in unison on the matter and provide international trials. Granting that, some misgivings were still felt because such international tribunals were not manned by neutrals. But who were neutrals? "The scope of the war, however, left few neutrals," said Justice Jackson, "and formal neutrality of a government did not mean disinterestedness on the part of all its citizens." He continued:

> "There was no escape from selection of the judges by the victorious powers and it seems naive to believe that they would have chosen more dispassionate or just jurists from other lands than from England, France and the United States. Those countries which enjoy the blessings of an independent judicial tradition rely upon the individual integrity, detachment and learning of the judge to shape his decisions rather than upon the source of his commission, his nationality or his class."

As for those men who had remained in Germany to commit their crimes, it was preposterous that Germany should become their sanctuary merely because no German courts could be trusted to hold such trials. Manifestly, those who were not major

criminals and not to be tried in an international court would be summoned before the military government courts of each individual occupying power.

It is one of the inherent rights and duties of a military governor to reestablish courts of justice in the occupied country. Although he will ordinarily reppen the local courts, if closed due to the war, he will not usually permit them to try cases involving offenses against the occupation itself, such as sabotage, injury to his soldiers, refusal to obey his orders, etc. These he will try in his own military courts. In these he may also try war crimes cases.

Inasmuch as one of the paramount objectives of the occupation of Germany was the restoration of the reign of justice and the removal of Nazi corruptions from German law, it might be disposed that a perfect object lesson could have been provided by a completely American court system. But the problem was not that simple. If court proceedings are conducted according to the rules of the military governor's country the local conquered population may be unfamiliar with them. They may not think they are getting justice according to their lights. What may seem just to him may seem unjust to them. Moreover, their local attorneys will not be equipped to be of any help to them with a strange court procedure to cope with.

This problem the planners tried to meet. The American and British were accustomed to the Anglo-American system of jurisprudence whereas the Germans knew only the Continental system. (An American would probably never believe he was getting a fair trial in Europe because of the different roles played by the judge and attorneys.) To solve the problem as well as to provide a court system that was fair, simple and flexible enough to

be administered by army men, a procedure was devised that approximated the Continental system. Having in mind war conditions and possibly a sullen and rebellious population, the army did not propose to let the Germans introduce delaying tactices and fine-spun legalisms. It was going to be fair but efficient. And if such procedures were good enough for current offenders they were good enough for war criminals also. Such were the rules in Dachau and Nurnberg. The London Charter, setting forth the rules to govern the IMT, approached the matter in much the same way. Commenting on it, Justice Jackson said:

> "It should not shock anyone that a trial before an Allied military tribunal should have some aspects based upon common law traditions and some drawn from the Continental and Slavic systems. For example, the United States and the United Kingdom cannot insist on the full sized application of Anglo-American procedures, the rules of evidence, the privilege against self-incrimination, and similar matters. These are not inherent parts of other systems of legal proceedings and there is no need for leaning over backward to give the Axis leaders the benefit of protective principles not afforded by German law even prior to Axis distortion of German justice. The Hitlerites need only have a fair trial.....the trial in all respects should be conducted justly and impartially."

The IMT was an international court and there were no American defense counsel before it. But in some of the zonal tribunals there were and, trained as they had been, the use

of the loose rules struck them as something approaching the sacrilegious. They had forgotten that similar relaxations were the custom in nearly all of the American administrative tribunals and that even the British and other Allies had adopted similar rules for their war crimes courts. Although they attempted to have the Supreme Court pass on such matters, none were successful. However, similar procedures used in the trial of General Yamashita, in Tokyo, were under review when the court considered his petition for a writ of habeas corpus. The majority of the court refused to interfere with the conviction but the late Justices Murphy and Rutledge were alarmed at the informal practices disclosed and dissented in vigorous and highly critical terms. They brushed aside the reminder that similar procedures had been already approved by the Supreme Court in 1942 in the case of the German saboteurs.

It can hardly be doubted that the adoption of technical rules of evidence would have resulted in mass acquittals and the Allies would have impressed the Germans less with their justice than with their impotence. Certainly it would have been an anomaly to find Germans returned to France and Poland for trial under continental rules and strictly judged while those tried in Germany would gaily go free. Professor Sheldon Glueck, America's foremost authority on war crimes, anticipated the sticklers for all of the Law's technicalities when he wrote in 1944:

> "The administration of justice is not some amiable little game of chess to be played forever according to the old rules though the heavens fall; it is rather a means to a socially and morally desirable end, and it must constantly be modified to achieve that end.

In our day and age, one major aim of the administration of justice in international affairs is to demonstrate beyond doubt that lawlessness. . . . .entails prosecution and punishment."

Notwithstanding Supreme Court sanction of its procedures, the Army has since announced that should it be required to again try war criminals it will adhere to traditional American rules. Already in August 1948, too late to affect the war crimes trials, the Continental-type rules were scrapped in the regular military government courts and U.S. procedures adopted in their place. This momentarily aroused many German lawyers who threatened to boycott the courts, asserting that they could not properly represent clients under rules they were unfamiliar with! Although the threat was not fulfilled, the outburst is significant only by way of proving that it is the familiar that seems fair.

Less concerned with the technical rules in the war crimes trials than their American brethren, the German defense counsel seemed more dissatisfied with certain Anglo-American attitudes that crept in despite the Continental atmosphere---things the Americans took for granted but which the Germans thought unfair. Most offensive to them was the tradition that a trial is a sort of duel or contest. They were accustomed to a full disclosure of all of the prosecution's evidence beforehand. Thus when the Americans would spring a surprise witness or unexpected evidence they reacted quite critically. Sometimes they intimated that evidence helpful to their defense was being withheld. Although this was hotly denied, one judge seemed to sympathize with their position. Judge Charles F. Wennerstrum (of the Iowa Supreme Court), one of the three members of the tribunal which heard the "Hostage Case" gave an exclusive interview to the Chicago Tribune as soon

as judgment had been pronounced and charged the prosecution with vindictiveness. He implied that they withheld evidence. "The trials, " he said, "were to have convinced Germans of guilt of their leaders. They convinced the Germans merely that their leaders lost the war to tough conquerors." Immediately, amid acrimonious complaints from the Tribune's reporter that the Army had peeked at his "scoop" as it went through Army communication channels, the chief prosecutor, General Taylor, countered that the judge's remarks were an "insult to able, conscientious, loyal Americans who are rendering devoted service to their Government. . . . You have. . . . sought to discredit the very judgment which you and your two distinguished colleagues have just rendered. . . . . You well know that these are. . . . .false accusations."

Another criticism, especially leveled at the Dachau courts, was that rules requiring expeditious trials were being followed too literally--that the Germans needed more time for their defense preparations. The authorities would remind them that similar regulations governed the court-martial trials of their own American soldiers. Perhaps the greatest amount of adverse publicity was aroused by the "Malmedy Massacre Case." Here the criticism was so strong that in the end the Army nearly had to apologize for the trial of the men responsible for the coldest atrocity against American soldiers in the history of the war. Caught between what was almost a mandate from the American people to bring the guilty ones to justice, on the one hand, and the difficulties of proving a case without eye-witnesses who could identify the SS troopers who had shot down the 150 surrendered Americans, on the other, the Army was in a most difficult situation. By outstanding detective work the field was narrowed to a particular panzer unit, but the members thereof, sworn to secrecy, refused

to talk. Ultimately by the use of the most adroit psychological methods they did talk. At the trial the prosecution itself brought out that "it took months of continuous interrogation in which all the legitimate tricks, ruses and strategem known to investigators were employed. Among other artifices used were stool pigeons, witnesses who were not bona fine, and ceremonies." Undoubtedly it anticipated some credit for the achievement. But when, after conviction, efforts were made to have the case heard by the Supreme Court, a hue and cry went up. Jealous of American honor and reputation for fair play and disturbed about stories of forced confessions from men in east European countries, an articulate segment of American public opinion roundly criticised the trials. Although the Supreme Court refused to hear the case, the Army held two investigations of the circumstances and the U.S.Senate held a most exhaustive one, in addition. The "Simpson Board" of the Army concluded that the "propriety of many of the methods employed to secure statements from the accused is highly questionable and, we conclude, cannot be condoned." Although it could not gauge the effect of these methods it believed that "sufficient doubt" was cast upon the proceedings to make it unwise to proceed with the execution of the death sentences. Nevertheless, it found that the record of trial "sufficiently manifests the guilt of the accused to warrant the findings of guilty" but believed that it was "extremely doubtful that an American court-martial would fix any punishment more severe than life imprisonment if it were trying members of the American Army who committed like offenses in the heat of battle" and therefore recommended that the twelve death sentences be commuted to imprisonment for life. Later six such sentences were so commuted and as to the others ~~it is~~ they were not

(doubtful if they will be) executed.

The senatorial investigators were not nearly so critical of the Army as the Army had been of itself. They believed that the Army investigations had not been thorough enough, that too much credence had been placed on the claims of brutalities (for such claims had been made by the prisoners), that these SS men were hardly worthy of belief for their own attorneys had admitted that they were such outrageous liars that they did not trust them on the witness stand at the trial. After calling on the Public Health Service to examine the men, the committee was convinced that the claims of brutalities were highly exaggerated. Most amazing, when one of the Army investigators, in civil life a judge, was pressed concerning the basis of an inflammatory article he had written, "American Atrocities in Germany," he recanted large portions of it and disclosed that he had been induced to publish it by a man whose "mission" it was to prevent further wars by releasing all German war criminals!

To balance the score, the Army was also under attack for being too lenient and too concerned with a war criminal's rights. Unquestionably, the greatest furore was raised when the reduction of the sentence of Ilse Koch to four years was announced.

Looking at the broad picture, it is evident that much consideration was shown to the Germans on trial. Their hearings were public and were reported to the world, the best qualified men available were sought to act as judges, the accused were permitted to call witnesses and to take the witness stand in their own defense, they had the right to petition for review after conviction--even to the highest court of the United States --and in any eventtheir cases were intently scrutinized for

extenuating circumstances, they were well treated while imprisoned, and most important of all they were given American officers or civilian lawyers to defend them, or they could have German counsel, or both. Their German attorneys were given facilities, food, cigarettes and transportation by the Army and were well-paid by the authorities. What is more, so solicitous was the Army of affording them every opportunity to procure the best attorneys that it even permitted known Nazis and SS members to appear for the defense and gave them immunity. More than half of those acting as defense counsel at Nurnberg were in that category.

In evaluating the various criticisms of the war crimes program insofar as they pertain to procedures, it will be recalled that no judicial system is perfect and that appellate techniques exist in recognition of this fact. It will be recalled too that the pleas of defense counsel are necessarily the extreme statements in support of his client. A good lawyer always attacks the prosecution and the court if his case is weak on the facts. In the larger view there is one basic question: has the system convicted men who have not committed the crimes charged? To this the American Army could honestly and firmly reply: "No. Every precaution was taken to assure that such could not happen." Certainly the acquittal or exoneration of some 16% of those tried is strong evidence of that fact. In this perspective the American public can feel assured that a difficult job was well done. It may like to remember the comment of two German physicians as representative of the unprejudiced view on the fairness of the trials, even though it was made only in connection with one case. These men were observers at the trial of the Nazi physicians and later published a report on these "Doctors of Infamy." In closing, here is what they said:

"One subject, however, that may be discussed even now is the manner in which the trial was conducted. Little purpose would be served merely to let it go at emphasizing the sense of sovereign impartiality displayed by the court. In present day Germany, its atmosphere steeped in distrust, such a judgment would only be regarded as subjective, if not inspired. And indeed, when victor, sits in judgment over vanquished, a situation is created that goes far toward favoring the subversion of justice. The man who distrusts these reporters when they say that there was no trace of such a thing in this trial should take the trouble to read the trial transcript. . . . . [then] he will become convinced, even without himself having witnessed the serene and unemotional atmosphere of the Nurnberg courtroom, that the trial was conducted in keeping with high traditions of jurisprudence. It was conducted even more, from a desire to render no verdict except with a full knowledge of how the accused were enmeshed in the whole historical pattern."

The American judges whose bearing called forth this remarkable appraisal were Walter B. Beals, Chief Justice of the Supreme Court of Washington, Harold L. Sebring, of the Florida Supreme Court, and Johnson T. Crawford, of the District Court of Oklahoma. Sitting as an alternate was Victor C. Swearingen, former Assistant Attorney General of Michigan.

XIX.

Although the denazification program is generally regarded as a separate process from the war crimes trials, both stem from related pledges at Potsdam and ultimately a large portion of the original trials program was practically absorbed by the denazification system.

Early in the Occupation the U.S. Military Government began to give its attention to the promise to blot out Nazism, and to purge the body politic of the men who had influenced German thought and life for evil. Then, purified but convalescing, the country was to establish new foundations upon which a democratic Germany could be built. At the outset, officers with detailed knowledge of the Nazi hierarchy prepared lists of organizations and offices where the taint would be found. Germans whose records showed such affiliations were suspect. To have them available for such trial as might follow and to lessen the danger of rebellion or sabotage, those in the "activist" class of organizations were to be held in "automatic arrest."

By January 1946 the Allied Control Council had issued a directive providing for a uniform basis for denazification in all four zones. In this it undertook to define which ones were to be removed. Taking the language of the Potsdam Declaration, it endeavored to spell out which were to be considered as having been"more than nominal participants" in the Party or "hostile to Allied purposes," and called for their removal from public office and positions of responsibility in private business. It went further and indicated that the Germans might begin the cleansing process themselves, guided by the terms of this directive, but under Allied supervision.

This was quickly implemented in the U.S.Zone. Bringing to a close the first phase of Military Government operated denazification, a new and broader program, operated by the Germans with onlyoverall U.S.Supervision,was put into force. The German law, the "Law for the Liberation from National Socialism and Militarism," drafted withAmerican advice and to meet American specifications, was enacted by the three new Laender, or states, into which the U.S. Zone had been divided, on March 5, 1946. It proved to be the most controversial piece of legislation in German history and, sad to recount, probably no oppressive Nazi law had ever aroused similar popular distaste. But this law was devised to be "good" for the Germans, and bitter medicine or not, the U.S. Military Government was standing over to see that it was taken.

Liquidation as a means of clearing out political opponents was well known in Europe but it was hardly the line the U.S. could permit or encourage the anti-Nazis to follow. Peaceful precedents were not known but a fair method must be found. Before a man could be made to suffer punishment he must have the opportunity to contest the charge. Thus the Law declared:

> "Everone who is responsible shall be called to account. At the same time he shall be afforded opportunity to vindicate himself."

This involved every German over the age of 18. For this job, involving thousands of trials, the regular court system was deemed neither big enough nor qualified enough, so special tribunals were organized, staffed by laymen having reputations as being "opponents of National Socialism and Militarism"

Categories of complicity were set forth and the limits of punishment for each were prescribed. Dividing the adult population

into five classes--1) Major Offenders, 2) Offenders (activists, militarists and profiteers), 3) Lesser Offenders (probationers), 4) Followers, and 5) Persons Exonerated--it provided appropriate penalties for those decreed to be within the first four.

By definition a Major Offender included practically every person also subject to trial as a war criminal but they could be tried by either or both systems. The most vehement critic of Nazi excesses could have found no fault with its comprehensive catalogue of criminality covering active party membership, plundering, deportations, concentration camp cruelties, and giving support to the "National Socialist tyranny" or persecuting its opponents. Their punishment was to include work in a labor camp from two to ten years, confiscation of their property as a "contribution to reparations," permanent ineligibility to hold public office or to act as notary or attorney, and loss of public pensions, the right to vote and the right to be a member of a political party, trade union or business association. Moreover, for a least ten years they were not to be employed except in "ordinary labor" and were to be prohibited from activity in a profession or business or as a teacher, preacher, editor, author or radio commentator.

Class two penalties were similar but of shorter duration. In Class three were to be placed those active Nazis who appeared to be truly misguided and for whom a period of probation was deemed essential to their rehabilitation. Such period was for no longer than two years and meanwhile they would be subject

to the employment restrictions but the severe penalties of the first two classes were not permissible.

On the other hand, those who could arrange for a classification of Follower had little to worry about. Such were deemed to have been merely nominal Party members who had taken no active part in things. For them the punishment could be only a fine of 50 to 2000 reichsmarks (the latter equivalent to approximately $60.00 after the 1948 currency reform and much less before). Job demotion was optional but no loss of civil rights or prohibition from political activity could be imposed. Military Government was rightly apprehensive about the possible abuse of this category. Warning that one so classified would be eligible for appointment or reinstatement in public or semi-public office and positions of responsibility in other fields, it cautioned a strict construction of the definition "otherwise the most important denazification objective of the Law. . . . . will be defeated." Little did it then realize how accurate this prediction was to prove nor how, within two years, its full efforts would be exerted in favor of a looser interpretation of the law.

In the meanwhile the IMT was studying this new statute. When it made its declaration concerning the criminality of the SS, the SD, the Gestapo and the Leadership Corps of the Nazi party, it had been pursuant to the original plan to later try their members in zonal courts for their participation. It had been contemplated that such members could therein contest the charges of individual participation but not the criminality of the organization, a fact already settled by the IMT. However, the Tribunal noticed that this new law included these very members within its scope but authorized a lesser punishment: a maximum of ten years' loss of liberty under the denazification

law but life imprisonment and even death under the "membership" legislation. Believing this inequitable and unwilling to countenance possible double jeopardy, it ruled that "membership" punishment should not exceed that fixed by the denazification law and that no person should be punished under both. This admonition the U.S. Military Government quickly carried to its logical conclusion. Here was the answer to the problem of creating, staffing and paying for the great judicial system that would be needed to try the "membership" cases. As the punishments were to be equalized and if the Germans tried a man the Americans could not, why not let the Germans handle the whole thing under their law? And that was the order, although it did not go so far as to terminate the regular war crimes program concerned with offenses other than mere "membership."

In approval of this solution Justice Jackson was to later remark that the denazification law reached the same people by a swifter and simpler method than was contemplated under the proposed "membership" trials plan which had been "one of the most troublesome and least useful features of the Nurnberg trial." It had only been adopted because at that time, in 1945, "no other plan for dealing with the membership of these lawless groups by the occupation had been promulgated."

The "membership" legislation was broad enough to be used for another purpose, however. It formed the basis for the twelve great "subsequent" Nurnberg trials wherein some incidental charges of membership were heard but which were mainly concerned with more serious war crimes. It was likewise the authority for like incidental charges in some of the Dachau proceedings but the Judge Advocate did not regularly invoke the law because he regarded it as unduly extending the scope of his mission. Otherwise, with

these exceptions, the entire "membership" program was merged into denazification.

At the beginning, one of the most curious (yet not unwelcome) effects of the new law was the flood of denunciations and accusations by Germans against fellow Germans, by neighbor against neighbor--evidently a remnant of the psychology of the Nazi regime. It seemed as if everyone was anxious to accuse someone else to divert suspicion from himself. He looked back over his life, and if there had ever been a time, no matter how remote, when he had performed a kindly act towards a Jew, that was brought up and decked out as veritable proof of innocence of all other charges. Suddenly the reviled Jew had become the pass-key to freedom. Suddenly the few surviving German Jews in post-war Germany, and those all over the world, wherever they may have fled, found themselves being cultivated by their former "good friends". It was even rumored that in Berlin one could buy certificates"establishing"the existence of a Jewish grandmother.

Despite all the earnestness the anti-Nazi Germans could summon in order to make the system work, the administration of the statute got off to a bad start. Military Government examined its operation at the end of the first six months and whereas it had regarded 13% of the cases it sampled as justifying the finding of Major Offender or Offender, the denazification officials had so classified only 1%. Consequently, General Clay very forcibly told the Germans that the Americans would again take over the job if it could not be handled any better within the ensuing sixty days. Thereafter, some improvement was seen.

But there were other troubles connected with the immensity of the task. Altogether about thirteen million persons were registered under the law, or about 25% of the population in the

U.S.Zone. About three-fourths of this thirteen million could be excluded at the outset for their registration statements did not show them to have been Nazis or war criminals, although a few were later discovered to have filed false statements. The total to be processed was cut considerably more by General Clay at Christmas in 1946. By amnesties he excluded another 19% because of youth (those in their teens during Hitler's time), poverty (obviously could not have profited from National Socialism) and physical disability. This left only about 8% to stand trial, but even this involved about one million persons. Here was an unparalleled administrative problem, for it is doubtful that ever before in history so many people were subject to court proceedings at one time. At peak strength some 545 tribunals employing a staff of over 22,000 were in operation.

On the theory that the cases of the "big Nazis" would require much time for preparation, the cases of the "little Nazis" were tried first so that they could know their fate quickly and get back to work as soon as possible. But the case load was so great that long delays were inevitable. Meanwhile thousands were being excluded from their normal sources of livelihood. The postponement of the important cases caused much cynicism. Soon the mounting dissatisfaction forced even Military Government to look for a way to cut corners. By October 1947 it had approved a speed-up program whereby those charged as Offenders could have their cases disposed of by summary proceedings without a formal trial, if they had not been in the SS or similar organizations and had not become incriminated in war crimes. These men were quickly classified merely as Followers, for the most part, and given the painless penalties authorized.

By the following March a survey reported the "discovery"

that most Germans initially charged as being in the first two categories ended up by being classified in the third of fourth --with inconsequential punishment, of course. Why not, then, permit the prosecutors to be "realistic" and give them full discretion to downgrade all the charges? Then by using the summary procedures these "small" cases could be swiftly disposed of. Obviously, denazification could not be scrapped but it could be interpreted away in the light of these statistics which, seen in true perspective, only pointed to the growing leniency of the program. It was this that was to be the precedent for further leniency!

By this time, with currency conversion not far off and with German production already beginning to revive, Military Government itself yearned for a speedy conclusion. Let the thousands of suspects get their records cleared and get back into productive labor, was the attitude. Thus, with the U.S. authorities behind them and placing every means at their disposal, the German officials wiped out a great backlog of cases in very short order. Whereas in February 1948 some 86,000 cases had been disposed of, in March 106,000 were handled and in April with about 217,000 amnestied and 93,000 "tried" the prodigious quota of approximately 310,000 was reached for that month.

With punishment so painless it began to be cynically considered a good thing to be classified as a Follower; it carried all of the advantages of previous Nazi Party membership with practically none of the disadvantages. Perhaps some day it might be a good item of reference when seeking a job after the Americans pulled out.

By 1949 stock could be taken of the results. The trials were still dragging on but enough cases had been processed to

warrant evaluation. Over 945,000 persons had had their cases formally or summarily disposed of. Of these over 51% had been classified as Followers, about 11% had been placed on probation for a few months as Lesser Offenders, 2% had been considered as Offenders, and only 2/10 of 1% had been deemed sufficiently implicated to justify classification as Major Offenders. Although the total of those in the two serious categories was approximately 23,500, only about 9,600, or less than half, were given labor camp sentences. In reckoning punishment, however, account could also be taken of some 74,000 who had been interned as suspects for nearly three years even though only about one-third were held further after trial was had.

In the other categories about 100,000 had a "no employment except in ordinary labor" restriction for varying periods; but as soon as the few months expired they were free to go back to work wherever they wished. Their debt to world society had been paid.

From these figures it is not difficult to understand how it has been possible for so many former Nazis to be back at their old stands; they are back in the government offices, in the courts, in the professions, in industry. If denazification was to keep them out for a long enough period to allow new blood to infuse itself throughout Germany, then it has not measured up to expectations. The process had become too mechanical. For many it involved "taking the cure" and getting it over with; no worse than a traffic fine and with about the same moral obloquy. It was a purge, but only of their worries and disabilities; it was not quite the purge of the national conscience that was hoped for. One of the German satiric magazines once lampooned the process by a cartoon showing a huge Rube Goldberg-like machine, full of wheels and dials. At

one end of this contraption, labeled "Denazification", stood a glum, evil-looking Nazi. Seen again, coming out of the other end, he was robed in white, crowned with a halo, and smiling beatifically.

From the 1949 survey it appeared that there were some 8,300 cases yet untried. ~~It is unlikely that~~ the final report on these ~~will~~ did not affect the statistical results in any great degree. Even if it were assumed that all were to be placed in the first two categories (an unlikely result) and added to the 23,500 already so classified, one would have a total of about 32,000 incriminated Nazis in the U.S. Zone; only 32,000 out of the million who had been chargeable under the law. And of the thirteen million who had been obliged to register this would yield a percentage of about 3/10 of 1%--less than three Germans out of every thousand considered guilty of playing any substantial part in the twelve-year reversion to barbarism!

Schacht was one of those who was classified as a Major Offender but the sentence did not stick. On appeal, he was exonerated and his eight-year labor camp sentence was quashed. Released from custody, he immediately returned to his home in the British Zone and despite later reversals of the reversal he refused to come back to the U.S. Zone to stand a new trial. Nor did the authorities force him too, despite impotent antics of the Wuerttemburg-Baden denazification officials solemnly setting and resetting the case for hearing. This comedy did little to help the prestige of the system.

Another notable, acquitted by the IMT but later denazified, was von Papen. On appeal, however, his classification as a Major Offender was reduced to Offender and his labor camp sentence terminated. A substantial fine was allowed to stand. Cuhorst, one of the judges acquitted in the "Justice Case" was also tried. Found to be a Major Offender, he was given four years in a labor camp to

think it over. The fabulous Skorzeny, Mussolini's rescuer, was also scheduled for trial but he "escaped" from the internment camp and "disappeared." Other well-known figures included Fritz Thyssen (the great industrialist who had helped bring Hitler to power and then repudiated him) who was classified as an Offender; Fritz Wiedemann (formerly German Consul-general in San Francisco and one-time adjutant to Hitler) who was found to be a Follower; and Werner Kraus (the prominent actor who had played the lead role in the film "Jud Süss" in a manner designed to arouse anti-Jewish antagonism) was ultimately placed in the Lesser Offender category after several trials. Even one whose activities had been carried on in America was regarded as amenable to the law, for Fritz Kuhn, the former head of the German-American Bund, was held for trial after his deportation by the U.S. to Germany at the end of the war. His final sentence as an Offender with a two year labor camp sentence, a fine and confiscation of his property was hardly the sort of welcome he had anticipated.

That the law was almost universally detested is hardly surprising, for no statute sponsored by the occupying power would have been welcome. Not only was this attitude held by those implicated under it but community leaders and clergymen charged that it was having a divisive effect on the people, ranging neighbor against neighbor. Some anti-Nazis also joined in the criticism. Deplored was the cynicism aroused when a few of the officials were themselves discovered to have concealed Nazi records; protested was arbitrariness of a law that deprived thousands of their usual jobs and rendered them nearly destitute for many months until their cases were heard; alleged were the contentions that many had been caught under it for mere opinions but no real criminality, that many smart fellows were getting off too easy or pulling strings or moving to other zones, that too many "little men" were being penalized, that too many

verdicts were prompted by purely political motives, that too many intellectuals were silenced, that proper account was not taken of the complete permeation of propaganda in a dictator-run state from which no one could escape, and that too many of the officials were stupid and with nothing to recommend them but a clear record or, worse, affiliation with opposition parties.

Doubtless, the cumulative effect of these criticisms had some effect on the course of the program but Military Government made no apologies for the system. It fully realized that any procedure devised would have been criticised by the Germans and would have been unwelcome. To charges that the denazification boards have been too lenient, it replied that there have also been many charges that they have been too harsh; to charges that the purposes of the law was often subverted to private ends, it pointed out that charges of favoritism and corruption are leveled against the administration of justice everywhere in the world; and to charges that it had failed to denazify, it expressed the belief that the law has "served to eliminate Nazi activists from positions of influence and has imposed continuing sanctions against those found to be incriminated." It recalled that there were no precedents for such a vast undertaking and that there was therefore no yardstick with which to measure its degree of success or failure. Ultimately, it believed, a change of heart in Germany must come from within.

Looking back, General Clay thought that the procedure might have been more effective if it had concentrated on a rather small number of leading Nazis without attempting the mass trials. Nevertheless, he was convinced that the system used had operated to exclude major Nazi leadership for years to come. In his view, had

not the nominal Nazis (whose real guilt was a matter of controversy) been restored to public life political unrest of a serious nature might have developed. It seemed to him that German public opinion, including the critically anti-Nazi trade unions and the denazification official themselves, supported the speedy winding up of the program. This too was the view in Washington.

Washington also favored an early cut-off date for further war crimes trials. They were beginning to be regarded as not in harmony with the new plans for Germany. Furthermore, they were expensive, costing several millions of dollars yearly. As early as July 1947, General Clay was instructed to "facilitate and bring to early completion the War Crimes Program" and by 1948 the Pope, in a letter to German Catholic leaders, declared that the world should forgive and foregt Germany's war crimes and help in the country's reconstruction. A deadline of June 30, 1948, had been set. Actually, the last Nurnberg case in progress on that date dragged on until April 1949, but no new trials were held at Dachau after the end of 1947.

When it became evident that not all of the cases in preparation would reach trial, and as part of the program to release Germans held in confinement if no actual charge was pending against them, thousands of suspects were released by the U.S., shriven of their offenses except insofar as the German denazification authorities might hold them. About half probably would never have been brought to trial anyway, due to the difficulties of proving a case against them. Witnesses were dead or unavailable or the offenses were relatively unimportant. How many of the other half would have been tried if the program had continued is conjectural.

By 1949 the war crimes programs of all nations had practically come to an end. It had been foreseen that many would go unpunished. Lord Wright, the Chairman of the United Nations War Crimes Commission, had indicated in 1945 that if ten percent of the war criminals would be tried that this would be regarded as satisfactory. Three years later, as he looked back, he reflected:

"But countries like the United States, Britain and the

members of the British Commonwealth are now so overwhelmed by the crowd of problems consequent on the war, that they seem involuntarily to turn aside and forget war crimes. . . . .The waves of war crimes prosecutions are beginning to settle down and will soon subside. The majority of the war criminals will find safety in their numbers. It is physically impossible to punish more than a fraction. All that can be done is to make examples."

In retrospect it will probably be conceded that the U.S was the most thorough in carrying out the war crimes program contemplated by the Potsdam Declaration, with second place going to England. In the British Zone there were, comparable to the Dachau courts, military tribunals for the trial of those who had mistreated British prisoners of war. They also heard such notable cases as the "Peleus Trial" involving five of the crew of a U-boat who killed the survivors of a sinking merchantman in the South Atlantic, the "Natzweiler Trial" involving ten Germans who murdered four British women by injection of poison at Natzweiler Concentration Camp, and the "Belsen Case" in which 45 persons stood accused of atrocities in the Belsen and Auschwitz camps. This was the first concentration camp case tried in Germany and set the precedent for those that followed in the American Zone. These courts sentenced some 180 Germans to death and approximately 270 to imprisonment for various terms. Of the 45 in the"Belsen Case", 30 were adjudged guilty, 11 of whom received the death sentence, one life imprisonment and the remainder prison terms varying from 1 to 15 years.

Later in the program the British turned over the jurisdiction of crimes against humanity/to civilian-staffed Control Council against Allied nationals (military government) courts, while reserving the offenses against British soldiers for trial by the military tribunals. A number of such cases were handled and included such crimes as mistreatment of prisoners in a penal camp and carrying out sterilization operations on Gypsies to prevent the increase of the race.

Where the victims were Germans the British far surpassed the U.S. in techniques of handling. Although the basic policy had been that the Germans would not be entrusted with the task of

trying war criminals, the principle was deemed particularly applicable only where the victims had been Allied nationals. There were not quite the same misgivings about German evasiveness in cases involving German victims and Allied Control Council Law No. 10 had been drafted to include a grant of authority to German courts to handle such, if permitted by the zone commander. The British gave the word and the Germans went to work. To prevent any whitewashing the British tried a few pilot cases in their own courts and rejected the common defenses of "superior orders" and "ex post facto". With these as models, the Germans made a rather creditable showing, trying about 500 of such cases involving approximately 1000 accused, of whom more than 600 were convicted. There were, however, only 4 death sentences. Most were given terms of imprisonment for varying periods while a few were let off with a fine.

This British insistence upon German assumption of responsibility was not without embarrassment, for the Germans in their zone frequently pointed to the U.S. zone where no such supervised efforts were being made and where, consequently, only a few such trials were held. Each case required special permission, as contrasted with the blanket authorization in the British zone, and the Germans were not enthusiastic enough to seek it very often. Furthermore, they had a tendency to apply the familiar defenses already rejected in the British Zone, and acquitted some of the accused. Although the Americans gave the Germans some aid by way of data from the mountains of evidence they had amassed but which had not been all utilized in the U.S.trials, there was no firm backing of the program, and much more was not even offered to them. This strange diffidence can probably be traced to an attitude based on not giving further offense to the Germans

--we will finish what we started but not begin anything new. In part too it may be a result of the tremendous scope of the denazification program, which if well administered should have caught the same culprits as would further war crimes trials.

The British Zone had no exact counterpart of the "subsequent" Nurnberg trials. In its military courts, however, it tried such military leaders as General von Falkenhorst for his responsibility for the killing of commandos and other Allied personnel when in command in Norway. Then, as late as 1949, it tried Field Marshal von Manstein for atrocities committed by his troops in Southern Russia. This trial came on amid a considerable amount of criticism in England, for many were provoked at the long delay. Contributing to the accused's defense fund were many prominent people, including Winston Churchill, intent on showing traditional British fair play by providing him with British defense counsel. He was found guilty of such offenses as failing to ensure public safety, issuing orders to kill hostages, and permitting deportations for forced labor, and sentenced to imprisonment for 18 years.

The French tried a number of war criminals in France for offenses committed therein. In the French Zone of Germany, however, only one outstanding trial took place. Hermann Roechling, one of the industrialists of the Saar region, was charged with planning and waging aggressive war as well as economic plundering and enslavement of civilians. This court, convoked under the Allied Control Council Law No. 10, the same law under which the "subsequent" Nurnberg trials were held, was composed of one Belgian, one Dutch and five French judges. Although he was convicted of the plundering and enslavement charges the charges of crimes against peace were not sustained. His sentence

was ten years' imprisonment and the forfeiture of his property.

Of trials in the Soviet Zone very little is known. In this field, as in others, secrecy has been the practice.

XXI.

Greater than his crime against the peoples of Europe was Hitler's crime against civilization, the crime of setting the clock back, the crime of bringing other nations to the point of once again regarding warfare as essential to their national welfare and to calmly expect "future wars," the crime of forcing them to adopt reprisal techniques and to so lower all standards to his. Now such things as the bombing of innocent civilians is coolly anticipated and prepared for and the use of atomic missiles is accepted with equanimity--its use meaningless unless as a weapon against defenseless peoples.

As the world sinks into deeper cynicism such attitudes can soon render it impossible to maintain adherence to the principles enunciated in the war crimes trials. Seekers of peace among the nations and the believers in a world of law have been striving in the United Nations to overcome this trend. Within several weeks after the judgment of the IMT, the United States proposed to the United Nations that the principles relating to crimes against peace be codified. By 1949 there had evolved a draft UN Declaration on Rights and Duties of States. This the General Assembly submitted to all member states and requested their comments by July 1, 1950.

Even greater progress was made with respect to international recognition of one of the most diabolical of the crimes against humanity. In 1946 the United Nations declared that the offense of "genocide"--the destruction of national, ethnical, racial or religious groups, as such, was a "crime under international law." Then, spurred by the perseverance of Professor Raphael

Lemkin, who coined that term, the General Assembly unanimously approved a draft Convention on Genocide. This was signed in 1948 by the representatives of twenty nations, including the United States. ~~(Now it must be ratified by these same nations before it comes into force).~~ Despite the universal abhorrence of the crime, in the U.S. the matter of ratification has aroused some controversy. Under the Convention an international court could pass judgment upon such acts. In this possibility some public-spirited, but overly-cautious citizens (the American Bar Association foremost among them) see a danger and recommend that the U.S. Senate not ratify it. Fearing international intervention, they argue that the acts condemned are already offenses under American law and no further international treaty is needed. Moreover, they believe that it infringes on the freedom of speech and press insofar as it declares that the "direct and public incitement to commit genocide" shall be a crime! (No doubt the draftsmen were thinking of a Streicher here.)

Yet to the advocates of the Convention its essentiality became apparent when it was learned that, although the London Charter had defined crimes against humanity so as to include murder and the extermination of civilian populations "before or during the war," the IMT had ruled that the persecutions of Jews in Germany <u>before</u> the war were neither war crimes nor committed in connection with an aggressive war. The tribunal therefore refused to hold the defendants accountable for such peacetime atrocities. In both the "Flick Case" and the "Ministries Case" the same question arose and the same result was reached. It is this gap in the law that the Convention is largely designed to reach.

The State Department, in urging ratification, reminded the Senate

of the many instances when the U.S. protested to other nations concerning their oppressive treatment of racial or religious minorities during peacetime. This international recognition of the criminality of such acts was only the next logical step. These instances had been referred to by the courts in the "Einsatzgruppen Case" and the "Justice Case" as evidence of the growth of the concept of crimes against humanity.

That rejection of the Convention will seriously harm the reputation of the United States for moral leadership can hardly be doubted. Such action will unquestionably be the occasion for cynical laughter through the long corridors of the war criminal prisons in Europe.

But there is yet a larger question. Will any rules prevent warfare and all of its horrors? There is no easy answer, for it takes more of the heart than it does of the law. Despite laws against murder from time immemorial, man still kills. Would anyone advocate their repeal on that account or because some murderers go scot free? For like reason laws defining the crimes of nations are needed. Granting that there may be times when they will not be invoked when they should be--because of a lowering of international morality, and granting that there may be times when they will be invoked when they should not be --by an aggressor or to becloud history, we of this age cannot keep the conscience of the future. But we can set forth the precepts we have learned at so huge and sad a cost to guide mankind on the steep and rocky road to universal peace.