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SUBJECT: Judgment of the International Military Tribunal

The attached paper concerning the judgment of the International Military Tribunal was prepared by a member of the Legal Division, Mr. Whitney R. Harris, who served on Mr. Justice Jackson's staff during the proceedings. The paper contains much interesting material and comment in convenient form, and is distributed for information and as a means of ready reference.

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LEGAL EFFECT AND SIGNIFICANCE OF THE JUDGMENT OF THE INTERNATIONAL MILITARY TRIBUNAL

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I. INTRODUCTION

The punishment of war criminals is a primary task of the military occupation of Germany under the Potsdam Agreement. United States' policy was enunciated by a directive of the Joint Chiefs of Staff which has been given quadripartite application by Articles II, III and IV of Control Council Law No. 10. This directive and law are designed to reach the major war criminals to be tried by each of the occupying powers in their respective zones of occupation. The crimes of which the accused may be charged are (a) war crimes proper, i.e., violations of the laws and customs of war; (b) crimes against the peace; (c) crimes against humanity; and (d) membership in criminal organizations.

The most important chapter in this program of punishing war criminals was the trial of the twenty-two alleged top German war criminals conducted by quadripartite action of the occupying powers. This trial, before the International Military Tribunal, which opened officially on the 20th day of November 1945, had its antecedents in the experiences after the last war in dealing with the war criminals of that day, and in certain international statements and agreements. No adequate appraisal of the effect and significance of the judgment of the International Military Tribunal can be made which does not take into account this pre-trial background.

II. PRE-TRIAL BACKGROUND

Trial of War Criminals after World War I.

The Preliminary Peace Conference of World War I established, on 25 January 1919, a Commission of fifteen to investigate and report upon violations of international law committed by Germany. The various Allied governments submitted memoranda detailing alleged breaches of laws and customs of war and the Commission recommended the creation of a special tribunal to be composed of three members appointed by the five principal powers and one by each of the lesser Allied governments for the purpose of prosecuting war criminals. The recommendations of the Commission failed, due in principal part to special reservations inserted in the report by American members, and as an alternative, Articles 228, 229 and 230 were inserted in the Treaty of Versailles. These articles expressed the right of the Allies to bring to trial before military tribunals persons accused of having committed acts in violations of the laws and customs of war, and bound the German Government to surrender all accused persons. The United States submitted no names, but the other Allied governments compiled a list of some 900 alleged war criminals which was presented to the German Government.

Instead of turning over the wanted persons, Germany proposed that it be permitted to prosecute the accused before the Supreme Court of the Reich at Leipzig, and this proposal was accepted. An abridged list of 45 major offenders was then submitted to Germany on May 7, 1920. The trial opened in Leipzig on May 23, 1921, two and a half years after the Armistice. Of the 45 presented in the abridged list, only 12 were actually brought to trial, and of these only six were convicted. The maximum sentence imposed was four years imprisonment, and both defendants so convicted "escaped" from prison shortly after commencing their sentences. That was the end and extent of punishment of the major war criminals of World War I.

The Moscow Declaration of 30 October 1943.

The foreign secretaries of the United States, Great Britain and the Soviet Union conferred at Moscow from 19 to 30 October 1943. At the conference, the foreign secretaries published a statement on atrocities signed by President Roosevelt, Prime Minister Churchill and Premier Stalin, containing a solemn warning that at the time of granting any armistice to any German Government, those German officers and men and members of the Nazi Party who were responsible for or took a consenting part in atrocities, massacres or executions would be sent back to the

countries in which their deeds were done in order that they might be judged and punished according to the laws of the liberated countries and of free governments established therein, except with respect to those German criminals whose offenses had no particular geographical localization and who would be punished by joint decision of the Governments of the Allies. Notice to German war criminals was stated unequivocally in this language: "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."

The Moscow Declaration thus accomplished three things: (1) It placed on notice all German war criminals that they would be held to account for their criminal acts; (2) it provided for return of German war criminals to the countries in which their crimes were perpetrated; (3) it provided for punishment of war criminals whose crimes were not localized (in effect major war criminals) by joint action of the Allied governments. At the Yalta Conference of 7 February 1945, the Allied Chiefs again stated their determination to bring all war criminals to justice and swift punishment.

The London Agreement of 8 August 1945.

For the purpose of giving effect to the punishment of major war criminals under the Moscow Declaration, an agreement was signed in London on 8 August 1945, by representatives of the Governments of the United States, France, Great Britain and the Soviet Union, acting in the interests of all the United Nations. Provision was made for other nations to adhere to the Agreement, and ultimately 23 Governments became signatories. This Agreement established the International Military Tribunal, the constitution, jurisdiction and functions of which were set out in the Charter appended to and incorporated as a part of the Agreement.

The Charter set up the International Military Tribunal to proceed with the just and prompt trial and punishment of the major war criminals of the European Axis. The Tribunal was to consist of four members, each with an alternate. The Tribunal was given power to try and punish major war criminals who committed any of the following crimes:

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

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.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit the crimes so specified were declared responsible for all acts performed by any persons in execution of such plan.

The Charter provided that at the trial of any individual member of any group or organization the Tribunal might declare, in connection with any act of which the individual might be convicted, that the group or organization of which the individual was a member was a criminal organization. The Charter empowered signatory powers to bring individuals to trial for membership in organizations declared criminal, and provided that in such cases the criminal nature of the organization could not be challenged.

The Charter provided that each signatory should appoint a Chief Prosecutor and that the prosecutors should act as a committee for preparing the indictment and submitting draft rules of procedure. Provisions were inserted insuring fair trials for the defendants, and the powers of the Tribunal in conducting the trial were specified. The Tribunal was directed to apply to the greatest possible extent expeditious and non-technical procedure and to admit any evidence which it deemed to have probative value. The Tribunal was authorized to impose sentences of death or such other punishment as it deemed just upon persons convicted. Sentences were to be carried out in accordance with orders of the Control Council for Germany, which was authorized to reduce or otherwise alter the sentences but not to increase the severity thereof.

III. TRIAL

The Indictment.

Following the publication of the Charter, the chief prosecutors, acting as a committee and working through their staffs, drew the Indictment, which was lodged with the Tribunal in Berlin on 18 October 1945. It named twenty-four leaders of the Nazi State and Party as defendants, and specified seven organizations as criminal.

The individuals are named in the Table appended hereto, together with notations of charges on which they were found guilty or acquitted, and the sentences they received; the organizations are also named in the appendix, together with notations of whether declared criminal.

The Indictment contained four counts. Count One - the Common Plan or Conspiracy - charged the defendants, with divers other persons, during a period of years preceding May 8, 1945, of participating in a common plan or conspiracy to commit crimes against peace, war crimes and crimes against humanity, as defined in the Charter. Count One set out particulars of the nature and development of the alleged common plan, describing the Nazi Party as the central core of the plan, the common objectives and methods, doctrinal techniques, totalitarian control of Germany, economic planning and mobilization for aggressive war, utilization of Nazi control for foreign aggression, and war crimes and crimes against humanity committed in the course of executing the conspiracy.

Count Two - Crimes against Peace - charged the defendants, with divers other persons, during a period of years preceding May 8, 1945, of participating in the planning, preparation, initiation and waging of wars of aggression. The invasions of Austria and Czechoslovakia were not specified as wars of aggression, but it was charged that wars of aggression were waged against Poland, the United Kingdom and France, Denmark and Norway, Belgium, the Netherlands and Luxembourg, Yugoslavia and Greece, the U.S.S.R., and the United States of America.

Count Three - War Crimes - charged the defendants with the commission of war crimes between September 1, 1939, and May 8, 1945, including murder and ill-treatment of civilian populations of occupied territory and on the high seas, deportation for slave labor of the civilian populations of occupied territories, murder and ill-treatment of prisoners of war, killing of hostages, plunder of public and private property, exaction of collective penalties, wanton destruction of cities, towns and villages and devastation not justified by military necessity, conscription of civilian labor, forcing civilians of occupied territories to swear allegiance to a hostile power, and Germanization of occupied territories.

Count Four - Crimes against Humanity - charged the defendants with the commission of crimes against humanity during a period of years preceding May 8, 1945, in Germany, Austria, Czechoslovakia and on the high seas, and in all countries and territories occupied by German armed forces after September 1, 1939, including the murder, extermination, enslavement, deportation and other inhumane acts committed against civilian populations before and during the war, and persecution on political, racial and religious grounds in connection with the common plan mentioned in Count One.

Statements of individual and organizational responsibility were appended to the Indictment, and the Indictment specifically requested that the seven named organizations be declared criminal.

The Indictment was promptly served upon all indicted individuals and was given to counsel appointed by the Tribunal to represent the organizations named in the Indictment. At least thirty days having been allowed the defendants to consider their pleas and to prepare for trial, the case formally opened on 20 November 1945 with the reading of the Indictment in open court.

Four defendants were unable to plead to the Indictment. Ley had committed suicide; the Tribunal had postponed proceedings against Krupp von Bohlen because of his physical incapacity, and Kaltenbrunner was hospitalized. Bormann was not present, and the Tribunal ordered his trial in absentia under Article 12 of the Charter. The remaining defendants all entered pleas of not guilty. Kaltenbrunner subsequently entered the same plea.

The Evidence.

Mr. Justice Jackson delivered the opening address for the American prosecution. He began:

"The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant and so devastating, that civilization cannot tolerate their being ignored because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury stay the hands of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power ever has paid to Reason."

Justice Jackson discussed in detail the evidence which the prosecution would offer to prove the first count of the Indictment and referred at

length to captured German documents which were to be offered in evidence. He declared that the evidence would show the defendants uniting in a plan which could be accomplished only by war in Europe - "their seizure of the German State, their subjugation of the German people, their terrorism and extermination of dissident elements, their planning and waging of war, their calculated and planned ruthlessness in the conduct of warfare, their deliberate and planned criminality toward conquered peoples". He stated that the prosecution "had no purpose to incriminate the whole German people", but that it wanted to reach "the planners and designers, the inciters and leaders without whose evil architecture the world would not have been for so long scourged with the violence and lawlessness, and wracked with the agonies and convulsions, of this terrible war".

Following the opening address, the American prosecution presented trial briefs and documentary and oral proofs on the issues comprised within Count One of the Indictment. Opening statements were made by the chief prosecutors of Great Britain, France and the U.S.S.R., and evidence was presented by their staffs on the other counts of the Indictment. Specific evidence was submitted by American and British prosecutors against the individual defendants and the organizations.

It would be impossible to review the evidence which was introduced before the Tribunal, or even to summarize it. The case for the prosecution was based in principal part upon captured German documents, the authenticity of which, with minor exceptions, was never challenged. The prosecution called only thirty-three witnesses in all.

The Defense.

With few exceptions, no attempt was made by the defense to disprove factual proofs submitted by the prosecution. In some instances, defense counsel brought out evidence which better served the prosecution than the defense. Thus, the former Commandant of Auschwitz, who testified to the gassing of 2,500,000 victims, was a defense witness.

In principal part, the defense consisted of pleas in avoidance. Conceding that aggressive wars were initiated, the defendant had no part in the planning. Conceding that racial undesirables were exterminated, the defendant had no knowledge of such facts. A great effort was made to prove that the German people generally were uninformed about conditions in concentration camps.

The defense on the law was presented on behalf of all defendants by Dr. Jahrreis, counsel for Jodl. His argument in brief was that (1) there was no effective international law governing the relations between nations at the time of the aggressions, (2) to hold individuals personally re-

sponsible for acts which they perform as representatives of states is to deny state sovereignty, (3) as absolute dictator, Hitler's orders were law and had to be obeyed by all.

Dr. Jahrreis argued that as to the Kellogg-Briand Pact there was complete agreement only to the proposition that war of self-defense is an undeniable right of all states, without which sovereignty does not exist, and that every state is alone competent to judge whether in a given case it is waging a war of defense. And he argued that no effective international procedure had been established "by which the community of states can, even against the will of the possessor, change conditions that have become intolerable, in order to provide life with the safety valve it must have if it is to avoid an explosion". He concluded, "In the practice of the relations between states there existed - at least during several years prior to 1939 - no effective general ruling of international law regarding prohibited warfare".

Dr. Jahrreis argued that the imposition of sentences against individuals for breach of peace between states would be revolutionary and would presuppose laws other than those in force when the actions laid before the Tribunal took place. "Of course the acts of state are the acts of men", he said, "but they are in fact acts of state, i.e., acts of the state carried out by its organs and not the private acts of Mr. Smith or Mr. Robinson. What the Indictment is doing when, in the name of the world community as a legal unity, it wants to have individuals legally sentenced for their decisions regarding war and peace is ..... to destroy the state mentally."

Dr. Jahrreis argued, "In a state in which the entire power to make final decisions is concentrated in the hands of a single individual, the orders of this one man are absolutely binding on the members of the hierarchy. This individual is their sovereign, their legibus solutus .....". He claimed that officials had "neither the right nor the duty to examine the orders of the monocrat to determine their legality".

Each pillar of Dr. Jahrreis' argument rested on the foundation of state sovereignty. He argued that the accused had the right to rely upon the conception of sovereignty as it had developed in European history. "Should things reach the point", he said, "where, according to general world law, the men who participated in the planning, preparation, launching and prosecution of a war forbidden by international law could be brought before an international criminal court, the decisions regarding the state's ultimate problems of existence would be subject to superstate control. One could of course still call such states sovereign, but they would no longer be sovereign."

IV. JUDGMENT

Findings and Sentences.

In handing down its opinion, on September 30 and October 1, 1946, the Tribunal formulated in detail and at length, findings on all issues raised by the Indictment. It described, by direct reference to the evidence, the origin and aims of the Nazi Party, the seizure of power, the consolidation of power, measures of rearmament, the common plan and conspiracy for aggressive war, preparation for aggression, the planning of aggression, the seizures of Austria and Czechoslovakia and the military aggression against other nations named in the Indictment, and it found that certain of the defendants planned and waged aggressive wars against twelve nations, as charged in Counts One and Two of the Indictment. The Tribunal made similar findings as to War Crimes and Crimes against Humanity, particularly the murder and ill-treatment of prisoners of war, the murder and ill-treatment of civilian populations, the slave labor policy, and the persecution of the Jews, and it found that such crimes had been committed by certain of the defendants as charged in Counts Three and Four of the Indictment.

The Tribunal then considered the evidence against the accused organizations and held that, with certain exclusions and limitations as to time, the prosecution had sustained the burden of proving the criminality of the Leadership Corps of the Nazi Party, the SS, the SD and the Gestapo; it refused to declare criminal the SA, the Reich Cabinet and the General Staff and High Command. The Tribunal carefully reviewed the evidence against each indicted individual, giving particular attention to the testimony and statements of the accused and to evidence introduced by the defense, and held that the prosecution had sustained the burden of proving, beyond a reasonable doubt, that all defendants were guilty under at least one count of the Indictment, with the exceptions of Schacht, von Papen and Fritzsche, who were acquitted. The sentences pronounced upon the guilty are set out in the Appendix.

The Soviet member of the Tribunal dissented from the acquittals of the individual defendants and of the Reich Cabinet and the General Staff and High Command. In effect, the Soviet judge felt that the prosecution had proved a sufficient case against all the individual defendants and against all the organizations named in the Indictment, with the single exception of the SA.

Law of the Case.

The Tribunal recognized in its final judgment that the basic law of the case, by and under which it was bound to render its decision, was the Charter. The Judgment states: "The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law." But in discussing the legal arguments advanced by counsel for the defense and the prosecution, and in construing and applying the Charter, the Tribunal declared principles of law which were not only determinative of the issues in this case but which will establish new and important precedents in international law.

The Charter of the Tribunal is binding upon all nations who have adhered to it. No one of the twenty-three nations who have signed the Charter can now contest in any future litigation that the waging of aggressive war is criminal. But the law of the Charter must be applied and construed by courts, and the construction placed upon it by this Tribunal sets an important precedent for all nations and all courts in the future. For this reason, the discussion by the Tribunal of the law of the case is of paramount importance, and the following are significant declarations of law:

1. The initiating and waging of aggressive war is a crime. The Tribunal said: "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."

2. The principle that there can be no punishment without a pre-existing law is valid and is not violated by the conviction of these accused. The Tribunal accepted the proposition that a person should not be punished for committing an act which he did not know to be criminal at the time he committed it. But, the Tribunal observed, "the maxim nullum crimen sine lege is not a limitation of sovereignty but is in general a principle of justice", and it declared that it would be unjust not to punish those who attacked neighboring states in defiance of treaties and assurances.

The Tribunal, however, held that the waging of aggressive war was criminal at the time the defendants committed their acts of aggression. The Tribunal stated that the renunciation of war as an instrument of national policy by the Kellogg-Briand Pact of 1928, to

which Germany was one of sixty-three signatories, "necessarily involves the proposition 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". The fact that the Pact does not expressly provide that such wars are crimes and does not establish courts to try those who violate it, does not inject an ex post facto feature any more than the Hague Convention of 1907 which prohibits certain methods of waging war but which does not designate such practices criminal or set up courts to try and punish offenders. Yet military courts have long tried and punished individuals for violating the rules of land warfare laid down by the Hague Convention. The Tribunal found support for its interpretation of the effect of the Kellogg-Briand Pact in frequent declarations that the waging of aggressive war was criminal, expressed in draft treaties, protocols and resolutions antedating the Pact of Paris.

3. Individuals may properly be held accountable for the waging of aggressive war and they cannot claim protection by the doctrine of State sovereignty. The Tribunal cited case law supporting the view that individuals may be held accountable for offenses against the laws of nations, and stated: "Crimes against international law 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." This ruling is, of course, limited only to offenses which are recognized as international crimes, and could in no way form a precedent for holding leaders of states personally accountable for treaty violations by their governments which did not involve the commission of crimes. Nor is it to be feared that the ruling will affect immunities which have been long recognized, approved and applied by nations in diplomatic relations. The Tribunal stated: "The principle of international law, which under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law."

On the other hand, the Tribunal has, by this declaration, greatly expanded the legal responsibility of all persons with respect to obligations under national and international law. The Tribunal said: "The very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state." Under this language, not only are leaders of a nation personally responsible for crimes which they cause to be committed in the name of the state, but all citizens are held to the standard of moral behavior required by the international law of crimes and may be held accountable for violations thereof committed by them while acting under the authority of the state. The effect of this reasoning is to make every person a citizen of the world with duties under international law which transcend obligations which may be imposed upon him by reason of his citizenship in a sovereign state.

4. The Tribunal construed the Charter as limiting the scope of conspiracy to the initiating and waging of aggressive war. The Tribunal rejected the charges in Count One of the Indictment that the defendants conspired to commit war crimes and crimes against humanity, and considered only the conspiracy to prepare, initiate and wage aggressive war. The Tribunal did not, of course, pass upon the question whether a provable conspiracy to commit war crimes or crimes against humanity would be a cognizable crime under international law, or whether a conspiracy to commit such crimes had, in fact, been proved by the prosecution in this case, but the Tribunal did hold the concept of conspiracy under the Charter to a much more restricted definition than that set forth in the Indictment which the prosecution sought to prove.

5. The Tribunal held that the conspiracy to wage aggressive war must be clearly established and closely related to the time of decision and action. The theory of the prosecution on the conspiracy count was that the historical development of the Nazi system, from the seizure of power to the actual invasion of neighboring states, was a part of the common plan to wage aggressive war. But the Tribunal held that the conspiracy to wage aggressive war had to be clearly outlined in its criminal purposes and could not be too far removed from the time of decision and action. The Tribunal found that a conspiracy to wage aggressive war did exist at least as early as November 5, 1937, the date of the first of four secret meetings, attended by certain top military and political leaders, at which Hitler unequivocally stated his intention to attack neighboring nations with force of arms. This limitation upon the scope of the conspiracy to wage aggressive war did not seriously affect the proceedings, however, since most of the defendants had been independently accused of waging aggressive war under Count Two of the Indictment.

6. The Tribunal held that the rules of land warfare set out in the Hague Convention of 1907 were declaratory of laws and customs of war and were binding upon Germany even though all belligerents were not parties to the Convention. The Hague Convention of 1907 contains a "general participation" clause to the effect that the rules laid down do not apply except between contracting powers, and then only if all the belligerents are parties to the convention. The fact that some of the belligerents in this war were not parties to the Convention raised the question whether the accused could be held responsible for the vast war crimes committed in the Eastern territories. The Tribunal pointed out that the Hague Convention itself declared that it was an attempt "to revise the general laws and customs of war" and held that by 1939 these rules had been recognized by

all civilized nations and had become a part of the unwritten laws and customs of war. It applied the same reasoning to the Geneva protocol of 1929 on the treatment of prisoners of war to which the Soviet Union was not a signatory.

7. The Tribunal held that to constitute crimes against humanity under the Charter the acts relied on must have been in execution of, or in connection with, aggressive war. The Charter defined crimes against humanity as certain offenses 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. The Charter was thus open to the construction that the Tribunal had jurisdiction over (1) crimes committed by the accused against the German people or other civilian populations before and during the war, and (2) persecutions committed in connection with such crimes, war crimes or crimes against the peace, as defined in the Charter. The Indictment followed this construction, Count Four distinguishing between crimes against civilian populations, and persecutions in connection with the common plan set out in Count One. The Tribunal, however, construed the phrase "in execution of, or in connection with, any crime within the jurisdiction of the Tribunal" as modifying the clause defining all crimes against humanity. The Tribunal stated that insofar as inhumane acts committed after the beginning of the war did not constitute war crimes, they were all committed in execution of or in connection with aggressive war, and constituted crimes against humanity, but it eliminated from its jurisdiction crimes and persecutions committed by the accused against the German people or other civilian populations before 1 September 1939. This means that the defendants have not been placed in jeopardy for mistreatment of German civilians, for false imprisonments, for Jewish persecutions, for beatings inflicted upon Social Democrats or union leaders and similar offenses committed prior to September 1, 1939, although they have been placed in jeopardy for such offenses committed after that date.

8. The Tribunal accepted the concept of "group criminality" but held that "mere membership" in a criminal group is not sufficient to attach criminality to the member. The Tribunal said that an important and well-established legal principle is that criminal guilt is personal and mass punishment should be avoided. On the other hand, it recognized that an organization may be criminal, if it consists of a group bound together for a common criminal purpose. But no member of such group could be held personally liable by reason of such membership if he was without knowledge of the criminal purposes or acts of the organization or was drafted by the state for membership, unless personally implicated in the commission of criminal acts as a member of the organization.

9. The Tribunal held that the burden was upon the Prosecution to prove criminality of the accused beyond a reasonable doubt. Although, under Anglo-American criminal law an accused person is presumed to be innocent and his guilt must be proved beyond a reasonable doubt, these standards of proof are not required under continental law and were not specified in the Charter. Yet, in the interest of justice, the Tribunal required the prosecution to meet this high standard of proof. In the acquittal of Schacht the Tribunal said: "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 the acquittal of von Papen, it used this language: "But it is not established beyond a reasonable doubt that this was the purpose of this activity". (Italics added.)

Effect of the Judgment.

Organizations. The London Agreement contemplated handling the problem of the Nazi criminal organizations in two stages: (1) a declaration of criminality of certain organizations by the International Military Tribunal, after a trial in which the organization would itself be represented in court, and (2) subsequent trials of individuals for the offense of membership in such organizations declared criminal by the International Military Tribunal, in any such case the finding of criminality of the organization to be conclusive.

After the adoption of the Charter, the Allied Control Council enacted Law No. 10, which declared that among the crimes cognizable by the occupying powers was the offense of membership in categories of groups or organizations declared criminal by the International Military Tribunal, and which authorized imposition of punishments including the death sentence and life imprisonment. Subsequently, Military Government (U.S.) initiated the enactment, by the three German Länder in the U.S. Zone of Occupation, of the Law for Liberation of 5 March 1946 under which German tribunals are authorized to impose sanctions against active Nazis, maximum sanction being ten years labor in a work camp. Active participation in various organizations, including those declared criminal by the International Military Tribunal, is one of the tests of classification under that law.

The Tribunal expressly limited its declaration of group criminality to persons who became or remained members of the organization with knowledge that it was being used for criminal acts or who were personally implicated as members of the organization in the commission of such crimes. It recommended that punishment of individuals for membership in the organizations declared criminal should be standardized through-

out the four Zones of Occupation in Germany, that double punishment should be avoided, and that punishment should not exceed sanctions provided by the Law for Liberation. These recommendations have been observed by the four occupying powers in the enactment of quadripartite denazification legislation under which most cases of membership in criminal organizations probably will be punished. Amendments to Control Council Law No. 10 may be advisable to give complete effect to these recommendations of the Tribunal.

The fact that certain of the organizations were acquitted of the charge of criminality does not operate either (1) to acquit all members of said organizations for crimes which they may have committed as members thereof, or (2) eliminate active membership in such organizations as a factor in determining the category into which such persons should be placed under denazification proceedings. In passing upon the criminality of each organization named in the Indictment, the Tribunal expressly excluded persons who had ceased to belong to the organizations prior to 1 September 1939. This limitation was imposed because the Tribunal held, in effect, that it was without jurisdiction under the Charter to consider crimes against humanity committed prior to that date. The crimes committed by the organizations in Germany and the support given by them to the development of Nazi institutions and methods in Germany prior to 1 September 1939, were thus not in issue under the Charter as construed by the Tribunal, and the acquittals or limited convictions of the organizations could not be pleaded in bar by members thereof categorized for denazification.

Individuals. Schacht, von Papen and Fritzsche were acquitted by the Tribunal on all counts on which they were indicted. The question has arisen whether it would be proper, in view of these acquittals, to permit institution of proceedings against them under denazification legislation. It is fundamental that no person should twice be placed in jeopardy for the same offense. Denazification proceedings are basically retributive rather than penal in character, however, and the sanctions imposed are by way of reparations for the protection of a democratic society in Germany and not as punishment for criminal acts. As shown in the preceding paragraph, furthermore, it is possible in each case to impose sanctions based upon charges other than those of which the accused were acquitted by the Tribunal. The principle of double jeopardy would not, therefore, be violated by action taken against the acquitted defendants under denazification legislation.

Whether these acquitted defendants, or other defendants who received less than the death sentence following conviction by the Tribunal, may be extradited to other countries or released to German authorities, after completion of sentence, for trial on specific charges not included within those for which they were indicted before the Tribunal, raises questions of policy as well as legal problems. United Nations which were not members of the Tribunal were nonetheless permitted to submit evidence against defendants accused of crimes committed against them or within their territories. Many of the smaller countries of Europe maintained delegations at Nurnberg for that purpose throughout the trial. Since none of the defendants has been placed in jeopardy for crimes against humanity committed prior to 1 September 1939, in some instances basis for subsequent trials may be found in specific crimes committed prior to that date.

42 Of the five military leaders who were tried by the Tribunal, all were found guilty of waging aggressive war, and only Doenitz was found not guilty of conspiring to wage aggressive war. All of these accused were members of the General Staff and High Command as defined in the Indictment. In view of their convictions, the fact that the Tribunal declined to declare the General Staff and High Command to be a criminal organization assumes less significance.

The Tribunal found that Doenitz and Raeder had violated the London Protocol of 1936 against unrestricted submarine warfare, but refused to impose sentences upon them for this breach of international law because of like breaches during the war by the United States and Great Britain. The necessary implication of this ruling is that the London Protocol is no longer acceptable international law because of deviations from it by its principal signatories, since the Tribunal rejected the argument that a rule of land or sea warfare which is violated by a belligerent during a war cannot be considered a punishable offense if it has likewise been violated by the opposing belligerents.

The acquittal of Schacht is not an acquittal of Nazi industrialists and financiers generally. Schacht was acquitted of the charge of waging aggressive war because he did not actively participate in the planning of any of the specific wars of aggression charged in the Indictment. He was acquitted of the charge of conspiring to wage aggressive war because the Tribunal held that it had not been established beyond a reasonable doubt that at the time he exercised a leading role in government and finance he knew of the aggressive plans. That the acquittal of Schacht on this count does not necessarily offer comfort to other leading industrialists and financiers is shown by the Tribunal's statement:

"Hitler could not make aggressive war by himself. He had to have the cooperation of statesmen, military leaders, diplomats and business men. When they, with knowledge of his aims, gave him their cooperation, they made themselves parties to the plan he had initiated." The confinement by the Tribunal of the conspiracy to wage aggressive war to narrow limits will not help any industrialists and financiers who directly participated in planning and initiating wars of aggression. Nor will the acquittal of Schacht be of aid to industrialists who participated in spoliation of occupied countries or employed slave labor in their factories.

The Charter provided that in case of guilt, sentences should be carried out in accordance with orders of the Control Council for Germany, which might at any time reduce or otherwise alter the sentences, but could not increase the severity thereof. Accordingly, a fifteen-day period was allowed prior to carrying out of sentences, during which time the Control Council considered petitions for clemency from the following: Bormann, Frick, Rosenberg, Streicher, Raeder, Goering, Frank, Keitel, von Neurath, Jodl, Seyss-Inquart, von Ribbentrop, Hess, Funk, Doenitz and Sauckel. Counsel for von Schirach submitted a letter for the purpose of preserving his right to petition for clemency on a later date. Only Kaltenbrunner and Speer failed to submit petitions. Appeals were filed on behalf of the four organizations which had been declared criminal, the SS, SD, Gestapo and Leadership Corps of the Nazi Party.

Having given careful consideration to the petitions, the Control Council confirmed the sentences in every instance, rejecting several pleas that executions be carried out by shooting rather than by hanging, and ordered the executions to be carried out by a special quadripartite commission. The only persons permitted to witness the executions, in addition to personnel of the commission, were eight press representatives, two from each of the prosecuting powers.

V. THE EXECUTIONS

The final act in this history-making International Military trial began at eleven minutes past one o'clock in the morning of 16 October 1946, when the white-faced former foreign minister, Joachim von Ribbentrop, stepped through the door into the execution chamber at Nurnberg and faced the gallows on which he and the others condemned to die by the Tribunal were to be hanged. Less than three hours before, Goering, the No. 2 Nazi, had followed the example of the No. 1 Nazi by taking his own life in his cell even as the prison officer was walking to the cell block to announce the final action of the Allied Control Council on the sentences passed.

Ribbentrop's hands were unmanacled and bound behind him with a leather thong. He walked to the foot of the thirteen stairs leading to the gallows platform. He was asked to state his name. Flanked by two guards and followed by the Chaplain, he slowly mounted the stairs. On the platform, he saw the hangman with the noose of thirteen coils and the hangman's assistant with the black hood. He stood on the trap and his feet were bound with a webbed Army belt. He was asked to state any last words, and said: "God protect Germany. God have mercy on my soul. My last wish is that German unity be maintained, that understanding between East and West be realized and there be peace for the world." The trap was sprung and Ribbentrop died at 1:29.

In the same way, each of the remaining defendants to receive capital sentences approached the scaffold and met the fate of common criminals. All, except the wordy Nazi philosopher, Rosenberg, uttered final statements. Keitel spoke as a Prussian soldier: "I call on the Almighty to be considerate of the German people, provide tenderness and mercy. Over 2,000,000 German soldiers went to their deaths for their Fatherland before me. I now follow my sons. All for Germany." Gestapo Chief Kaltenbrunner declared apologetically: "I served the German people and my Fatherland with willing heart. I did my duty according to its laws. I am sorry that in her trying hour she was not led only by soldiers. I regret that crimes were committed in which I had no part. Good luck Germany." Frank said quietly: "I am thankful for the kind treatment which I received during this incarceration and I pray God to receive me mercifully." Frick spoke only the phrase, "Let live the eternal Germany". Streicher shouted "Heil Hitler!" as he climbed the stairs and followed with the words: "Now I go to God, Purim Festival 1946. And now to God. The Bolshevists will one day hang you. I am now by God my father." And his last words were, "Adele, my dear wife". Sauckel protested: "I die innocently. The verdict was wrong. God protect Germany and make Germany great again. Let Germany live and God protect my family." Jodl spoke in the manner

of an officer addressing his troops. "I salute you, my Germany." Seyss-Inquart climaxed the final statements when he said: "I hope that this execution is the last act of the tragedy of the second world war and that a lesson will be learned so that peace and understanding will be realized among the nations. I believe in Germany." Seyss-Inquart died at 2:57 less than two hours after von Ribbentrop had entered the execution chamber.

VI. CONCLUSION

The trial of the top Nazi war leaders having been brought to successful conclusion, it is now the task of Military Government and of the Theater Judge Advocate to apply the principles of law laid down in the judgment of the International Military Tribunal to the prosecution of the remaining German war criminals, to the end that, as far as possible, the guilty shall be punished according to the magnitude of their personal crimes or the degree of their participation in the general crimes of the Nazi regime.

Punishment of war leaders will be carried out in the U. S. Zone by four separate procedures:

(1) Major German war leaders will be brought to trial before Military Tribunals set up under Military Government Ordinance No. 7. The United States Chief of Counsel for War Crimes is the prosecuting authority under this ordinance. This activity is the direct sequel to the trial of the top twenty-two German war leaders.

(2) Trials of Germans for commission of war crimes against American military personnel and atrocities committed in concentration camps overrun by American armies, are being held before Special Military Courts set up at the direction of the Theater Commander. The Theater Judge Advocate is the prosecuting authority for these trials.

(3) Germans who are charged with committing crimes against humanity upon other Germans, in violation of German law, may be tried in the ordinary German criminal courts.

(4) Other Germans who have substantial responsibility for the crimes of the Hitler regime, by reason of active participation in the Nazi system, will be subject to sanctions imposed by German tribunals under the Law for Liberation from National Socialism and Militarism of 5 March 1946.

Consummation of this program will satisfy the objective of the Potsdam Agreement that, "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".

TABLE OF VERDICTS AND SENTENCES

Individuals	Count One	Count 2	Count 3	Count 4	Sentences
Goering	Guilty	Guilty	Guilty	Guilty	Death
Hess	Guilty	Guilty	Not guilty	Not guilty	Life imprisonment
von Ribbentrop	Guilty	Guilty	Guilty	Guilty	Death
Ley	(Committed suicide prior to trial)				
Keitel	Guilty	Guilty	Guilty	Guilty	Death
Kaltenbrunner	Not guilty	(Not indicted)	Guilty	Guilty	Death
Rosenberg	Guilty	Guilty	Guilty	Guilty	Death
Frank	Not guilty	(Not indicted)	Guilty	Guilty	Death
Frick	Not guilty	Guilty	Guilty	Guilty	Death
Streicher	Not guilty	(Not indicted)	(Not indicted)	Guilty	Death
Funk	Not guilty	Guilty	Guilty	Guilty	Life imprisonment
Schacht	Not guilty	Not guilty	(Not indicted)	(Not indicted)	Acquittal
Krupp	(Dismissed because of ill health)				
Doenitz	Not guilty	Guilty	Guilty	(Not indicted)	10 years' imprisonment
Raeder	Guilty	Guilty	Guilty	(Not indicted)	Life imprisonment
von Schirach	Not guilty	(Not indicted)	(Not indicted)	Guilty	20 years' imprisonment
Sauckel	Not guilty	Not guilty	Guilty	Guilty	Death
Jodl	Guilty	Guilty	Guilty	Guilty	Death
Bormann	Not guilty	(Not indicted)	Guilty	Guilty	Death
von Papen	Not guilty	Not guilty	(Not indicted)	(Not indicted)	Acquittal
Seyss-Inquart	Not guilty	Guilty	Guilty	Guilty	Death
Speer	Not guilty	Not guilty	Guilty	Guilty	20 years' imprisonment
von Neurath	Guilty	Guilty	Guilty	Guilty	15 years' imprisonment
Fritzsche	Not guilty	(Not indicted)	Not guilty	Not guilty	Acquittal

Organizations	
Reich Cabinet	(Not declared criminal)
Leadership Corps	(Declared criminal in higher echelons)
SS	(Declared criminal)
SD	(Declared criminal)
Gestapo	(Declared criminal)
SA	(Not declared criminal)
High Command	(Not declared criminal)