CHAPTER XI
DEVELOPMENT OF THE LAW RESPECTING CRIMINAL GROUPS AND ORGANISATIONS.

INTRODUCTORY NOTES

One of the most important developments of international law in the field of war crimes, is that which took place in respect of so-called “criminal groups or organisations”.

The term was introduced in the course of the preparatory work undertaken by the Allied Governments in order to bring major war criminals to trial. It was inserted in the Charter instituting the International Military Tribunal for the Prosecution and Punishment of the Major War Criminals of the European Axis (hereinafter called the Nuremberg Charter). It was used in the indictment submitted to this Tribunal and confirmed as part of contemporary international law by the Judgment of the Nuremberg Tribunal. Finally, it was made part of a number of laws enacted by the Allied authorities after the occupation of the enemy countries, such as of Law No. 10 of the Allied Control Council for Germany, in force in all four zones of occupation.

As was often the case in its history, international law developed in this field under hard pressure of circumstances. It grew out of the necessity to meet a new type of criminality which had never before faced human society so directly or on so vast a scale.

The pattern was furnished by the Nazis. Groups and organisations such as the Gestapo and the S.S. had proved to have perpetrated, and to have been created with the specific purpose of committing an endless series of mass crimes: killing of millions of people in extermination camps (Dachau, Belsen, Auschwitz, etc.); murder of the entire population of inhabited places (Lidice); systematic tortures and massacres, killing of hostages and other atrocities against defenceless men, women and children in all countries under the Nazi domination. Such immeasurable human suffering, imposed upon the victims, the total number of whom equalled the entire population of many a country, had been effected by large bodies of individuals, specially organised and trained for the purpose by the Nazi Government. Often members of such bodies had joined on a voluntary basis, and in the great majority of cases, irrespective of whether they had volunteered or been conscripted, they knowingly and willingly carried out the criminal policy of their group or organisation.

As a consequence, the prima facie evidence collected in respect of such organisations indicated that their individual composition mattered less than the fact that the bodies were as a whole engaged in criminal activities. From that it followed that, as far as their members were concerned, the mere fact of having belonged to them provided, if not a definite proof, then at least a serious suspicion that any of the members had actually
taken part in the commission of crimes systematically carried out by the group as a whole.

This fundamental fact led to the following considerations. It was thought both justified and necessary to admit a presumption of guilt against all members of such bodies until proof was found to the contrary. The justification lay in the criminal nature itself of the organisations, as proved by facts establishing beyond doubt that they had actually and systematically perpetrated innumerable crimes. The necessity sprang from the large number of both the individual perpetrators and the victims. This would have made it impracticable to complete judicial proceedings against the accused within a reasonable period of time, were their trials to be conducted on an individual basis. The collection of evidence against hundreds of thousands of such accused persons, whose guilt would have to be established individually, would have required all the processes of a huge judicial machinery spread over many years of intensive work. In addition, there was a danger that, even if such a vast enterprise were to be undertaken, many accused would escape justice for the simple reason that, beyond their membership at the time of the crimes, and evidence proving the crimes of their respective groups, no further evidence of their individual complicity could be obtained. This would apply particularly in cases where the sole witnesses of the crimes were the victims, who had died and whose testimony was lost for ever. Such was precisely the case with the most despicable crimes, those which took place in the secrecy of extermination camps and caused the death of the largest number of victims.

It was to meet such circumstances and considerations that measures were undertaken in order to enable the arm of justice to reach the culprits. This Chapter contains information as to how the subject was treated and what final solution was found in the body of the law. As will be seen, although the question seems at first sight to be comparatively simple and to warrant an easy answer, it has from beginning to end been far from following such a smooth path. The main obstacle consisted in finding a solution which would not result in automatic collective responsibility and which would not blindly hit innocent as well as guilty individuals. Politically the issue was a major one. The Allied nations had fought the war in order to eradicate regimes which had been founded on such an indiscriminate basis, and which had persecuted whole communities of people only on account of collective denominations, such as race, political creed or religion. Consequently, no solution could be accepted which would or could amount to the persecution of Germans on account of their having belonged to Nazi organisations.

The difficulties in finding such a solution proved so serious that they necessitated a precise definition of the effects of the law which was laid down in respect of criminal groups or organisations. This was done by the International Military Tribunal at Nuremberg in its Judgment. It will be seen that, without such definition, the law could have been interpreted, even unwittingly, so as to be diverted from its real and single goal, which was to bring to justice persons guilty of war crimes, who would otherwise have escaped punishment.
ACTIVITIES OF THE COMMISSION

A. ACTIVITIES OF THE COMMISSION

The question of criminal organisations was one of the subjects which attracted the attention of the Commission from the earliest stages of its work. It gave rise to several proposals and elaborate discussions which resulted in a recommendation made to member Governments well before the Nuremberg Charter was signed and the Nuremberg Trial started.

(i) PROPOSAL OF THE LEGAL COMMITTEE

During the first months of the Committee's activities consideration was given to the question of what kind of evidence was required for drawing up lists of war criminals. At that time some members were doubtful as to whether the whole scheme of making such lists was feasible and necessary. Thus, in March, 1944, the French representative, objecting to the scheme and to proposals requiring evidence in all cases against the accused, expressed the view that, in the case of the Gestapo, the evidence was unnecessary. He said that under the laws of certain countries, including France, in such cases "the real crime consisted in the mere fact of being a Gestapo member operating in an oppressed territory". He concluded that, if the listing of such persons was to be declined unless specific evidence was submitted, the Commission would "refuse to put on its Lists men who, for the national judge, were already by operation of the law accused persons". (1) This opinion was not shared by other members.

In view of such division of opinion between members of the Commission, the Legal Committee studied the question in July and August, 1944. It agreed that in the case of certain groups or organisations, such as the Gestapo, mere membership could be regarded as sufficient prima facie evidence against the accused for the purpose both of his being listed and of being tried by the competent court. As a result of its deliberations, the Committee prepared a draft recommendation which it suggested should be adopted by the Commission as a guiding rule for its Committee on Facts and Evidence, in charge of preparing the Lists, and as legal advice and recommendation to member Governments.

The draft was limited to three Nazi organisations, known to have been engaged in continuous criminal activities: the S.A., S.S., and Gestapo. (2) The draft declared the right of each nation to punish its own nationals who joined the ranks of the S.A., S.S. or Gestapo, irrespective of the territory in which they served, as well as those German or foreign members of the same organisations who served in its territory. Nations were declared entitled to impose punishment "either on the basis of their present criminal law or on the basis of new legislation". No further qualifications were taken into account, so that the right declared was constructed on the premise that membership represented a crime in itself. In addition, the draft declared the right of the Allied occupying authorities in Germany to disband the S.A., S.S. and Gestapo, intern its members,

(1) See M.13, 21.3.1944, p. 2.
(2) See Doc. C.35, 24.7.1944, Draft Recommendation regarding the Sturmabteilungen (S.A.), Schutzstaffel (S.S.), and Geheime Staatspolizei (Gestapo) " See also Doc. C.35 (1), 4.8.1944, containing verbal amendments to para. 1 of the original draft.
and "make membership in them henceforth a crime and punish it as such".

The draft was considered by the Commission on 1st and 8th August, 1944.(6) Some members thought it only duplicated what had already been recommended in respect of the apprehension and the detention of S.A., S.S. and Gestapo members. Other members were of the opinion that by mentioning a "new legislation", the Commission would be taking a stand on the controversial subject of _ex post facto_ or retroactive legislation. It was observed that some countries could and had enacted such legislation, whereas in others there was a constitutional bar. Further members thought that certain passages had or might be interpreted as having an undesirable restrictive effect. Such was, in their opinion, the recommendation that membership of the organisations should be regarded as representing "henceforth" a crime, whereas there were opinions that it was a crime already.

As a result, the feeling prevailed that further study of the subject was required and decision at this stage was postponed.

When studying the subject, the Committee and the Commission had at their disposal a report prepared by the Czechoslovak representative.(2) The report contained a detailed account of the origin, organisation, purpose and activity of these organisations.

(ii) PROPOSAL REGARDING THE NAZI GOVERNMENT

In September, 1944, the Commission was engaged in the preparation of a special list regarding "major war criminals" or "arch criminals", as they were alternately called at the time. Under the Moscow Declaration, such criminals were to be punished on an international level, and it was felt that the Commission should collect the evidence against them without waiting for the Governments to present it. The Committee on Facts and Evidence was concerned with this matter.

At this stage the Netherlands representative suggested that the Commission should declare the whole German Government responsible for the atrocities committed by their subordinates.(3) He was supported by the delegates of Australia, Belgium, China, India, Norway, Poland and Yugoslavia. No formal decision or recommendation was made declaring the Nazi Government a criminal group, but this was implied in the decision taken by the Commission to collect evidence in respect of the Nazi Government and similar "arch-criminals" and to open a special list for them.

By the end of the year feelings steadily developed in this direction, and on 13th December, 1944, a Sub-Committee was appointed, under the Chairmanship of Lord Wright, to advise on the question how far criminal responsibility for war crimes extended to "subordinate members or officials of the guilty Government".(4) At its first meeting (6th February,

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(1) See M.26, 18.1.1944, p. 2-3, and M.27, 8.8.1944, p. 3-4.
(2) Doc. C.32, 22.6.1944, _Report on the German Sturmabteilungen (S.A.), Schutzstaffeln (S.S.) and Geheime Staatspolizei (Gestapo)_.
(3) See M.33, 26.9.1944, p. 3-6.
1945), the Sub-Committee defined the scope of its inquiries as being
"whether membership of enemy Governments may involve criminal
responsibility for the criminal policy followed by such Governments". In
the course of its proceedings the Sub-Committee studied a report
prepared by the Czechoslovak representative.\(^{(1)}\) The author submitted
and reviewed a number of facts, such as; the aims and conceptions of
Nazism; their realisation by the Nazi Government through suppression
of personal liberty and a series of crimes (slave labour, torture, starvation,
mass murder); the position and relationship between the members
of the Nazi Government. He then considered the issues in the light of
penal law and came to the conclusion that "membership of the German
Government during a period in the course of which war crimes were
either committed or prepared by members of the State apparatus, was a
sufficient prima facie proof of their guilt and justified the decision to put
them on the list of war criminals".

The above conclusion of the Czech representative met with the general
approval of the Sub-Committee.\(^{(2)}\) Together with the Sub-Committee's
findings, it was to be considered at a later stage by the Commission in
connection with other proposals and reports, which completed as a whole
the study of criminal groups or organisations.

(iii) PROPOSAL OF THE FRENCH DELEGATION

On the day of the appointment of the above mentioned Sub-Committee,
the French representative re-opened the question of membership of
the S.S. and Gestapo. He informed the Commission that, by an ordinance
of August, 1944, the French Government had decided to assimilate crimes
committed by the S.S. and Gestapo to those of an "association de mal-
fasseurs" covered by the French Penal Code.

He suggested that this might be a proper ground for reaching a
unanimous decision on similar lines between all member Governments,
and proposed that such a possibility be considered in a full debate of the
Commission.

The debate took place on 20th December, 1944. The French delegate
added to his previous statements that his proposal was not limited to
the Gestapo and the S.S. It concerned any other group or organisation
which, although externally a military formation, really existed for the
purpose of committing crimes, such as the "liquidation" of persons
obnoxious to the Nazis. After much discussion, during which several
members supported and others objected to the French proposal, the matter
was referred for legal opinion to Lord Wright's Sub-Committee.\(^{(3)}\)

In the Sub-Committee no progress could be made on account of
divergencies which arose around the concept and the effects of "collective
responsibility", and the matter was referred back to the Commission.

To meet the legal objections raised by some members and to clarify

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\(^{(1)}\) Doc. C.68, 13.3.1945, The Criminal and personal responsibility of the members of
the German Nazi Government.

\(^{(2)}\) See M.61, p. 4.

\(^{(3)}\) See M.43, 20.12.1944, p. 4-5.
the issue as he saw it, the French representative submitted a memorandum at the end of March, 1945.\(^{(1)}\) He stated that a large number of war criminals would escape punishment solely on account of the difficulty of proving their individual guilt. To require such evidence in the case of large groups of criminals would place upon any prosecutor an impossible task. On the other hand, the well established principle of individual guilt could not be applied to the entirely new phenomenon of mass crime. Hitherto the legislator was not concerned with the repression of this kind of crime, for it could not develop in civilised countries. Therefore, no formal provisions intended to punish such crimes could be found in municipal law. The solution was to be a novel one in view of the novelty of mass criminality. French law provided two methods of solving the problem. One was the presumption of guilt which reversed the onus of proof. In such cases it sufficed to establish that the accused was in a position in which the presumption applied. Where this was so, the accused was held guilty unless he could succeed in demonstrating his innocence. Thus, in a French village, Oradour sur Glane, the entire locality was destroyed and nearly all its inhabitants massacred by units of the German Division "Das Reich". It would be impossible to attempt to prove what part every individual took in the massacres, so that, if the general principles of criminal law were to be applied in a strict sense, most of the perpetrators would have to be acquitted. They had themselves taken care that this should be so, by killing all the possible witnesses. The only solution was to apply a presumption of guilt in respect of all members of the units involved. The second method was to hold individuals guilty of membership in an "association" of criminals, as provided for in the French Penal Code (Art. 265-267). French law required only two conditions: that membership should be voluntary, and that the object of the "association" should be to commit crimes. By an Ordinance of 28th August, 1944, this law was extended to all "organisations or enterprises having systematic terrorism for their object". To what extent this would affect Nazi groups or organisations was a matter for the courts to decide on the basis of facts, but there was no doubt that the Gestapo and similar groups would be implicated. The main thing was that, wherever a group was identified as criminal in its purposes and/or activities, every member was liable to punishment for the mere fact of having belonged to the group.

The French representative moved that a recommendation on the above lines be made by the Commission to all member Governments. He pointed out that, regarding both methods cited from the French law, new legislation would be required in countries lacking similar provisions.

In the discussion which took place regarding the memorandum, the French delegate limited his motion to establishing a presumption of guilt for the Gestapo and certain formations of the S.S. He did not insist that membership in these organisations be declared a war crime.

The majority of members agreed in principle with the proposal. However, some of them, such as the Belgian delegate, thought that no special legislation regarding the presumption of guilt was practicable or necessary.

\(^{(1)}\) Doc. C.85, 28.3.1945, Memorandum by Professor André Gros on the problem of collective responsibility for war crimes.
In the case of the Gestapo and similar bodies, the presumption could be applied under the general principles of penal law without having recourse to special legislation. To do the latter might give too much prominence to a method admittedly recommended for limited purposes and not as a general principle. He thought the task of defining the presumption would be impossible, and submitted a memorandum on those lines.\(^{(1)}\)

Other members, such as the Netherlands delegate, did not agree that what was to be decided upon was "collective" responsibility. The latter meant that all members of a group were held responsible for crimes for which only a specific number of them were in fact guilty. This could not be accepted, since it would mean condemning innocent as well as guilty persons. The Polish representative was of the opinion that the concept of "association of criminals" could not be applied to the Nazi organisations. The former referred to criminal groups being illegal under the laws of the country where they operated. This was not the case with the Gestapo, S.S. or S.A., which were all legal organisations under German law. The Czech representative was not satisfied with establishing only a presumption of guilt. In line with the report previously prepared by him, he thought that the facts already collected warranted an outright declaration that membership in the Gestapo, S.S. and similar bodies was a war crime in itself.

On the suggestion of the United States representative, it was agreed that, before considering a specific recommendation, more facts were required concerning the criminal nature of the Nazi organisations. The United States delegate drew attention to the fact that, for instance, the S.S. had several branches, and for some of them there was no evidence that they were engaged in criminal activities. The Polish delegate stressed the fact that the total membership of the Gestapo, S.S. and S.A. amounted to about 4 million individuals and that it would hardly be possible to hold them all guilty for the crimes perpetrated by their respective organisations.

The Commission decided that a full report on the facts and legal conclusions deriving from them should be prepared by its Legal Secretariat, and adjourned the matter until the submission of such report.\(^{(2)}\)

(iv) Report of the Commission's Legal Secretariat

The report was submitted in May, 1945.\(^{(3)}\) It contained a review of facts collected from various sources, including German ones, and dealt on the one hand with the internal structure and functions of the Gestapo, S.S. and S.A., and on the other with the most typical crimes committed by them, such as atrocities in concentration camps; massacres of the type committed in Lidice and Oradour sur Glane; persecution and extermination of the Jews; forced labour and deportations; and ill-treatment of

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\(^{(1)}\) Doc. C.89, 10.4.1945, Collective responsibility for war crimes—observations on Professor Gross' memorandum.

\(^{(2)}\) For the debate in the Commission see M.55, 11.4.1945, p. 6-9 and M.57, 24.4.1945, p. 5-6. For the views of the Polish delegate see also Doc. C.92, 23.4.1945, Observations of Dr. T. Cyprian concerning collective responsibility for war crimes.

\(^{(3)}\) Doc. C.106, 7.5.1945, History, constitution and operation of the Gestapo, S.S. and S.A.
prisoners of war. Each of the organisations was considered in its various ramifications and in relationship to its assignments in regard to the crimes committed. The study of these facts brought about the following conclusions:

(a) Gestapo—Its activities in connection with concentration camps, massacres, persecutions of the Jews, forced labour and deportation, were such as to make every person in its service suspect of being criminally responsible for the commission of these crimes.

(b) S.S.—Members of the Death Head Formation (Totenkopfverbände) of the S.S. were suspected of being responsible for the actual perpetration of these crimes, particularly in concentration and extermination camps.

Members of the formations called "S.S. Verfuegungstruppen" and "Allgemeine S.S." were also suspect, with the proviso that a number served only in "welfare" departments of the Allgemeine S.S.

Members of the "Waffen S.S." comprised units independent of other S.S. formations. They were mostly members of the regular army and bore no prima facie guilt of crimes.

(c) S.A.—Individuals who were members before 30th June, 1934, were suspect of crimes committed against the opponents of the Nazi regime in Germany itself. After that date no more circumstantial evidence could be found to establish a specific presumption of guilt of its members than for members of any other organisation of the Nazi movement in general.

(v) RECOMMENDATION OF 16TH MAY, 1945

With the presentation of this report, the whole field of criminal organisations as far as the Nazis were concerned, had been exhaustively explored and nothing more stood in the way of taking a decision.

On 4th May, 1945, the French representative submitted a draft recommendation, which was adopted by the Commission on 16th May with a few verbal amendments. The recommendation, as adopted, read:

"The United Nations War Crimes Commission, having ascertained that countless crimes have been committed during the war by organised gangs, Gestapo groups, S.S. or military units, sometimes entire formations, in order to secure the punishment of all the guilty, makes the following recommendation to the member Governments:

(a) to seek out the leading criminals responsible for the organisation of criminal enterprises including systematic terrorism, plundered looting and the general policy of atrocities against the peoples of the occupied States, in order to punish all the organisers of such crimes;

(b) to commit for trial, either jointly or individually all those who, as members of these criminal gangs, have taken part in any way in the carrying out of crimes committed collectively by groups, formations or units."

The recommendation under (a) met to a certain extent the proposal submitted by the Netherlands delegate and developed by the Czech representative in regard to the criminal nature of the Nazi Government and the responsibility of all its members. It met it to the extent to which it recognised that responsibility for war crimes committed by Nazi

(1) Doc. C.105, 4.5.1945, Collective responsibility for war crimes—draft recommendation to the Governments proposed by Professor Gros.
(2) Doc. C.105 (1), 17.5.45. For discussion preceding the adoption of this recommendation see M.61, 16.5.45, p. 3-4.
organisations or groups lay not only on members of such organisations or groups, but on other "leading criminals" as well, who had formed and directed such collective bodies in the commission of crimes. The recommendation did not go so far as to mention members of the Nazi Government in particular, or to proclaim the Nazi Government a criminal group as a whole. However, the formula clearly included the Government and came very near to such a result.

The recommendation under (b) was of a similar nature. While not explicitly declaring criminal either of the Nazi organisations, it recognised that such bodies existed, that they represented "criminal groups" and that their members should be tried "jointly or individually" for having "taken part in any way" in the crimes of the group or organisation. This implied the possibility of holding such individuals guilty of membership as such.

On 23rd May the Commission completed its activities in this field by considering the effect which two of the reports prepared should have on the listing of war criminals in the Committee on Facts and Evidence. It considered the Czech representative's report on the criminal nature of the Nazi Government. The United States representative agreed with the conclusion that membership in the Nazi Government was sufficient prima facie evidence for putting any of its members on the Lists, and proposed that this be approved by the Commission. It was noted that this was already being done by the Committee on Facts and Evidence. The conclusions in the report of the Legal Secretariat concerning the Gestapo, S.S. and S.A. were likewise endorsed and both subjects were referred to the Legal Committee for the purpose of finding suitable formulae for the guidance of the Committee on Facts and Evidence.(1)

B. THE NUREMBERG TRIAL

In dealing with the problem of criminal organisations and collective penal responsibility the Commission had only raised the main issue. Issues regarding details, particularly the specific legal questions which required solution in order to enable the erection of a logically consistent and juridically justifiable theory, were all left untouched. These were the subject of full development on the occasion of the Nuremberg Trial.

The first, and for the time being, the only authoritative pronouncement on criminal groups or organisations, on the basis of international law, was made during the trial of the German Major War Criminals by the International Military Tribunal at Nuremberg. The pronouncement was made by the Tribunal on the basis of specific provisions of the Charter, which defined its jurisdiction and procedure, and after considering specific charges brought by the Prosecutors. The latter played a very prominent part in defining the boundaries of the concept of collective penal responsibility and contributed largely to the final decision of the Tribunal. Both the law of the Charter and the Judgment of the Tribunal introduce a novel method of dealing with organised mass criminality of a type which is itself new in many respects. The Judgment can be regarded as a judicial

(1) See M.62, 23.5.1945, p. 5-6.
precedent with far reaching effect. One of its legal effects was that the
decision of an international court had, to a certain extent, become binding
upon other national or local courts, and that it had introduced an effective
judicial means of combating mass criminality organised by States against
other States and nations.

(i) THE LAW OF THE CHARTER

The defendants at the Nuremberg Trial were all members of one or
more Nazi groups or organisations, and it will be seen that, in addition
to bodies such as the Gestapo, S.S. or S.A. and the Nazi Government,
which were all mentioned in the preceding pages, the prosecutors included
in their Indictment bodies such as the General Staff and the High Command.
The relevant provisions which are embodied in the Nuremberg Charter
are at the present time the only source of international law concerning
criminal groups or organisations. These provisions are the following:

Article 9

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

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

Article 10

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

Article 11

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

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

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

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

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

to do so.

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

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

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

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

The most important provision is undoubtedly the last, quoted under (f).
A narrow, literal interpretation of its terms could lead to the conclusion
that the mere fact of having belonged to an organisation declared criminal
is in itself a crime without further qualifications, and that the subsequent
court has no choice but to condemn the accused once he is brought before it.
Such far-reaching conclusion was, however, not arrived at by the
Tribunal, neither was it meant in the Charter or advocated by the majority
of the prosecutors. Both the latter, and the Tribunal in its Judgment,
laid down certain conditions in which a member should be regarded as
personally guilty. The only dissenting opinion was voiced by the Russian
prosecutor. While admitting that a declaration by the Tribunal does not
bind the subsequent court to pronounce an automatic sentence of guilt,
he thought that the Tribunal was not asked to enter into the question of
the conditions under which a member should or should not be considered
guilty. This, in his opinion, was a matter for the subsequent court to
decide, so that he dissented from any ruling being made by the Tribunal on
this subject. More details of these two different approaches will be
found later.

It is worth noting that criminal organisations are also mentioned in
the Charter of the International Military Tribunal for the Far East,
enacted by the Supreme Commander for the Allied Powers, General
MacArthur, on 19th January, 1946. There are, however, no provisions
corresponding to those of the Nuremberg Charter. The only reference is
in Art. 5 of the Far Eastern Charter, which defines the jurisdiction of the
Far Eastern Tribunal. It says that the "Tribunal shall have the power to
try and punish war criminals who as individuals or as members of organisa-
tions" are prosecuted for offences falling within the Tribunal’s competence.
In the absence of provisions similar to those of the Nuremberg Charter,
it is not clear, and it will at any rate not be clear until the Tribunal
pronounces its Judgment, whether the Tribunal is entitled to make declarations
such as those made by the Nuremberg Tribunal. This question will
probably remain unanswered in view of the fact that the prosecutors
have not indicted any of the groups or organisations to which the Japanese
defendants belonged.
(ii) THE PROCEEDINGS

(1) Groups or Organisations Indicted

In their Indictment the prosecutors for the U.S.A., France, United Kingdom and U.S.S.R. charged the following Nazi groups or organisations as being criminal:

(a) The Cabinet of the Nazi Government (Reichsregierung or Reich Cabinet), consisting of members of the ordinary cabinet after the accession of Hitler to power on 30th January, 1933. This comprised Reich Ministers who were heads of departments of the Central Government or without portfolio; State Ministers acting as Reich Ministers; and other officials entitled to take part in meetings of the Cabinet. In addition to members of the ordinary Cabinet, the Indictment charged members of the Council of Ministers for the Defence of the Reich (Ministerrat fuer die Reichsverteidigung) and members of the Secret Cabinet Council (Geheimer Kabinettssrat).(1)

The following defendants were prosecuted as members of the Reich Cabinet: Goering, Ribbentrop, Hess, Rosenberg, Frank, Bormann, Speer, Frick, Schacht, Papen, Neurath, Seyss-Inquart, Keitel, Raeder.(2)

(b) The Leadership Corps of the Nazi Party (Das Korps der Politischen Leiter der Nationalsozialistischen Deutschen Arbeiterpartei), comprising the leaders of the various functional offices of the Nazi party, such as the Reichsleitung (Party Reich Directorate) and the Gauleitung (Party Gau Directorate), as well as the territorial leaders, such as Gauleiters. The prosecution reserved the right to exclude from their charge leaders of subordinate ranks or of other types or classes.(3)

The following defendants were prosecuted as members of the Leadership Corps: Rosenberg, Bormann, Frick, Ley, Sauckel, Speer, Schirach, Streicher.

(c) The S.S. (Schutzstaffeln) of the Nazi Party, including different formations such as “Allgemeine S.S.”, “Waffen S.S.”, “S.S. Totenkopfverbaende”, “S.S. Polizei Regimenter”, and the S.D. (Sicherheitsdienst des Reichsfuehrers-S.S.).(4)

The following defendants were prosecuted as members of the S.S.: Goering, Ribbentrop, Hess, Kaltenbrunner, Rosenberg, Frank, Bormann, Frick, Sauckel, Neurath, Seyss-Inquart.

(d) The Gestapo (Geheime Staatspolizei or Secret State Police), comprising all its members without distinction.(5) The defendants involved included Goering and Kaltenbrunner.

(1) See Indictment, text published by the International Military Tribunal at Nuremberg as document No. 1, Appendix B, p. 35.
(2) For more details regarding these defendants and their positions in the Cabinet, see op. cit., p. 28-34.
(3) See op. cit., Appendix B, p. 35.
(4) See op. cit., Appendix B, p. 36.
(5) See op. cit., Appendix B, p. 36.
(e) The S.A. (Sturmabteilungen) of the Nazi Party, which represented the earliest formations of the party and were used particularly throughout the years preceding the accession of Hitler to power and during the first years of the Nazi regime in the suppression of the opposition by force.\(^{(3)}\)

It counted among its members the following defendants: Hess, Rosenberg, Bormann, Ley, Sauckel, Schirach, Streicher.

(1) The General Staff and High Command, of the German armed forces, comprising the highest commanders of the different services (Wehrmacht, Army, Navy, Air Force).\(^{(3)}\)

The following defendants belonged to the group: Goering, Keitel, Jodl, Raeder and Doenitz.

(2) Charges laid against Groups or Organisations

Each of the above Nazi bodies was charged on all counts under the Charter, that is, with crimes against peace—including, as a separate crime, conspiracy to prepare, initiate or wage aggressive wars—with war crimes and crimes against humanity. However, each body was more specifically charged for certain types of crimes or degrees of penal responsibility.

The Reich Cabinet and the Leadership Corps of the Nazi Party were charged with planning, organising, directing or instigating the commission of all three types of crimes. "Every crime charged in the Indictment", said the prosecution, "was a crime committed by a regime controlled by the Party, and it was the Leadership Corps which controlled the Party and made it function."\(^{(3)}\) The part played by the Cabinet was described as follows: "While the Party, through the political leaders, gave orders to the State, it was the Reich Cabinet . . . that transformed those orders into law. Just as the Leadership Corps made the Party function, so the Cabinet made the State function. Every crime which we have proved was a crime of the Nazi State, and the Reich Cabinet was the highest agency for political control and direction within the Nazi State."\(^{(4)}\).

The two bodies were, thus, held responsible for originating and leading the whole series of violations of international law, of laws and customs of war and of laws of humanity which materialised in the military aggressions of Nazi Germany against other nations and in the innumerable atrocities perpetrated by members of the German forces and authorities against civilians, prisoners of war and combatants.

The Gestapo, S.S. and S.A., the General Staff and High Command were more particularly charged as the instruments of the criminal policy directed by the Reich Cabinet and the Leadership Corps. The first two were chiefly charged in connection with crimes committed in implementing Nazi racial, biological and resettlement policies, both before and during

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2. See op. cit., Appendix B., p. 38.
the war of 1939-1945, in which atrocities perpetrated in concentration
camps occupy a prominent place. The S.A. was charged as the main
instrument in similar atrocities during the early years of Nazism. The
General Staff and High Command were charged particularly for their
part in the preparation, initiation and waging of aggressive wars, and also
for war crimes and crimes against humanity ordered or abetted by them
during the war(3).

The Prosecution laid emphasis on the fact that all these groups or
organisations were interdependent and inter-related as branches in fact
of a single apparatus:

"It would be a mistake", said one of the prosecutors, "to consider these
organisations named in the Indictment, as isolated, independently functioning
aggregations of persons, each pursuing separate tasks and objectives. They
were all a part of, and essential to, the Police State planned by Hitler and
perfected by his clique into the most absolute tyranny of modern times.
That Police State was the political Frankenstein of our era, which brought
fear and terror to Germany and spread horror and death throughout the
world. The Leadership Corps of the Nazi Party was its body, the Reich
Cabinet its head, its powerful arms were the Gestapo and the S.A., and
when it strode over Europe its legs were the armed forces and the S.S. It
was Hitler and his cohorts who created this Police-State-monster, and it
brought Germany to shame and the nations of Europe to ruin".(4)

(3) Exclusion of Certain Classes of Members

The organisations were, in principle, indicted as a whole, and the charges
were submitted against all their members. The Prosecution, however,
conceded on its own initiative certain distinctions and excluded from the
Indictment certain classes of members. These concessions were made in
respect of the Gestapo, the Leadership Corps and the S.A.

Thus, the Prosecution excluded persons employed by the Gestapo
"in purely clerical, stenographic or similar unofficial routine tasks";
Charges against the Leadership Corps were limited to "the Fuhrer, the
Reichsleiters, the main department and office holders" down to the
"Gauleiters and their staff officers; the Kreisleiters and their Staff officers;
the Ortsgruppenleiters, the Zellenleiters and the Blockleiters, but not
members of the staff of the last three classes of officials". All other
members were excluded.(5) The following classes of members of the
S.A. were excluded: "Wearers of the S.A. Sports Badge; the S.A.
controlled Home Guard Units (S.A. Wehrmannschaften), which were not
strictly speaking a part of the S.A.; the National Socialist League for
Disabled Veterans and the S.A. Reserve".(6)

No such concessions were made in respect of the other indicted
organisations.

(1) For detailed charges see op. cit., p. 1-142; also The Trial of German Major War
Criminals, Proceedings of the International Military Tribunal sitting at Nuremberg, Part
referred to as Proceedings).
(3) For full particulars regarding the organisation and structure of the Leadership
Corps, see Proceedings, Part 3, p. 1-529.
(4) Proceedings, Part 8, p. 48. Also p. 56. At a later stage the Prosecution suggested
further exclusions from the S.A. See Speeches of the Prosecutors, p. 33.
(4) The Theory of Collective Criminality

As has previously been stressed, a narrow interpretation of the relevant provisions of the Nuremberg Charter could have led to the conclusion that, once a group or organisation is declared criminal, all its members are to be regarded as automatically guilty, and that no choice is left to the subsequent courts but to punish any member brought to trial before them. It has also been stressed that this did not represent the views of the Nuremberg Tribunal and was never intended to be so by the authors of the Nuremberg Charter nor advocated at any time by the prosecutors themselves.

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

The prosecutors undertook to provide the answers, and in doing so they constructed a precise and complete theory. The theory was evolved by the United States Chief Prosecutor, Justice Robert H. Jackson, one of the promoters and principal authors of the Nuremberg Charter and the leading figure at the Trial. It was endorsed by the other prosecutors, with certain not unimportant reservations expressed by the Russian prosecutor, and was accepted and confirmed by the Tribunal in its Judgment. This development took place in response to a decision of the Tribunal requesting the prosecution and the defence to clarify in particular the tests of criminality which were to be applied, in view of the fact that the Charter did not define a criminal group or organisation. The theory can conveniently be described under three main items: the concept of collective criminality; the legal nature of a declaration of criminality; and the effects of such declaration.

(a) The Concept of Collective Criminality. When presenting the case against criminal groups or organisations to the Tribunal, Justice Jackson made reference in the first place to the fact that the Charter did not introduce an entirely new legal concept. He referred to the legislation of different countries in which membership in certain collective bodies, as well as the bodies themselves, were considered criminal and their members prosecuted as such. More details on this subject will be found in a later part of this Chapter where provisions of municipal law are reviewed. Reference will be made here only to the legislation mentioned by the United States Chief Prosecutor. It is the following:

A United States Law of 28th June, 1940(2), provides that it is unlawful for any person to organise or help to organise any society, group or assembly of persons to teach, advocate or encourage the overthrow or destruction of any Government in the United States by force or violence, or to be or become the member of, or affiliate with, any such society, group or assembly of persons knowing its purposes.

(1) Proceedings, Part 4, announcement made on 14th January, 1946, p. 244-245.
(2) So-called Smith Act.
In Great Britain there were in the past laws of a similar nature, such as the British India Act No. 30 of 1836. It provided that "whoever was proved to have belonged to a gang of thugs" was to be punished with "imprisonment for life with hard labour".\(^1\)

The French Penal Code provides that any organised "association or understanding" made with the object of preparing or committing crimes against persons or property, constitutes a crime against public peace.\(^2\)

The Soviet Penal Code contains provisions similar to those of the French Code, around the concept of the "crime of banditry".\(^3\)

The most striking references were those made to the German laws themselves. The German Penal Code of 1871 punished by imprisonment the "participation in an organisation, the existence, constitution, or purposes of which are to be kept secret from the Government, or in which obedience to unknown superiors or unconditional obedience to known superiors is pledged". In 1927 and 1928 German Courts treated the entire German Communist Party as criminal, and pronounced sentences against its Leadership Corps. Judgment against members of the Communist Party included every cashier, employee, delivery boy and messenger, and every district leader. In 1924 German courts declared the entire Nazi Party to be a criminal organisation. The German Supreme Court laid down general principles for any organisation liable to a declaration of criminality and stated that it was "a matter of indifference whether all the members pursued the forbidden aims". It was "enough if a part exercised the forbidden activity". It also considered irrelevant whether "members of the group or association agreed with the aim, tasks, means of working and means of fighting" and what their "real attitude of mind" was. In all such cases they were held guilty.\(^4\)

While referring to these precedents, Justice Jackson introduced the essence of the concept of collective criminality, through the notion of "conspiracy" as it evolved more particularly in English and American law. The criteria provided by the latter, for determining whether the ends of the indicted organisations were guilty ends, lay in establishing whether the organisations contemplated "illegal methods" or purposed "illegal ends". If so, the responsibility of each member for the acts of every other member was not essentially different from the liability for conspiracy. The principles of the latter were that no formal meeting or agreement was necessary; that no member was bound to know who the other members were and what part they were to take or what acts they had committed; that members were liable for acts of other members, although particular acts were not intended or anticipated, if they were committed in execution of the common plan; and, finally, that it was

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\(^1\) \textit{Proceedings}, Part 8, p. 42. Other laws cited as precedents in English legislation were the Unlawful Societies Act of 1799; the Seditious Meetings Acts of 1817 and 1846; the Public Order Act of 1936, and the Defence Regulation (188), of 1939.


not essential to be a member of the conspiracy at the same time as the others or at the time of the criminal acts.\textsuperscript{(1)}

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

(1) The group or organisation must be "some aggregation of persons associated in identifiable relationship with a collective, general purpose," or, as this was put by another United States prosecuting officer, with "a common plan of action".\textsuperscript{(3)} The notions of "group" or "organisation" are non-technical. They "mean in the context of the Charter what they mean in the ordinary speech of the people". The term "group" is used "as a broader term, implying a lesser or less formal structure or relationship than is implied in the term organisation".\textsuperscript{(9)}

(2) Membership in such group or organisation "must be generally voluntary", that is "the membership as a whole, irrespective of particular cases of compulsion against individuals or groups of individuals within the organisation must not have been due to legal compulsion".\textsuperscript{(4)}

(3) The aims of the organisation "must have been criminal in that it was designed to perform acts denounced as crimes in Art. 6 of the Charter", that is crimes against peace, war crimes or crimes against humanity.\textsuperscript{(5)} The organisation "must have participated directly and effectively in the accomplishment" of these criminal aims and "must have committed" crimes from Art. 6.\textsuperscript{(7)}

(4) The criminal "aims or methods of the organisation must have been of such character that its membership in general may properly be charged with knowledge of them".\textsuperscript{(6)}

As a fifth and last condition, required only for the purpose of enabling the Nuremberg Tribunal to make a declaration of criminality under the Charter, the United States Chief Prosecutor referred to the necessity of establishing that some individual defendant tried by the Tribunal had been a member of the organisation, and was guilty of some act on the basis of which the organisation was to be declared criminal.\textsuperscript{(8)}

Such were the elements of the concept of collective criminality as defined by the Prosecution and as lying at the root of the concept of "criminal organisation" and of a declaration under the Nuremberg Charter. It will be noted that with qualifications, such as voluntary membership and knowledge of the criminal purposes or acts, they are far

\textsuperscript{\(1\)} Op. cit., p. 44.
\textsuperscript{\(2\)} On this last formula see Speeches of the Prosecutors p. 62.
\textsuperscript{\(3\)} Proceedings, Part 8, p. 47.
\textsuperscript{\(4\)} Loc. cit., also p. 40-41.
\textsuperscript{\(5\)} Speeches of the Prosecutors p. 62.
\textsuperscript{\(6\)} Justice Jackson in op. cit., p. 46.
\textsuperscript{\(8\)} Justice Jackson in op. cit., p. 46.
\textsuperscript{\(9\)} Loc. cit. For concurring views of the British and French Prosecutions that the above five points were to be treated as conclusive on the occasion of the Tribunal's final decision, see op. cit., p. 53 and 57.
from operating on the basis of automatic and indiscriminate collective guilt. What they do is to circumscribe a sphere of undisputed criminal activity conducted by a multitude of individuals who have, as a whole, willingly and knowingly taken part in it. On the other hand, as defined, they relate to a specific judicial act which, although denouncing the whole group as criminal, does not prejudice the issue of guilt and punishment of the individual members. This, as we will see, is only partly and in principle solved in a declaration of criminality, whereas the actual decision is left to the competent courts and fully allows for acquittals, as the case may be.

The elaborate qualifications submitted by the United States Chief Prosecutor in respect of the concept of collective criminality and that of a criminal group or organisation, were presented to the Tribunal with a view to serving as a direct basis for its decision on the main issue involved. This method did not meet with the approval of the Russian Chief Prosecutor. In his opinion, the "absence in the Charter of any detailed definition of a criminal organisation was not an omission in the Charter, but its basic position following the fact "that such definition was left to the competence of the national or local courts. He, therefore, disagreed with the method of his other colleagues of introducing qualifications for consideration by the Nuremberg Tribunal. "Attempts to demand", he said, "some kind of definite indication (voluntary membership, mutual information, etc.) are not only unsupported by the Charter but differ from it by their entire structure. The main and sole task presenting itself to the Tribunal does not consist in similar investigations" but only in establishing whether or not "the organisations participated in the realisation of the plan of Hitler's conspirators."(1) It will be seen that these views did not meet with the Tribunal's agreement. While advocating such a course the Russian Prosecutor agreed with the substance of the United States Chief Prosecutor's views, that the declaration would and could not bind subsequent courts to pass automatic sentences against every member. He did not specify, however, what should, in his opinion, be the tests to be applied, but insisted that these should be entirely determined by the national courts.(2)

(b) Legal Nature of the Declaration of Criminality. The declaration of criminality, as provided in the Nuremberg Charter, is a specific judicial act. The indicted organisations, said the United States Chief Prosecutor, were "not on trial in the conventional sense of that term". They were "more nearly under investigation as they might have been before a Grand Jury in Anglo-American practice". The competence of the Tribunal was limited to try "persons", which meant only "natural persons" and not entities or bodies. As a consequence the Tribunal was not "empowered to impose any sentence" upon the indicted groups and organisations. "The only issue," he added, concerned "the collective criminality of the organisation or group, and it was to be adjudicated by what amounts to a declaratory judgment".(3) The declaration, said the British Prosecutor

(2) Proceedings, Part 8, p. 114.
Sir David Maxwell-Fyfe, was in the nature of a “res adjudicata” or of a “judgment in rem” as distinct from a “judgment in personam”. (1)

No statements could have more accurately defined the legal nature of the declaration of criminality provided for by the Nuremberg Charter. The Tribunal decides only on the issue as to whether a group or organisation is criminal under the tests or elements described in the preceding pages. It reaches its decision primarily on the basis of the aims and acts committed by the entity as such, and does not enter into the question as to whether all of its members joined it voluntarily, or acted knowingly and willingly, or whether some of them were personally innocent of any crime or charge. For the purposes of the declaration it suffices to establish the latter tests in respect of a portion of its members. (2)

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

In connection with such a type of declaration of collective criminality, it is worth noting that, in strict law, the Tribunal was not bound, but only empowered, to adjudicate on the issue. This rule derives from the fact, stressed by the United States Chief Prosecutor, that the indicted groups and organisations “were not on trial in the conventional sense of the term”. Consequently, it was neither imperative nor legally inconsistent to free the Tribunal from applying the traditional rule of obligatory adjudication, positive or negative, on the issue submitted to it for judgment.

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

The prosecution made this point clear when advocating that, from the view point of the individual members, the consequence of the declaration was that it created a rebuttable presumption of guilt, and thus reversed the burden of proof. Members, when tried, were not allowed to disprove that their organisation or group was criminal at the time of their membership, but they were entitled to disprove the tests made against them individually as members of the body declared criminal. “Nothing precludes him (a member) from denying that his participation was involuntary”, said Justice Jackson, “and proving that he acted under duress; he may prove that he was deceived or tricked into membership; he may show that he had withdrawn, or he may prove that his name on the rolls is a case of mistaken identity. Actual fraud or trick of which a member is a victim, “has never thought to be the victim’s crime”. As

(2) For more details on these points see statement of Justice Jackson in op. cit., p. 46-47.
regards the member’s knowledge of the criminal nature of the organisation, “he may not have known on the day he joined, but may have remained a member after learning the facts. And he is chargeable not only with what he knew, but with all which he was reasonably indicted”(1).

It will be seen later that the Tribunal did not wish to answer the thesis of presumption of guilt either way, but that it decided that, apart from cases where a member was proved guilty of specific crimes, the tests of voluntary membership, and of actual or reasonably presumed knowledge represented the main issues upon which the subsequent courts were to decide each individual case of guilt.(2)

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

(5) The Case for the Defence

The Defence made, as could be expected, every attempt to disqualify the right of the Tribunal to declare the indicted organisations criminal. Their arguments were numerous and they tackled the issue from all sides and aspects. The most important can be summed up as follows:

The proposed declarations were peculiar to the Anglo-American law and were unknown and “unheard of” in the jurisprudence of other countries.

In the precedents referred to by the prosecution, including those from Germany, the defendants convicted as criminals were always individual persons, never organisations as such.

The indicted organisations had been dissolved by the Allied authorities, they no longer existed and therefore could not be the object of a declaration of criminality.

(2) It is interesting to note that, during the proceedings, some of the judges expressed opinions to the effect that a declaration of criminality could or even should be understood to result in obligatory and automatic convictions. Thus, the French judge, M. Donnedieu de Vabres, questioned the legal basis for introducing the tests submitted by Justice Jackson. According to these tests, emphasised the French judge, a member could be acquitted by proving that his membership was not voluntary or that he never knew of the criminal purpose of the organisation. "However", he said, "I suppose that this Tribunal has a different conception. I suppose that it considers the condemnation of the individual who was a member of the criminal organisation, obligatory and automatic. Strictly speaking, the interpretation which has been advocated by Mr. Jackson is not written in any text. It does not appear in the Charter. Consequently, by virtue of what tests would the Tribunal in question (meaning the subsequent court) be obliged to conform to this interpretation?" To this Justice Jackson replied that "there could be no such thing as automatic condemnations, because the authority given in the Charter is to bring persons to trial for membership."

"But," added Justice Jackson, "the points could be raised by the defendant that he had defences, such as duress, force against his person, or threats of force, and would have to be tried." See Proceedings, Part 8, p. 103-104. Doubts such as those expressed by the French judge are an illustration of how terms of the Charter could have, however unwittingly, been misinterpreted, had there not been a theory to explain their real purpose and meaning. It is also worth noting that, before making final decisions in its Judgment, all judges debated at length the theory of the United States Chief Prosecutor in the course of the proceedings and manifested their anxiety to clarify in every detail the issues involved. For full data, see op. cit., p. 97-113.
To declare an organisation criminal meant the outlawing and branding as criminal not only of the organisation as such, but of each individual member. It, therefore, meant a final sentencing of every one of them to a "general loss of honour".

The laws already issued by the Allied authorities for the subsequent trial of members of organisations declared criminal, rendered every member liable to the death penalty(1) which bore no proportion to the alleged guilt of all members.

Membership of the indicted organisations comprised many millions of individuals so that declarations of criminality would unavoidably strike innocent individuals.

The Charter did not define the concept of criminal organisations, so that, according to the general principle of lex loci, the gap was to be filled on the ground of German law in the first place. In German law the concept was unknown and contrary to its spirit.

In any case a declaration could not be founded on the tests of the prosecution. It could be made only on condition that the "original purpose" of an organisation "was directed to the commission of crimes in the sense of Art. 6 of the Charter" and that it "was known to all members". Or else, if the original purpose was not criminal, "all members" must have participated "during a certain period of time" in the planning and perpetration of such crimes.(2)

The task of declaring an organisation criminal was that of a legislator and not of a tribunal. The declaration amounted in fact to a law for the subsequent courts and this was contrary to the principles of modern justice.(3)

It was not correct to say that members could exculpate themselves in the subsequent trials. Any declaration was founded on the principle that membership was a crime in itself, so that the only real ground for dismissing the charge was that the defendant was not a member. It was highly improbable that acquittals could be achieved under the tests submitted by the prosecutors.(4)

Needless to say that in addition to these arguments the defence contested that the indicted organisations were criminal in the sense of the Charter(5) and denied that some of them, such as the General Staff and High Command

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(1) The reference made here concerned the Allied Control Council for Germany, Law No. 10, an account of which will be found later.
(2) For more details on all the above points see Proceedings, Part 8, p. 61-63 and 91-92.
(3) Op. cit., p. 66-68. During the proceedings the French judge raised the issue by asking the United States Chief Prosecutor whether, by defining and qualifying the concept of collective criminality and that of criminal organisations, with a view to giving directives to the subsequent courts, the Tribunal would not in fact assume the role of a legislator. The United States Chief Prosecutor answered that "there was in this something in the nature of legislation", but that there was "nothing in that matter which controlled the Tribunal itself or could invalidate its findings". See op. cit., p. 104.
(5) For fuller particulars regarding the case of the defence in respect of each of the indicted organisations, see op. cit., p. 61-93, 117-126.
were "groups" or "organisations" within the terms of the Charter.\(^{(0)}\) It was also argued at length that, in the indicted organisations, membership was not generally voluntary and that the great majority of members did not even think of the aims and purposes of the organisations.

The Prosecution rebutted all these points. It emphasised that the evidence submitted fully proved the criminal nature of the indicted bodies and that the Tribunal had more than sufficient ground to pass its verdict. It referred to the fact that the killing of millions by the Nazi regime, as proved by the evidence, could not have been done without "disciplined, organised, systematic manpower to do it".\(^{(2)}\) It refuted that such mass murder could have been a secret to members, and dismissed arguments such as those complaining of the "dishonour" which would fall upon millions of members by stressing that the latter were already dishonoured by the evidence produced.\(^{(3)}\) As to the legal points raised in order to disqualify the right of the Tribunal to make declarations of criminality, the Prosecution maintained its position on the lines described in connection with the law of the Charter and the precedents referred to.\(^{(4)}\)

Pursuant to Art. 9 of the Charter, the Defence made applications for the hearing of members of the indicted organisations, and a separate procedure was devised to this effect. A total of 102 witnesses for the defence gave oral testimony, and an unusually large number of affidavits containing statements of the witnesses was admitted. A total of 310,213 affidavits was received, out of which 136,213 were for the S.S.; 155,000 for the Leadership Corps; 2,000 for the Gestapo; 10,000 for the S.A.; and 7,000 for the S.D.\(^{(5)}\)

(iii) THE JUDGMENT

In its Judgment the Nuremberg Tribunal made, on the one hand, a general ruling regarding the legal basis, the meaning and the effects of a declaration of criminality under the terms of the Charter, and, on the other, it delivered a verdict of guilt in respect of three of the six indicted organisations.

(1) General Ruling

The general ruling was made with particular regard to the effects of a declaration of criminality upon the punishment of individual members by the competent courts. Referring to the provisions of the Charter, as well as to provisions of other laws enacted in anticipation of declarations by the Tribunal in this field,\(^{(6)}\) the Tribunal established in the first place that, under these rules, there was a "crime of membership" for individuals who belonged to organisations declared criminal. It said:

"A member of an organisation which the Tribunal has declared to be

\(^{(1)}\) Op. cit., p. 64 and 92.
\(^{(4)}\) For detailed information on replies of the prosecution, see Proceedings, Part 8, p. 93-117.
\(^{(5)}\) Speeches of the Prosecutors, p. 5.
\(^{(6)}\) This concerns the Allied Control Council for Germany, Law No. 10, an account of which will be found under C.\((i)\).\(1\), below p. 318 et seq.
criminal may be subsequently convicted of the crime of membership and be punished for that crime by death."(1)

However, added the Tribunal:

"This is not to assume that international or military courts which will try these individuals will not exercise appropriate standards of justice. This is a far-reaching and novel procedure. Its application, unless properly safeguarded, may produce great injustice."(2)

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

"This discretion is a judicial one and does not permit arbitrary action, but should be exercised in accordance with well settled legal principles, one of the most important of which is that criminal guilt is personal, and that mass punishment should be avoided. If satisfied of the criminal guilt of any organisation or group, this Tribunal should not hesitate to declare it to be criminal because the theory of "group criminality" is new, or because it might be unjustly applied by some subsequent tribunals. On the other hand, the Tribunal should make such declaration of criminality so far as possible in a manner to insure that innocent persons will not be punished."(3)

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

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

"A criminal organisation is analogous to a criminal conspiracy in that the essence of both is co-operation for criminal purposes. There must be a group bound together and organised for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter. Since the declaration with respect to the organisations and groups will, as has been pointed out, fix the criminality of its members, that definition should exclude persons who had no knowledge of the criminal purposes or acts of the organisation and those who were drafted by the State for membership, unless they were personally implicated in the commission of acts declared criminal by Article 6 of the Charter as members of the organisation. Membership alone is not enough to come within the scope of these declarations."(4)

Two distinct consequences appear from this statement—first the concept of and the tests regarding the criminality of a group or organisation, and secondly, the tests for establishing the guilt of individual members of the group. With regard to the first, the concept is reached when there is a "group bound and organised for a common purpose" and when such a group "is formed or used in connection with the commission of crimes". When these two elements are fulfilled, a declaration that an organisation is criminal as a whole is justified. Since the Tribunal stressed that the organisation had to "be formed or used" in connection with the commission of criminal acts, this meant that it is not essential for the group to have actually committed crimes; it is sufficient if it was set up for this purpose. With regard to the second, the tests are those of elimination, and two classes of members are excluded. First, those "who had no knowledge of the criminal purpose or acts of the organisation" and secondly, those "who were drafted by the State unless they were personally implicated in the commission" of criminal acts. The second proviso means that persons who were compulsorily drafted, even if they had knowledge of the criminal purpose of the organisation, are not guilty unless they personally were implicated in the commission of crimes.

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

The Nuremberg Tribunal left untouched the question of how such evidence can be made good by either the prosecution or the defence. Competent courts have, however, full latitude in admitting circumstantial
evidence, and the question of whether it is reasonable to believe that the accused had or had not knowledge of the criminal purpose or acts of his organisation can, and will in most cases have to be, solved on the basis of the accused's rank and position, his duties and assignments while serving in the organisation, and the like. With regard to the second test, that of the implication of persons who joined the organisation on a non-voluntary basis, the Tribunal's word "unless" following the description of a member compulsorily enlisted, seems to indicate that, whenever the accused has established his compulsory enlistment, the burden of proof that he had actually committed crimes lies on the prosecution.

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

The Tribunal concluded its statement of principle by making certain recommendations to the courts competent for the subsequent trials. They will be recorded when dealing with the laws governing such trials.

(2) The Verdict

As previously mentioned, the Tribunal made declarations of criminality in respect of three of the six indicted organisations. By a majority decision only, the judges found no grounds for pronouncing the other three to be criminal, though the Soviet judge dissented from the opinion of his colleagues in respect of two of these three organisations.

(a) Organisations declared criminal. The Tribunal declared criminal the Leadership Corps of the Nazi Party, the Gestapo and S.D., and the S.S.

The declaration concerning the Leadership Corps was made in the following terms:

"The Leadership Corps was used for purposes which were criminal under the Charter and involved the Germanisation of incorporated territory, the persecution of the Jews, the administration of the slave labour programme, and the mistreatment of prisoners of war. The defendants Bormann and Sauckel, who were members of this organisation, were among those who used it for these purposes. The Gauleiters, the Kreisleiters, and the Ortsgruppenleiters participated, to one degree or another, in these criminal programmes. The Reichsleitung as the staff organisation of the party is also responsible for these criminal programmes as well as the heads of the various staff organisations of the Gauleiters and Kreisleiters. The decision of the Tribunal on these staff organisations includes only the Amtsleiters who were heads of offices on the staffs of the Reichsleitung, Gauleitung and Kreisleitung. With respect to other staff officers and party organisations attached to the Leadership Corps other than the Amtsleiters referred to above, the Tribunal will follow the suggestion of the Prosecution in excluding them from the declaration.

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

Thus, the Tribunal limited the effect of the declaration to specific classes
of members, as proposed by the prosecution. In addition, following the
principle contained in Art. 6 of the Charter, that crimes falling within its
jurisdiction had to be connected with an aggressive war, the Tribunal
limited their responsibility to the time of the late war, i.e. from 1st
September, 1939, onwards. It also qualified the “personal guilt” of
members by applying the tests previously described. In this respect,
however, the Tribunal was satisfied that membership in the Leadership
Corps was “voluntary at all levels”,(2) and omitted this test from the
declaration as irrelevant, thus precluding the accused from using com-
mandatory enlistment in their defence.

The declaration regarding the Gestapo and S.D. was made in similar
terms and with the same effect as to the voluntary basis of membership:

“The Gestapo and S.D. were used for purposes which were criminal
under the Charter involving the persecution and extermination of the Jews,
brutalities and killings in concentration camps, excesses in the administra-
tion of occupied territories, the administration of the slave labour programme
and the mistreatment and murder of prisoners of war. The defendant
Kaltenbrunner, who was a member of this organisation was among those
who used it for these purposes. In dealing with the Gestapo the Tribunal
includes all executive and administrative officials of Amt IV of the R.S.H.A.(3)
or concerned with Gestapo administration in other departments of the
R.S.H.A. and all local Gestapo officials serving both inside and outside of
Germany, including the members of the Frontier Police, but not including
the members of the Border and Customs Protection or the Secret Field Police,
except such members as have been specified above. At the suggestion of the
Prosecution the Tribunal does not include persons employed by the Gestapo
for purely clerical, stenographic, janitorial or similar unofficial routine
tasks. In dealing with the S.D. the Tribunal includes Amts III, VI and VII
of the R.S.H.A. and all other members of the S.D., including all local repre-
sentatives and agents, honorary or otherwise, whether they were technically
members of the S.S. or not.

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

(1) Judgment, p. 70-71. For the reasons on which the Tribunal based their declaration
see op. cit., p. 67-71.
(3) The R.S.H.A. was the Reich Security Head Office (Reichssicherheitshauptamt)
which controlled the whole of the Gestapo and S.D. under Himmler. The various
“Amts” (III, IV, VI, and VII) mentioned were departments of the R.H.S.A. responsible for
particular types or fields of crimes.
hold positions enumerated in the preceding paragraph prior to 1st September, 1939."(1)

Finally, the declaration in respect of the S.S. reads:

"The S.S. was utilised for purposes which were criminal under the Charter involving the persecution and extermination of the Jews, brutalities and killings in concentration camps, excesses in the administration of occupied territories, the administration of the slave labour programme and the mistreatment and murder of prisoners of war. The defendant Kaltenbrunner was a member of the S.S. implicated in these activities. In dealing with the S.S. the Tribunal includes all persons who had been officially accepted as members of the S.S. including the members of the Allgemeine S.S., members of the Waffen S.S., members of the S.S. Totenkopf Verbände and the members of any of the different police forces who were members of the S.S. The Tribunal does not include the so-called S.S. riding units. The Sicherheitsdienst des Reichsführer S.S. (commonly called the S.D.) is dealt with in the Tribunal's Judgment on the Gestapo and S.D.

"The Tribunal declares to be criminal within the meaning of the Charter the group composed of those persons who had been officially accepted as members of the S.S. as enumerated in the preceding paragraph who became or remained members of the organisation with knowledge that it was being used for the commission of acts declared criminal by Article 6 of the Charter, or who were personally implicated as members of the organisation in the commission of such crimes, excluding, however, those who were drafted into membership by the State in such a way as to give them no choice in the matter, and who had committed no such crimes. The basis of this finding is the participation of the organisation in war crimes and crimes against humanity connected with the war; this group declared criminal cannot include, therefore, persons who had ceased to belong to the organisation enumerated in the preceding paragraph prior to 1st September, 1939."(2)

Unlike the Leadership Corps and the Gestapo and S.D., for this organisation the Tribunal recognised that membership was not always voluntary, and therefore included the test required in this respect.

(b) Organisations not declared criminal. The majority of the judges came to the conclusion that declarations should not be made in respect of the S.A., the Reich Cabinet, and the General Staff and High Command.

For the S.A. the Tribunal gave the following reasons:

"Up until the purge beginning on 30th June, 1934, the S.A. was a group composed in large part of ruffians and bullies who participated in the Nazi outrages of that period. It has not been shown, however, that these atrocities were part of a specific plan to wage aggressive war, and the Tribunal therefore cannot hold that these activities were criminal under the Charter. After the purge, the S.A. was reduced to the status of a group of unimportant Nazi hangers-on. Although in specific instances some units of the S.A. were used for the commission of war crimes and crimes against humanity, it cannot be said that its members generally participated in or even knew of the criminal acts. For these reasons the Tribunal does not declare the S.A. to be a criminal organisation within the meaning of Article 9 of the Charter."(3)

The above findings were, thus, chiefly based upon the fact that crimes perpetrated by the S.A. were not "part of a specific plan to wage aggressive war," which the Tribunal held to represent the essential prerequisite for being within the scope of its jurisdiction.

(1) Op. cit., p. 75. For full details concerning the ground on which the Tribunal founded its declaration see op. cit., p. 71-75.
(2) Op. cit., p. 79. For details see p. 75-79.
Two reasons were given for withholding a declaration with regard to the Reich Cabinet:

"The Tribunal is of the opinion that no declaration of criminality should be made with respect to the Reich Cabinet for two reasons: (1) because it is not shown that after 1937 it ever really acted as a group or organisation; (2) because the group of persons here charged is so small that members could be conveniently tried in proper cases without resort to a declaration that the Cabinet of which they were members was criminal."(9)

The first reason was based upon the finding that "from the time that it can be said that a conspiracy to make aggressive war existed the Reich Cabinet did not constitute a governing body, but was merely an aggregation of administrative offices subject to the absolute control of Hitler." The Tribunal established that not a single meeting of the Reich Cabinet was held after 1937, and that the "Secret Cabinet Council never met at all". It concluded that members of the Reich Cabinet were involved only individually, and that no evidence was to hand to prove that the Cabinet took part in crimes as a group or organisation.(10)

As to the second reason, the Tribunal ascertained that there were altogether 48 members of the Reich Cabinet, that 8 of them were dead and 17 were on trial before it. It accordingly found that the remaining 23 could all be brought to trial individually, and that by a declaration "nothing would be accomplished to expedite or facilitate their trials".(10)

Finally, the following statement was made in respect of the General Staff and High Command:

"The number of persons charged, while larger than that of the Reich Cabinet, is still so small that individual trials of these officers would accomplish the purpose here sought better than a declaration such as is requested. But a more compelling reason is that in the opinion of the Tribunal the General Staff and High Command is neither an "organisation" nor a "group" within the meaning of those terms as used in Article 9 of the Charter. . . . 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."(10)

While expressing the above opinion, the Tribunal ascertained that the evidence submitted against the General Staff and High Command was, in respect of many members "clear and convincing" and reached the same conclusions as that expressed for members of the Reich Cabinet,

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namely that members who were not already being tried by it could and should be brought to trial on an individual basis.\(^1\)

It thus appears that in respect of the Reich Cabinet and the General Staff and High Command, the Tribunal used also reasons of judicial expediency, by finding that the comparatively small number of members and the evidence regarding their individual guilt represented a good ground for making unnecessary a declaration against the body as a whole.

The Soviet judge dissented from the opinion of his American, British and French colleagues in respect of the Reich Cabinet and the General Staff and High Command. In his opinion both organisations or groups ought to have been declared criminal, as the leading factors in the commission of crimes against peace, war crimes and crimes against humanity. His arguments were entirely founded on a different estimate of the relevant facts and were thus debatable. He did not enter into the second reason invoked by the majority, that of procedural expediency, apparently because he did not agree that such ground could justify withholding a declaration of criminality. As a consequence he limited his arguments to a number of facts which, in his view, warranted considering the Reich Cabinet and the General Staff and High Command as criminal organisations. It is not possible nor necessary to reproduce these arguments. It suffices to say that, regarding the Reich Cabinet, the Soviet judge’s views were that it had “a direct and active role in the working out of the criminal enterprises” of the Nazis, and that it was “particularly untenable and rationally incorrect” to refuse to declare it criminal.\(^2\) As to the fact that it did not meet after 1937, the Soviet judge dismissed the argument by stating that these and similar circumstances only proved that the Nazi Government was “not an ordinary rank and file Cabinet but a criminal organisation”.\(^3\) As to the General Staff and High Command he thought that it “represented the most important agency in preparing and realising the Nazi aggressive and man-hunting programme”,\(^4\) and that refusal to declare it criminal “contradicted both the actual situation and the evidence sub-

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\(^1\) This passage of the Judgment reads: "Although the Tribunal is of the opinion that the term "group" in Article 9 must mean something more than this collection of military officers, it has heard much evidence as to the participation of these officers in planning and waging aggressive war, and in committing war crimes and crimes against humanity. This evidence is, as to many of them, clear and convincing. They have been responsible in large measure for the misery and suffering that have fallen on millions of men, women and children. They have been a disgrace to the honourable profession of arms. Without their military guidance the aggressive ambitions of Hitler and his fellow Nazis would have been academic and sterile. Although they were not a group falling within the words of the Charter, they were certainly a ruthless military caste. The contemporary German militarism flourished briefly with its recent ally, National Socialism, as well as or better than it had in the generations of the past. Many of these men have made a mockery of the soldier’s oath of obedience to military orders. When it suits their defence they say they had to obey; when confronted with Hitler’s brutal crimes, which are shown to have been within their general knowledge, they say they disobeyed. The truth is they actively participated in all these crimes, or sat silent and acquiescent, witnessing the commission of crimes on a scale larger and more shocking than the world has ever had the misfortune to know. This must be said. Where the facts warrant it, these men should be brought to trial so that those among them who are guilty of these crimes should not escape punishment.” See op. cit., p. 83.

