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He disagreed that members of the Nazi General Staff and High Command could be compared to those of Supreme Commands in Allied countries, because of their relationship with the Nazi party and other Nazi organisations.

C. RULES IN MUNICIPAL LAW

In addition to the rules of international law contained in the Nuremberg Charter, criminal organisations are covered by rules of municipal law. It has already been seen that the prosecutors at the Nuremberg Trial made reference to such rules with a view to demonstrating that the provisions of the Charter were not an entirely novel legal phenomenon. It has also been mentioned that certain rules had been enacted in connection with those of the Nuremberg Charter, and that they were promulgated in order to regulate the trial of members of criminal organisations prosecuted on the basis of the declarations made by the Nuremberg Tribunal. It thus appears that the field is covered by two sets of rules. On the one hand, there are rules which form part of the national law of various Allied countries and which existed before the Nuremberg Charter and Trial. In some of these countries they were supplemented after the end of the war against Germany, in order to clarify the legal issues raised by the type of collective criminality furnished by the Nazis. On the other hand, there are rules specifically enacted in the ex-territories of the III Reich (Germany and Austria) and insuring the trial of members of the criminal organisations tried by the Nuremberg Tribunal. In Germany they were enacted in direct connection with the Nuremberg Charter and Judgment, and in Austria, although not directly linked, they cover a similar field.

An account will first be given of the rules in the occupied territories, as they relate to the most numerous trials of this type and since the most important of them are implemented on the basis of the Nuremberg Judgment.

(i) RULES IN OCCUPIED TERRITORY

(1) Germany

(a) Law No. 10. The trial of members of criminal organisations is regulated by Law No. 10 of the Allied Control Council for Germany of 20th December, 1945. This law was enacted for the whole of occupied Germany so that its provisions are in force in all four zones of occupation. The reason for promulgating these provisions in German territory was that members to be tried all belonged to Nazi organisations, and that the Allied authorities decided that they should consequently be tried as a rule in Germany.

Among the acts enumerated as crimes in Art. II of Law No. 10 is the following:

"Membership in categories of a criminal group or organisation declared criminal by the International Military Tribunal."

(2) For details on the Soviet judge's dissenting opinion see op. cit., p. 142-149.
This crime is liable to the same penalties as those provided for the other crimes enumerated, namely crimes against peace, war crimes and crimes against humanity.

These penalties are:

(a) Death.
(b) Imprisonment for life or a term of years, with or without hard labour.
(c) Fine, and imprisonment with or without hard labour, in lieu thereof.
(d) Forfeiture of property.
(e) Restitution of property wrongfully acquired.(1)
(f) Deprivation of some or all civil rights.

"Any property declared to be forfeited or the restitution of which is ordered by the Tribunal shall be delivered to the Control Council for Germany, which shall decide on its disposal."(2)

As can be seen the range of punishments is very wide and the Courts are at liberty to impose any of them, including the death penalty. A notable feature, however, is that the law does not say that "punishments will consist of one or more" of the penalties enumerated, but only that they "may". This wording made possible a re-adjustment of penalties for the "crime of membership" by subsequent legislation, as distinct from punishment for other crimes covered by Law No. 10. Further reference to this will be made later.

Law No. 10 does not specify which courts in Germany are competent for the trial of members of criminal organisations. It simply states:

"The Tribunal by which persons charged with offences hereunder shall be tried and the rules and procedure thereof shall be determined or designated by each zone Commander for his respective zone."(3)

Such tribunals and rules were determined in several zones and they will be recorded separately. The above provision contains yet another rule which is relevant in respect of the power of the Nuremberg Tribunal's Judgment for the courts functioning under Law No. 10. This rule reads:

"Nothing herein is intended to, or shall, impair or limit the jurisdiction or power of any court or tribunal now or hereafter established in any zone by the Commander thereof, or of the International Military Tribunal established by the London Agreement of 8th August, 1945."(4)

This rule is significant in that, by confirming that the power and jurisdiction of the Nuremberg Tribunal are left unimpaired by Law No. 10, it sanctions the legal effects of such powers and jurisdiction in respect of the courts functioning under its terms. It is in the light of this proviso that the general ruling made by the Nuremberg Tribunal in regard to criminal organisations and membership therein, should be understood as having a binding effect upon the subsequent courts.

As mentioned above, tribunals, rules and procedure for the trial of members of criminal organisations were determined in the British and

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(1) This is improperly included among punishments. Such restitution is not and cannot represent a penalty, but only a redress of the damage inflicted.
(2) Art. II, (3).
(3) Art. III, (2).
(4) Italic introduced.
United States zones of occupation. Certain rules of substantive law were prescribed pursuant to recommendations made by the Nuremberg Tribunal in its Judgment. These recommendations will now be recorded and followed by the existing zonal rules.

(b) Recommendations of the Nuremberg Tribunal. The Nuremberg Tribunal ended its general ruling in the following terms:

"Since declarations of criminality which the Tribunal makes will be used by other courts in the trial of persons on account of their membership in the organisations found to be criminal, the Tribunal feels it appropriate to make the following recommendations:

1. That so far as possible throughout the four zones of occupation in Germany the classifications, sanctions and penalties be standardised. Uniformity of treatment so far as practical should be a basic principle. This does not, of course, mean that discretion in sentencing should not be vested in the court; but the discretion should be within fixed limits appropriate to the nature of the crime.

2. Law No. 10, to which reference has already been made, leaves punishment entirely in the discretion of the trial court even to the extent of inflicting the death penalty.

The De-Nazification Law of 5th March, 1946, however, passed for Bavaria, Greater-Hesse and Wurttemberg-Baden, provides definite sentences for punishment in each type of offence. The Tribunal recommends that in no case should punishment imposed under Law No. 10 upon any members of an organisation or group declared by the Tribunal to be criminal exceed the punishment fixed by the De-Nazification Law. No person should be punished under both laws.

3. The Tribunal recommends to the Control Council that Law No. 10 be amended to prescribe limitations on the punishment which may be imposed for membership in a criminal group or organisation so that such punishment shall not exceed the punishment prescribed by the De-Nazification Law."(1)

The De-Nazification Law of 5th March, 1946, referred to by the Tribunal, is in force in the United States zone and will be dealt with in the analysis of the United States zone rules. The Nuremberg Tribunal, thus, made a strong point of the necessity of reducing the punishments as provided by Law No. 10 in order to fit "the nature of the crime". The Tribunal found that the "crime of membership" in itself(2) did in no case deserve a more severe punishment than that prescribed in the De-Nazification Law of March, 1946, that is, as will be seen, 10 years imprisonment.

It will be noted that, in order to achieve such a result, the Tribunal found it necessary to recommend the amendment of Law No. 10. No such amendment took place, probably for the reason previously mentioned. The rule of Art. II, (3) of Law No. 10 is that the punishments "may" consist of the penalties enumerated. This may be interpreted to mean not only that the courts are always at liberty to apply lesser penalties, but that it is within the competence of the zonal authorities to make re-adjustments

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(1) Judgment, p. 67.
(2) This distinction is important, for a defendant prosecuted for membership can at the same time be found guilty of either of the other specific crimes covered by Law No. 10, i.e. crimes against peace, war crimes or crimes against humanity. In such cases the punishments applicable are those from Art. II of Law No. 10 without restriction.
binding upon the courts in connection with their powers determined under the terms of Art. III (2).

(c) Rules in the British Zone. To implement the above recommendations, the British Military Government in Germany issued on 1st November, 1946, a set of rules regulating all trials of members of criminal organisations.\(^{(1)}\)

The rules were enacted with express reference to Art. 10 of the Nuremberg Charter and to the declarations made by the Nuremberg Tribunal. Competence to try members of criminal organisations was conferred upon German courts.

The main rule of substantive law contained in the ordinance reads:

"The accused persons will be charged with having been a member of a criminal organisation with knowledge that it was being used for the commission of acts declared criminal by Article 6 of the Charter of the International Military Tribunal."\(^{(2)}\)

This rule leaves unanswered the question of whether the "knowledge" referred to is to be proved by the prosecution or whether it is to be presumed and rebutted by the accused. As previously pointed out, this leaves either course open according to the estimate of the court.

The jurisdiction over persons to be tried as members of criminal organisations is limited to the categories or classes defined by the Nuremberg Tribunal in its Judgment in respect of each of the organisations declared criminal, and does not, as a matter of course, comprise members of organisations which were not declared criminal.\(^{(3)}\)

Finally, the recommendations of the Nuremberg Tribunal regarding the punishments were fully applied. Art. V of Ordinance No. 69 specifies:

- "Any person found guilty will be liable to any or all of the following penalties:
  - (a) Imprisonment (Gefaengnisstrafe) for a term not exceeding 10 years;
  - (b) Forfeiture of property;
  - (c) Fine."

This leaves out the death penalty and imprisonment for life, as well as hard labour. In addition, the courts are entitled to take into account mitigating circumstances when passing sentence.\(^{(4)}\) Finally, further prescriptions regarding the way of imposing penalties, as well as any other matter connected with the carrying out of Ordinance No. 69, are reserved and delegated to the Central Legal Office of the British Military Government.\(^{(5)}\)

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\(^{(2)}\) Art. IV, 9.

\(^{(3)}\) A full list of such categories or classes is contained in an appendix to Ordinance No. 69 under the heading "First Schedule".

\(^{(4)}\) Art. VI.

\(^{(5)}\) Article VII, which reads: "The Central Legal Office shall issue such regulations or orders as may be necessary or expedient for carrying this Ordinance into effect, including directions as to the maximum sentences to be imposed in relation to any rank or appointment held in any of the said criminal organisations, provided that in no cases shall any sentence of imprisonment exceed the maximum laid down in Article V hereof."
(d) Rules in the United States Zone. In the American zone of Germany, rules were issued by the United States Military Government in a letter dated 9th April, 1947, and circulated to the Directors of the local Military Governments for Bavaria, Wurttemberg-Baden, Greater Hesse and Bremen. (1)

The letter contains, in the first place, an account of the Nuremberg Judgment and specifies which organisations were declared criminal as well as which categories of members were determined as liable to be brought to trial. Special care was taken to exclude categories not comprised in the Nuremberg declarations. (2)

Following the Nuremberg Tribunal's recommendations, the trial of such members was entrusted to the German courts established by the De-Nazification Law of 5th March, 1946. (3) Substantive and procedural provisions of this law were declared applicable "to the extent to which this was consistent with the finding of the International Military Tribunal." (4) This includes in particular the types and degrees of punishments recommended by the Nuremberg Tribunal.

Under the rules of the De-Nazification Law, whose official title is "Law for Liberation from National Socialism and Militarism", (5) there are four groups of "offenders" and penalties are specified for each particular group. (6) The severest penalty is 10 years detention in a labour camp, whereas other penalties include the loss of a great variety of rights, such as of political rights, the right to exercise a professional vocation, to hold public office and the like. (7) Under the rules of the United States Military Government the courts can apply any of these punishments, and the accused against whom such punishments can be pronounced are only those defined in the Nuremberg Judgment.

Unlike the British rules, those of the United States Military Government contain a specific answer to the question of who is to bear the burden of proof in respect of the tests of individual guilt. In line with the attitude consistently held by the United States Chief Prosecutor in Nuremberg, it introduced the principle of presumption of guilt in the following terms:

"Upon proof of membership within any of the incriminated groups of the organisations found criminal, a presumption shall arise that the member joined or remained a member with knowledge of the criminal acts and purposes of the organisation. This presumption is rebuttable and may be overcome by evidence to the contrary in accordance with Article 34 of the

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(1) Letter of the Office of the Military Government for Germany (U.S.), AG 010.6 (IA), of 9th April, 1947.
(2) Para. 1-6 of above Letter.
(3) These courts comprise tribunals in the first instance, at the rate of one for each urban and rural district, and of "appeals" tribunals competent for the revision of their judgments. See Art. 24 of the above Law.
(4) Para. 7 of above Letter.
(5) The above law was enacted by the local German Governments for Bavaria, Greater Hesse and Wurttemberg-Baden upon approval of the United States Military Government.
Its provisions are cited from the official English translation.
(6) These groups are named as follows (Art. 4): major offenders; offenders (activists, militarists and profiteers); lesser offenders (probationers); and followers.
(7) For fuller details see the above Law, Art. 15-18.
Law. A similar presumption shall arise with reference to the voluntary nature of a respondent’s membership in the Waffen S.S., those who claim that they were drafted into membership by the State in such a way as to give them no choice in the matter, have the burden of proving such a defence.

It thus appears that in the United States zone the presumption of guilt is introduced to a full extent and that it relates to all cases and all tests of individual criminality. As previously explained, this means that the prosecution is bound to prove only the fact of “membership” in each particular case, and that, failing evidence submitted by the defendant regarding the presumptions determined against him, he is to be punished. This, however, as has also been explained, does not mean automatic punishment. The courts have wide powers to admit direct or circumstantial evidence in defence of the accused, and to dismiss the presumption on the basis of such evidence.

(2) Austria

Punishment of members of criminal organisations is dealt with in a “Constitutional Law concerning War Crimes and other National Socialist Misdeeds” enacted on 26th June, 1945, by the Austrian Provisional Government. The Law was promulgated before the enactment of the Nuremberg Charter and has, consequently, no link with the Nuremberg Trial. It regulates the trial of war criminals by Austrian courts, under the penal jurisdiction of the Austrian administration as allowed by the occupying powers, and contains rules approaching those deriving from the Nuremberg Charter and Judgment in respect of criminal organisations.

Article 1, para. 6, of this Law contains the following provision:

Any person who, during the National Socialist tyranny in Austria, acted, even temporarily, as a member of the Reich Government, or as a leading official of the N.S.D.A.P., with the rank of Gauleiter or similar grade and upwards, or with the rank of Reichsleiter or similar grade and upwards, or as Reichsstatthalter, Reich Defence Commissioner or Leader of the S.S.—including the Waffen S.S.—with the rank of Standartenführer and upwards, will be deemed to be a war criminal within the meaning of paragraphs 1 and 2 above. Such persons, being regarded as instigators and contrivers of the above-mentioned crime shall be sentenced to death.

(1) This Article regulates the rebuttal of presumptions of guilt declared by the De-Nazification Law in respect of “major offenders” and “offenders”. In lists attached to the Law there is an extensive enumeration of those who are regarded as falling within these two groups and who are held guilty until proof to the contrary. See Art. 5-6 and 7-10 of the De-Nazification Law.

(2) It will be remembered that the Nuremberg Tribunal found that voluntary membership existed in all cases regarding the Leadership Corps of the Nazi Party and the Gestapo and S.D.

(3) Para. 8 of the above letter.

(4) Although a former territory of the III Reich, Austria had from the outset a separate status from Germany. In the Moscow declaration of November, 1943, the Allied Powers decided to re-establish its independence, and an Austrian Provisional Government was set up before the completion of the occupation of Austrian territory by the Allied Powers, in May, 1945. The setting up of this Government gave rise to certain differences between the Western Powers and Russia, but these were soon dispelled and the Austrian Government recognised by all Powers.

Para. 1 and 2 of Art. 1, referred to in the above text, define the notion of war crimes and war criminals. Penalties provided by this Law are very severe. In numerous cases no lesser punishment can be imposed than 10 years' penal servitude, and in many other cases the death penalty is the only punishment.

From the above quoted provision it appears that the classification of members held guilty on account of their membership in the groups or organisations described is similar to that of the Nuremberg Judgment as far as the Nazi Party and the S.S. are concerned. A major difference appears in respect of members of the Reichs Cabinet, who are included on an equal footing, and an entirely different solution is given to the question of the personal guilt of the members involved. All such members are regarded individually guilty on account of their membership taken in itself and have to be punished automatically on this ground. This amounts to the solution which was carefully avoided during the Nuremberg Trial and which had always given rise to apprehension in the Commission before the Trial.

(ii) RULES IN ALLIED COUNTRIES

In the national law of various Allied countries, provisions dealing with criminal groups or organisations were either already in existence for a varying length of time preceding the enactment of the Nuremberg Charter and of the rules that followed it, or were introduced in order to cover the type of collective criminality evidenced by Nazi activities. In most cases such subsequent rules were prescribed in addition to those already existing, as a further development of the laws in this field.

Provisions which were in force prior to the Nuremberg Charter form part of the common penal law systems of the countries concerned and most of them are, in a sense, wider in scope than those prescribed in respect of the Nazi organisations. They are wider in that they concern any type of criminal group, aiming at the commission of a greater variety of crimes than those covered by the Nuremberg Charter. On the other hand, they are, in connection with such a feature, general in nature and wide enough to embrace the cases covered by the Nuremberg Charter. In view of the procedure and legal effects prescribed in this Charter, the question of their implementation in the case of groups or organisations declared criminal by the Nuremberg Tribunal, does not arise in making another declaration under the terms of domestic law. They serve only the purpose of trying members of criminal organisations as a result of the declarations made by

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(1) These definitions are as follows; "(1) Any person who, in the course of the war launched by the National Socialists, has intentionally committed or instigated an act repugnant to the natural principles of humanity or to the generally accepted rules of international law or to the laws of war, against the members of the armed forces of an enemy or the civilian population of a state or country at war with the German Reich or occupied by German forces shall be punished as a war criminal. (2) Any person who, in the course of this war, acting in the real or assumed interest of the German armed forces or of the National Socialist tyranny, has committed or instigated an act repugnant to the natural principles of humanity against other persons, whether in connection with war-like or military actions or the actions of militarily organised groups, shall be considered guilty of the same crime."

(2) See Art. 1, para. 3-5 and Art. 2-8 of the above Law.
the Nuremberg Tribunal. In this manner, whenever such members are brought to trial before courts in Allied territory, provisions of municipal law play the same role as those in force in occupied territory.

As to the provisions which were prescribed with the specific purpose of rendering possible the trial of members of organisations declared criminal by the Nuremberg Tribunal, whenever enacted without direct previous support or link with the common law, they were introduced as a development of the laws and customs of war as embodied in or observed under the terms of municipal law.

The following account is not exhaustive but only illustrative. Selection has been made of various types of legislation demonstrating different ways in which the trial of members of criminal organisations is covered by the legislation. (2)

(1) Canada

The Canadian War Crimes Regulations which came into force on 30th August, 1945, contain the following provision (para. 10, (3)):

"Where there is evidence that a war crime has been the result of concerted action upon the part of a formation, unit, body or group of persons, evidence given upon any charge relating to that crime against any member of such a formation, unit, body, or group may be received as prima facie evidence of the responsibility of each member of that formation, unit, body, or group for that crime; in any such case all or any members of any such formation, unit, body, or group may be charged and tried jointly in respect of any such war crime and no application by any of them to be tried separately shall be allowed by the court."

The above provision is limited to the field of war crimes, but as such it is general in nature and not specifically related to members of organisations prosecuted before the Nuremberg Tribunal. It covers any other group (formation, unit, body) of persons and establishes a prima facie case of guilt for all or any of its members. This effect does not depend on a declaration of criminality, and it is consequently not necessary that the group had repeatedly committed crimes and thus proved its criminal nature. Presumption of guilt is established as soon as evidence is to hand that "a war crime has been the result of concerted action" of the group.

This provision furnishes a sufficient legal basis for the trial of members of organisations declared criminal by the Nuremberg Tribunal on the part of Canadian military courts. It should be noted that Canada was not a signatory to the Nuremberg Charter and is accordingly not entitled

(1) The bringing to trial of members of organisations declared criminal by the Nuremberg Tribunal before national courts and not only before military, occupation or other courts in Germany, is explicitly provided for in Art. 10 of the Nuremberg Charter. As a rule such trials may take place whenever a member had served in Allied territory and the Power entitled to prosecute him wants to try him within its own jurisdiction.

(2) This legislation is reviewed in alphabetical order of countries.

(3) On 6th August, 1946, the Canadian House of Commons adopted a Bill (No. 309, Second Session, Twentieth Parliament, 10 George VI, 1946), by which it reenacted the War Crimes Regulations prescribed by the Governor in Council on 30th August, 1945. The Regulations thus acquired statutory effect. In connection with the Bill they became "the Canadian War Crimes Act (An Act respecting War Crimes)" in 1946.

to claim such trials under Art. 10 of the Charter. However, whenever a member of such organisations is detained by Canadian authorities, as prisoner of war or otherwise, and whenever such member is guilty of war crimes falling within the jurisdiction of Canadian courts, nothing prevents such trials from taking place. In such cases it should also be noted that, not being a signatory, Canada is also not bound, in strict law, by the decisions of the Nuremberg Tribunal. It is, however, safe to assume that these decisions would have great weight.

(2) **Czechoslovakia**

In a law of 24th January, 1946, the Czechoslovak Provisional National Assembly included provisions for the punishment of members of a number of Nazi or Nazi-sponsored organisations which committed crimes against the State or Czechoslovak citizens. The relevant provisions were devised in a similar manner to those in force in Austria and proclaimed automatic punishment for mere membership. These provisions read:

"Paragraph 2"

"Any person who during the period of imminent danger to the Republic (Para. 18) was a member of one of the following organisations: Die Schutzstaffeln der Nationalsozialistischen Deutschen Arbeiterpartei (S.S.), or Freiwilige Schutzstaffeln,(9) or Rodobrany, or Szabadcsapatok,(4) or of any other organisation of a similar character, shall, if he did not commit any offence incurring a severer penalty, be punished for his crime by penal servitude for a period varying from five to twenty years and in presence of especially aggravating circumstances by penal servitude for a period varying from twenty years to a life sentence."

"Paragraph 3"

"(2) Anyone who during the same period was an agent or leader in one of the following organisations: Nationalsozialistische Deutsche Arbeiterpartei (N.S.D.A.P.), Sudetendeutsche Partei (SdP), Ulajka, Hlinkova Garda, Svatoplukova Garda, or in any other Fascist organisation of the same character, shall if he has not committed an offence incurring a severer penalty, be sentenced to penal servitude for from five to twenty years."

The effect of both provisions is that, once a member of the above organisations is brought to trial, the courts are bound to impose penalties

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(2) The period of imminent danger, as distinct from the period of war, was declared to have started on 21st May, 1938, i.e. nearly a year before the invasion of Czechoslovakia by the Nazis in breach of the Munich agreement. No date was fixed for the end of this period, but it is to be taken that it goes in any case until the Nazi invasion in March, 1939, and that it links up with the date on which Czechoslovakia considers that a state of war started between her and Germany.

(3) This was a Nazi organisation composed mostly of Sudeten Germans from Czechoslovakia, who volunteered as shock troops and operated from Germany in Czech territory at the time when the Nazis were creating disturbances prior to the Munich agreement in order to acquire the Sudetenland.

(4) "Rodobran" was a Czech Fascist organisation composed of fifth columnists who co-operated with the Nazis in their scheme to incorporate Czechoslovakia into the III Reich. "Szabadcsapatok" was a similar organisation of the Hungarian minority in Czechoslovakia. Both ceased to be active after the Nazi invasion in March, 1939.

(5) The German Nazi Party.


(7) A Czech Fascist organisation.

(8) A Slovak Fascist organisation corresponding to the German S.S.

(9) The principal Czech Fascist organisation.
for mere membership and, consequently, without further evidence than that concerning membership. The difference between them is that all members of the organisations enumerated in para. 2 are to be punished without distinction of rank or category, whereas in the case of organisations enumerated in para. 3(2), penal responsibility is limited to “agents and leaders” and apparently does not extend to other members.

(3) France

By an Ordinance of 24th August, 1944, the then Provisional French Government prescribed rules for the trial of war criminals in pursuance of the laws and customs of war and of the French penal laws, civil and military. Article 2 of this Ordinance extended, by way of interpretation, certain provisions of the French Penal Code to enemy or quisling criminal groups or organisations. The relevant passages of this Article read:

"By interpretation of the provisions of the Penal Code and of the Code of Military Justice:

(2) Organisations or undertakings of systematic terrorism are regarded as representing an "association of malefactors" as provided in Article 265 and subsequent articles of the Penal Code."

This includes organisations declared criminal by the Nuremberg Tribunal. Punishments to be inflicted are those from the Penal Code. The relevant provisions of the said Code are the following:

"Art. 265. Any association formed, for whatever period of time and irrespective of the number of its members, or any understanding made with the aim of preparing or committing crimes against persons or property, constitutes a crime against public peace.

"Art. 266. Any person affiliated with an association formed or taking part in an understanding made with the aim specified in the preceding Article, shall be punished with hard labour.

"Art. 267. Any person who knowingly and willingly favours the authors of crimes provided in Art. 265 by furnishing instruments of the crimes, means of communication, accommodation, or place of meeting shall be punished with imprisonment."

France being one of the signatories to the Nuremberg Charter, is entitled to bring to trial members of organisations declared criminal

(1) This method is known in continental law as "legislative interpretation" and often serves to amend or extend the existing law.

(2) The original text reads:

"Art. 2.—Par interprétation des dispositions du code pénal et du code de justice militaire, sont considérés comme:

(2)—L'Association de malfaiteurs prévue par les articles 265 et suivants du code pénal: les organisations ou entreprises de terrorisme systématique.

(3) similar provisions exist in the Belgian Penal Code, as well as in the Czechoslovak Penal Code: The original French text reads:

"Art. 265. Toute association formée, quelle que soit sa durée, ou le nombre de ses membres, toute entente établie dans le but de préparer ou de commettre des crimes contre les personnes ou les propriétés, constituent un crime contre la paix publique.

"Art. 266. Sera puni de la peine de travaux forcés à temps, quiconque se sera affilié à une association formée ou aura participé à une entente établie dans le but spécifié à l'article précédent . . .

"Art. 267. Sera puni de la réclusion quiconque aura sciemment et volontairement favorisé les auteurs des crimes prévus à l'article 265, en leur fournissant des instruments de crime, moyens de correspondance, logement ou lieu de réunion . . ."
by the Nuremberg Tribunal, and the above provisions are those under which such trials are to be conducted. The effect of the provisions of the Penal Code is that, providing the affiliation is voluntary, the crime of membership is punishable in itself and it would appear that the punishment is automatic. However, as a signatory to the Nuremberg Charter and a participant to the Nuremberg Trial, both in the prosecution and the judgment, France is to be regarded as bound by the general ruling of the Nuremberg Tribunal and its verdict. When trying members of Nazi organisations French courts would, therefore, be expected to apply the Penal Code to the extent to which this is consistent with the Nuremberg Judgment.

(4) Great Britain

It has been seen that the prosecution in Nuremberg had referred to certain British laws with a view to demonstrating that the provisions of the Nuremberg Charter were not entirely a legal novelty.

It should be recorded that, apart and in addition to such laws, new provisions were inserted in contemporary British legislation. The British Regulations for the Trial of War Criminals, issued by Royal Warrant of 14th June, 1945, contain a provision similar to that in the Canadian war crimes laws. Regulation 8 says:

"Where there is evidence that a war crime has been the result of concerted action upon the part of a unit or group of men, then evidence given upon any charge relating to that crime against any member of such unit or group may be received as prima facie evidence of the responsibility of each member of that unit or group for that crime."

An amendment of 4th August, 1945, added the following provision:

"In any such case all or any members of any such unit or group may be charged and tried jointly in respect of any such war crime and no application by any of them to be tried separately shall be allowed by the court."

The effects are the same as those mentioned in respect of Canadian legislation, with the important difference that, insofar as organisations declared criminal by the Nuremberg Tribunal are concerned, their members are tried under the rules prescribed for the British zone in Germany. The above provisions are applicable to members of other "units or groups of men", particularly in purely military formations. On the other hand, in view of the fact that Great Britain is bound by the Nuremberg Judgment as a signatory to the Charter, they are equally not applicable to members of the Reich Cabinet, General Staff and High Command.

(5) Norway

The Norwegian legislator did not find it necessary to operate by means of new legislation in respect of criminal organisations. The view was taken that existing provisions of common penal law were sufficient to secure the trial and punishment of members of such organisations.

A general provision is contained in Art. 330 of the Norwegian Penal Code (1902), which reads:

(1) Amendment No. 1, Royal Warrant, A.O. 127-1945.
(2) The translation was provided by the Norwegian representative on the United Nations War Crimes Commission.
"He who founds or participates in an organisation which has by law been declared illegal or whose aim it is to commit or encourage punishable acts or whose members pledge themselves to unconditional obedience towards anybody, shall be fined or imprisoned for a period not exceeding 3 months. If the aim of the organisation is to encourage crimes, imprisonment for a period not exceeding 6 months may be imposed."

The Norwegian Penal Code contains, in addition, provisions dealing with "conspiracy" to commit certain specific crimes, and prescribing punishment for persons taking part in such conspiracy. They include crimes against the State, against persons and property.

So, for instance, Art. 94, para. 1 of the Penal Code reads:

"He who enters into a conspiracy with one or more persons with the intention of committing any such crime which has been described in Art. 83, 84, 86 and 90 shall be punished with imprisonment for a period up to 10 years. In no case, however, shall the penalty exceed ⅔ of the maximum punishment prescribed for the specific crime concerned."

Acts covered by Art. 83, 84, 86 and 90 concern crimes against the State and include conspiracies to commit the following crimes: subjection of the State or part of its territory to foreign domination; involving the State in war or hostilities; unlawful bearing of arms or assistance to the enemy; disclosure of State secrets to a foreign power.

Art. 159 punishes in similar terms conspiracy to commit crimes against property and public security by: arson; explosions; floods; railway accidents; pollution of drinking water; introduction of poison into objects of general use; causing introduction of dangerous contagious diseases. Special punishments are provided for conspiracy to commit larceny or robbery (Art. 259, 268, 269). The maximum penalty for some of these crimes is life imprisonment.

It thus appears that the Norwegian Penal Code makes punishable two types of the "crime of membership" in an organisation or conspiracy. One is general in the sense that it is not qualified by any specific crime. It entails only minor punishments (Art. 330). The other is specific in that it is qualified by particular crimes of a serious character, and consequently entails severer punishments. The general test for any such membership is voluntary affiliation with the group or conspiracy, as it is in the French Penal Code. Other tests intervene according to the type of organisation or conspiracy.

As it stands, the Norwegian Penal Code makes possible the punishment of any member of the organisations declared criminal by the Nuremberg Tribunal for the general crime of membership provided in Art. 330 and in addition, for that provided in the other Articles to the extent to which such members were parties to one of the specific conspiracies covered by the Penal Code. The striking feature is that, failing some such specific crime of membership, persons belonging to Nazi organisations are liable only to minor punishments, not exceeding 6 months imprisonment. No more severe penalty can be imposed on the basis of the criminality of the group in itself.

(1) The term "crimes" is used in a technical sense, meaning acts which, according to Norwegian law, are punishable with imprisonment exceeding three months.
(6) **Poland**

In a Decree issued by the Minister of Justice of 11th December, 1946, and consolidating previous Polish war crimes enactments, special provisions were included for making possible the trial and punishment of members of Nazi or Nazi-sponsored organisations whose activities were connected with Poland during the late war. These provisions introduced the "crime of membership" as a separate offence and, like the laws in Austria and Czechoslovakia, made the punishment of this offence automatic and obligatory upon the courts. Criminal organisations were defined in connection with the crimes covered by the Nuremberg Charter, and membership in any organisation, not only in those declared criminal by the Nuremberg Tribunal, was made a crime. Likewise, any member of such organisations was made liable to punishment, irrespective of classes or categories, and membership in certain organisations was declared to be a crime in itself and in every case.

The relevant provisions of the above Decree read:

"**Article 4**

(1) Any person who was a member of a criminal organisation established or recognised by the authorities of the German State or of a State allied with it, or by a political association which acted in the interest of the German State, or a State allied with it, is liable to imprisonment for a period of not less than three years, or for life, or to the death penalty.

(2) A criminal organisation in the meaning of Para. 1 is a group or organisation:

(a) which has as its aims the commission of crimes against peace, war crimes or crimes against humanity; or

(b) which while having a different aim, tries to attain it through the commission of crimes mentioned under (a).

(3) Membership of the following organisations especially is considered criminal:

(a) the German National Socialist Workers' Party (National Sozialistische Deutsche Arbeiter Partei—N.S.D.A.P.) as regards all leading positions.

(b) the Security Detachments (Schutzstaffeln—S.S.).

(c) the State Secret Police (Geheime Staats-Polizei-Gestapo).

(d) the Security Service (Sicherheits Dienst—S.D.) ".

It is thus apparent that, even though connected with the same types of crimes as those tried by the Nuremberg Tribunal and with some of the organisations which were declared criminal by it, the Polish legislator follows a legal line entirely different from that adopted in the Nuremberg Judgment. Membership in the Gestapo, S.S. and S.D. entails automatic punishment irrespective of rank. The only exception concerns members of the Nazi Party, which are indicated as comprising only those occupying "leading positions". In addition liability to punishment extends to members of any other organisation defined in Art. 4, para. 1, including those not declared criminal by the Nuremberg Tribunal.

It should be noted that Poland was not a signatory but only an adherent to the Nuremberg Charter, and that consequently, in strict law, she is not bound by the Nuremberg Judgment. Her legislation furnishes an illustration of cases where the said Judgment did not exercise its influence in this field.
It has already been seen that penal retribution for membership in certain groups or organisations formed part of the United States municipal law before the Nuremberg Trial. The United States Chief Prosecutor in Nuremberg quoted a law of 28th June, 1940, making membership in such bodies a crime, and he referred, in addition, to the concept of "conspiracy", which occupies an important place in the Anglo-American legal system.(1) It has also been seen that special rules were prescribed for the United States zone in Germany concerning the trial of members of organisations declared criminal by the Nuremberg Tribunal.

In addition to all these laws or rules it should be noted that provisions similar to those of the British and Canadian war crimes regulations were incorporated in certain local American military regulations. They were for instance embodied in the "Regulations governing the Trial of War Criminals" by United States military commissions in the "China Theater" of operations.(2) Whereas rules for the zone in Germany were enacted only pursuant to the Allied Control Council Law No. 10 and to the Nuremberg Charter and Judgment, and were limited to the trial of members of organisations declared criminal by the Nuremberg Tribunal, the Chinese regulations form part of American military law in general. It is true that they are not embodied in the American Rules of Land Warfare, which comprise the laws and customs of war as understood and observed by the United States. But it is also true that they are the first of their kind in American war crimes legislation and can be regarded as a nucleus which may in time be developed in the main body of American military law.

Like other United States rules, the Chinese regulations reflect the concern of the American lawmakers to operate by means of rebuttable presumption of guilt. Art. 16, d. and e. provide:

d. If the accused is charged with an offence involving concerted criminal action upon the part of a military or naval unit, or any group or organisation, evidence which has been given previously at a trial of any other member of that unit, group or organisation, relative to that concerted offence, may be received as prima facie evidence that the accused likewise is guilty of that offence.

e. The findings and judgment of a commission in any trial of a unit, group or organisation with respect to the criminal character, purpose or activities thereof shall be given full faith and credit in any subsequent trial by that or any other commission of an individual person charged with criminal responsibility through membership in that unit, group or organisation. Upon proof of membership in such unit, group or organisation convicted by a commission, the burden of proof shall shift to the accused to establish any mitigating circumstances relating to his membership or participation therein.

The first rule is that whenever a "concerted criminal action"—which is only one way of describing the same concept of collective criminality as that covered by the Nuremberg Charter—is established by one court in respect of a unit, group or organisation, courts trying other members of such bodies may regard the accused as prima facie guilty of the same concerted offence as that for which the first accused were tried. This is more or less the equivalent of the effect of a declaration of criminality

(1) Proceedings, Part. 8, p. 44-45.
(2) These Regulations were issued by the H.Q., United States Forces, China Theater, on 21st January, 1946, as document A.G. 0005. JA.
under the Nuremberg Charter for bringing members to trial before other courts. The second rule is still more similar to the Charter in that it gives force to the judgment of one court before the other courts, in respect of the criminal nature of the body concerned. Where the "criminal nature, purpose or act" of a unit, group or organisation is established on the occasion of the trial of one member, it is to be "given full faith and credit in any subsequent trial" of other members. This is the equivalent of the binding effect of a declaration of criminality prescribed by the Nuremberg Charter. The third rule is the one with which we are already familiar when dealing with the American attitude. Members of a body whose "character, purpose or acts" are found to be criminal by one court, are presumed guilty until they can establish "any mitigating circumstances relating to their membership or participation" in such body. The regulations do not mention the tests of voluntary membership or of knowledge of the criminal nature of the body, but in the light of what has previously been seen in relation to American prosecution and laws, they are to be regarded as also relevant under the Chinese regulations.

D. TRIALS OF MEMBERS OF CRIMINAL GROUPS AND ORGANISATIONS

Before closing this study of the law regarding criminal groups or organisations, it is worth noting a number of illustrative trials which took place under the appropriate laws as a consequence of the Judgment delivered by the International Military Tribunal at Nuremberg. A great many trials of this kind have been held or are still in progress in Germany, and others took place before national courts of certain Allied countries. It would not serve a useful purpose, nor would it be possible at this stage, to attempt to make a complete survey of such trials.

Among the most important war crime trials in general, stand those which were and are still being held by United States Military Tribunals at Nuremberg. They are commonly known as "subsequent Nuremberg trials" or "subsequent Nuremberg proceedings". They deal exclusively with outstanding cases, either on account of the calibre of the accused who are next to the Major War Criminals tried by the International Military Tribunal, or on account of the types of crimes tried, or both. Their total number does not exceed 12 cases. At the time of writing about half have been completed, and the rest are still in progress. In most of these trials the accused were charged separately with the crime of membership in organisations declared criminal by the International Military Tribunal, in addition to other offences falling within the notion of crimes against peace, war crimes or crimes against humanity. The judgments pronounced included both convictions and acquittals on the charge of membership, and contain opinions of the subsequent tribunals which throw light on how the general ruling and verdicts of the International Military Tribunal were carried out.

All these trials were and are being held under the terms of the Allied Control Council Law No. 10. It is now proposed to review them very briefly, within the space allowed in this document.
JUDGMENTS OF THE SUBSEQUENT MILITARY TRIBUNALS AT NUREMBERG

(1) Trial of Karl Brandt et al. (Medical case)

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

All experiments were conducted in concentration camps (Dachau, Sachsenhausen, Natzweiler, Ravensbruck, Buchenwald, etc.), and caused inhumane suffering, torture or death of many inmates. They consisted in high altitude experiments to investigate the limits of human endurance and existence at extremely high altitudes (up to 68,000 feet); freezing experiments to investigate means of treating persons severely chilled or frozen; malaria experiments to investigate immunisation and treatment of malaria; lost (mustard) gas experiments to investigate treatment caused by that gas; sulfanilamide experiments to investigate the effectiveness of the drug; bone, muscle and nerve regeneration and bone transplantation experiments; seawater experiments to study methods of making seawater drinkable; epidemic jaundice experiments to establish the cause of and discover inoculations against that disease; sterilization experiments to develop a method best suited for sterilising millions of people; spotted fever experiments to investigate the effectiveness of vaccines; experiments with poison to investigate the effect of various poisons. In addition to this, several defendants were charged with activities involving murder, torture and ill-treatment not connected with medical experiments. In all cases inmates of concentration camps were used as "guinea-pigs", and were as a rule healthy subjects.

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

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

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

In one of the most outstanding subsequent trials at Nuremberg, 16 German high officials of the Reich Ministry of Justice, judges and prosecutors of Nazi courts were prosecuted for the commission of criminal offences by means of legislative or judicial acts. It should be emphasised that it is the first time in recorded history that individuals were tried for such criminal offences. The presumed integrity and high standards of members of the legislative and judicial machinery had not been scrutinised and tested under legal principles of penal law and justice in face of Nazi practices through the legislative and judicial machinery.

The trial opened on 17th February, 1947, and was commonly designated as the "Justice Case". The judgment was delivered on 3rd and 4th December, 1947.

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

Seven defendants, including Altstoetter, were accused of having committed such crimes as members of organisations declared criminal by the International Military Tribunal. The organisations involved were the S.S., S.D. and Leadership Corps of the Nazi Party. Some of the defendants were members of two organisations simultaneously. They were accordingly charged separately with the crime of membership in such organisations. As in the previous case the Tribunal applied the tests of criminality defined by the International Military Tribunal and found the accused individuals guilty of membership on different grounds. Altstoetter was found guilty as a member of the S.S. falling within the groups declared

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\text{(1) Op. cit., p. 11396; 11430-11431; 11439; 11455-11456; 11487-11509, 11520-11521; 11530-11531.}
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\text{(2) Op. cit., 11472.}
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\text{(3) Case No. 3, tried by United States Military Tribunal No. 3.}
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\text{(4) Official Transcripts of the American Military Tribunal III in the matter of the United States of America against Josef Altstoetter et al., defendants, p. 10654.}
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\text{(5) Indictment of the above trial, p. 18.}
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\text{(6) Official Transcripts, Announcement, p. 10713.}
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criminal by the International Military Tribunal, on the grounds that he had knowledge of the criminal purposes and acts of the S.S. and remained voluntarily in the organisation. The test of knowledge was likewise positively established against two other defendants. In one case the Tribunal was satisfied by the evidence that the accused actually knew of the execution of political prisoners and that he personally took part in the misdeeds. It also arrived at such conclusion on the basis of circumstantial evidence deriving from the accused’s official position and duties. “No man who had his intimate contacts with the Reich Security Main Office, the S.S., the S.D., and the Gestapo could possibly have been in ignorance of the general character of those organisations”. In the second case the evidence regarding the mens rea of the accused was entirely of a circumstantial nature. The crimes, said the Tribunal, “were of such wide scope and so intimately connected with the activities of the Gauleitung (the accused’s organisation) that it would be impossible for a man of the defendant’s intelligence not to have known of the commission of these crimes, at least in part if not entirely”. It is interesting to note that the chief defendant, Altstoetter, was found guilty only on the count of membership and freed from other charges. He was sentenced to 5 years imprisonment.

Two defendants were acquitted. In one case the defendant was charged as a member of the Leadership Corps of the Nazi Party, and the Tribunal established that his group did not in fact belong to the Leadership Corps, nor to any other organisation declared criminal. In the second case the accused was charged as a member of the Leadership Corps Staff and a “sponsoring” member of the S.S. The Tribunal found him not guilty, and none of these cases did the accused belong to the classes of members included in the declarations made by the International Military Tribunal.

(3) Trial of Oswald Pohl et al

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

The S.S. Economic and Administrative Main Office was in charge of running concentration camps and a large number of industrial, manufacturing and service enterprises in Germany and occupied countries. It was responsible for all financial matters of the S.S., for the supply of food,

(6) Case 4, tried by United States Military Tribunal No. 2.
clothing, housing, sanitation and medical care of inmates and S.S. personnel of concentration camps; for the construction and maintenance of houses, buildings and structures of the S.S., the German police and of the concentration and prisoners of war camps; and for the order, discipline and regulation of the lives of the concentration camps inmates. In addition, it was charged with the supply of slave labour of the concentration camp inmates to public and private employers throughout Germany and the occupied countries, as well as to enterprises under its own management.

On account of such relationship with concentration camps and slave labour, all the accused were charged with taking part in the commission of "atrocities and offences against persons and property, including plunder of public and private property, murder, extermination, enslavement, deportation, unlawful imprisonment, torture, persecutions on political, racial and religious grounds, ill-treatment of, and other inhumane and unlawful acts against thousands of persons, including German civilians, nationals of other countries, and prisoners of war."(1) The accused were thus tried as leading instruments of the criminal policy conducted by the heads of the Nazi Party and State against the millions who were ill-treated or perished in concentration camps or as slave labour.

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

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

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

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

(1) Official Transcript of the American Military Tribunal in the matter of the United States of America, against Oswald Pohl et al., p. 8057.
evidence in respect of the personal guilt of the members. In view of the fact that no rules to this effect were issued with particular regard to the United States Military Tribunal at Nuremberg, and that the International Military Tribunal had left the field clear, the above ruling was within the powers of the United States Tribunal and the legal basis of its jurisprudence cannot be challenged.

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

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

"After weiging all the evidence in the case, and bearing in mind the presumption of innocence of the defendant, and the burden of proof on the part of the prosecution, the Tribunal must agree with the contentions of the defendant." 

The Tribunal then dismissed all the tests of individual guilt in the following terms:

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

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

In the second case the accused, Leo Volk, was head of a legal department of the W.V.H.A. Like in the preceding case the prosecution contended that he had knowledge of the criminal purposes and acts of the W.V.H.A. on account of his office and duties. The accused's defence was that he

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had no such knowledge, but merely prepared notarial documents, carried on
law suits and generally gave legal advice. The Tribunal was satisfied
that the accused was a “vital figure” in his department and refuted the
defence thesis that, in order to convict him, proof should be submitted that,
if he knew of the criminal purposes or acts of his organisation, he must
have had the power to prevent crimes from being committed. The
Tribunal declared:

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

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

The Tribunal found that no such evidence had been submitted, and that
the accused did not voluntarily join the organisation but was drafted
from a private firm he personally did not want to leave for the W.V.H.A.
It also established that, in the W.V.H.A., he had a special status in that he
was employed under special contract. In view of these facts the Tribunal
decided that the accused’s guilt for membership had not been established
“beyond reasonable doubt” and while convicting him on other counts,
it acquitted him from this particular charge. (2)

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

“Perhaps in the case of a person who had power or authority to either
start or stop a criminal act, knowledge of the fact coupled with silence could
be interpreted as consent. But Vogt was not such a person. His office in
W.V.H.A. carried no such authority, even by the most strained implication.
He did not furnish men, money, materials or victims for the concentration
camps. He had no part in determining what the inmates should eat or wear,
or how hard they did work or how they were treated. The most that can
be said is that he knew that there were concentration camps and that there
were inmates. His work cannot be considered any more criminal than that
of the bookkeeper who made up the reports which he audited, the typist
who transcribed the audit report or the mail clerk who forwarded the audit
to the Supreme Auditing Court.” (3)

As a consequence the accused was acquitted on all counts. (4) In the
second case the accused was acquitted for not belonging to any of the
classes or categories of S.S. members included in the declaration of the
International Military Tribunal. (5)

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

Defendant August Frank was Chief Supply Officer of the Waffen-S.S. and Death Head Units under the defendant Pohl, and became Pohl’s Chief Deputy of the W.V.H.A. In view of his position and the field of his competence and duties the Tribunal came to the following conclusions:

"... anyone who worked, as Frank did, for eight years in the higher councils of that agency cannot successfully claim that he was separated from its political activities and purposes."(1)

From that the Tribunal further concluded that he “could not have been ignorant” or that he “must have known” of the purposes as well as of a series of criminal acts described by the Tribunal.(2) He was found guilty of “participating and taking a consenting part” in the “slave labour programme... and in the looting of property of Jewish civilians for the eastern occupied territories”. In this connection he was also convicted for the crime of membership.(3)

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

"The Tribunal concludes that the defendant Tschentscher was not a mere employee of the W.V.H.A., but held a responsible and authoritative position in this organisation. He was chief of Amt-B-I, and in this position had large tasks in the procurement and allocation of food. Conceding that he was not directly responsible for furnishing food to the inmates of concentration camps, he was responsible for furnishing the food to those charged with guarding these unfortunate people.

"The Tribunal is fully convinced that he knew of the desperate condition of the inmates, under what conditions they were forced to work, the insufficiency of their food and clothing, the malnutrition and exhaustion that ensued, and that thousands of deaths resulted from such treatment. His many visits to the various concentration camps gave him a full insight into these matters.

"The Tribunal finds without hesitation that Tschentscher was thoroughly familiar with the slave labor program in the concentration camps, and took an important part in promoting and administering it."(4)

For these reasons the accused was found guilty both of actual participation in war crimes and crimes against humanity and of the crime of membership.(5)

In all other cases the Tribunal had either clear evidence of the actual participation of the accused in specific criminal acts, such as in the case

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of Pohl himself, or else sufficient evidence to draw conclusions as to their
 guilty knowledge, and on this basis pronounced sentences of guilt for the
crime of membership.\(^{(1)}\)

(4) Trial of Friedrich Flick et al.

The last completed subsequent trial at Nuremberg which included the
crime of membership, was that of Friedrich Flick and five other defendants.
It opened on 20th April and closed on 22nd December, 1947.\(^{(2)}\) It was one
of several trials commonly designated as “industrial cases”, for the
defendants were not officials of the Nazi State, but private citizens engaged
as business men in German heavy industry. Flick owned a steel
 corporation controlling or affiliated with iron and coal mining companies.
The other defendants were his assistants and associates. They were
charged, \textit{inter alia}, with taking part in, and being members of, groups or
organisations connected: \textit{Count I}: with “enslavement and deportation to
slave labour” of concentration camp inmates and other civilians, as well
as with the “use of prisoners of war” in work prohibited by international
law (armament production, etc.), \textit{Count II}: with “plunder of public and
private property, spoliation, and other offences against property” in
occupied territories; \textit{Count III}: with “persecutions on racial, religious and
political grounds”; \textit{Count IV}: with “murders, brutalities, cruelties,
tortures, atrocities and other inhumane acts committed principally by the
S.S.”

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

As in the “Pohl Case”, the United States Military Tribunal which tried
Flick, Steinbrinck and others rejected the thesis of presumption of guilt and
took the view that the burden of proof concerning the tests of crim-

\(^{(2)}\) Case 5, tried by United States Military Tribunal No. 4.
ality for membership lay on the prosecution. So, in the case of Steinbrinck it declared the following:

"Relying upon the International Military Tribunal’s findings . . . the prosecution took the position that it devolved upon Steinbrinck to show that he remained a member without knowledge of such criminal activities. As we have stated in the beginning the burden was all the time upon the prosecution."(1)

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

In assessing the tests relevant for determining Steinbrinck’s individual guilt, the Tribunal declared that there was no evidence showing that he was personally implicated in the commission of crimes perpetrated by the S.S. and that no contention had been made to the effect that he was drafted on a compulsory basis. It therefore determined that his personal guilt was to be established solely on the basis of the test of knowledge of the criminal nature of the S.S.

As mentioned above, the Tribunal’s findings on this test were made on the basis of the accused’s activities as member of the “Keppler Circle”. This circle was composed of about 30-40 bankers, industrialists and S.S. leaders, including the S.S. Reichsführer Himmler himself. Steinbrinck was a member from the beginning, which dated as far back as 1932. The circle was originally formed by Hitler’s economic adviser Keppler, who gave it his name, with a view to inducing industrialists and other top businessmen to support the Nazi programme and regime. The circle had regular informal meetings and its members made regular donations upon Himmler’s request, amounting to a total of 1 million Reichsmarks annually. Himmler’s explanation for such requests was that he needed funds for “his cultural hobbies and for emergencies for which he had no appropriations”. Steinbrinck contributed very large sums of money every year. The Tribunal was satisfied that the meetings of the group did not have “the sinister purposes ascribed to them by the prosecution”, and found “nothing criminal or immoral in the defendant’s attendance at these meetings”. It was also satisfied that, in the beginning and particularly before the war, “the criminal character of the S.S. was not generally known”. It came, however, to the conclusion that “later” it “must have been known”; “that during the war and particularly after the beginning of the Russian campaign” there was not “much cultural activity in Germany”; and that consequently members of the group could not “reasonably believe” Himmler was spending their money for other purposes than to maintain the S.S. The Tribunal found “no doubt” that “some of this money” went to the S.S., and declared “immaterial whether it was spent on salaries or for lethal gas”. From this it concluded that Steinbrinck was guilty of the crime of membership.(2) The Tribunal’s findings in this respect were, thus, entirely based on circum-

(1) Official Transcript of the American Military Tribunal IV in the Matter of the U.S.A. against Friedrich Fick, et al., pp. 11015-11016. The reference made to the statement delivered “in the beginning” of the judgment, concerns a general statement, made without particular regard to the crime of membership, whereby the Tribunal stressed, among the rules of fair trial, that of the presumption of innocence until proof to the contrary is established by the prosecution. See op. cit., p. 10975.

(2) For details on Tribunal’s findings see op. cit., pp. 11014-11022.
stantial evidence and were, from a practical point of view, founded on premises equivalent to that of a presumption of guilt.

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

(ii) TRIALS IN PROGRESS AT THE SUBSEQUENT PROCEEDINGS IN NUREMBERG

As has been pointed out, several more trials are, at the time of writing, still in progress before the United States Military Tribunals at Nuremberg. One concerning members of a group involved in crimes committed against children and adults on racial grounds, has just ended but the text of the judgment has not been made available for inclusion in this account.

In four of these trials defendants were charged with membership of organisations declared criminal by the International Military Tribunal. One is the "racial" case just mentioned, otherwise designated as "Case 8", involving Ulrich Greifelt and 13 other accused. All defendants but one were members of the S.S. and were prosecuted for the crime of membership in addition to other charges. Another is the trial of Otto Ohlendorf and 23 other defendants, otherwise known as the "Einsatzgruppen Case", or "Case 9". All defendants were members of the S.S. falling within the categories defined by the International Military Tribunal. As such they filled the ranks of special units called "Einsatzgruppen", whose chief tasks were to carry out exterminations in occupied territories, and were all charged with the crime of membership. Yet another trial is that of the board of directors and other leading officials of the world-wide German chemical concern "I.G. Farbenindustrie", commonly designated as the "I.G. Farben Case" or "Case 6". It comprises 24 defendants, three of whom were charged with membership in the S.S. The last trial is that of 21 leading officials of the German Foreign Office (Case 11), with Baron von Weizsäcker at the head of the list. 14 defendants were charged with membership in the S.S., four of whom were in addition prosecuted as members of the Leadership Corps of the Nazi Party and one as member of the S.D.

The judgments already delivered indicate that important verdicts can be expected in the above trials as well.

(iii) CONCLUSIONS

It would be premature to draw definite and detailed conclusions from the above trials at this stage. One issue is, however, clear and should be emphasised. The findings of the courts, as well as the various laws and regulations issued for the trial of members of criminal organisations, make it abundantly clear that the rules of evidence permit two different and as a matter of fact opposite ways of determining members' individual or personal guilt. As has often been pointed out, the International Military Tribunal refrained from solving the question of whether this should be done on the basis of presumption of guilt or of presumption
of innocence, and accordingly whether the onus of proof should lie on the prosecution or on the defence. Local American rules, such as those issued for Germany and China, answer the question in favour of presumption of guilt, whereas proceedings of the United States Military Tribunals at Nuremberg answer it in favour of the traditional rule of presumption of innocence.

This question has not failed to attract attention even before the subsequent proceedings started. A few weeks after the Judgment of the International Military Tribunal was delivered, the French Government, realising that the Judgment did not secure uniformity of jurisprudence in this respect, made attempts at achieving such an end by diplomatic action. It proposed to several United Nations, including the United States of America, Great Britain and the U.S.S.R., the convening of a conference with a view to arriving at an agreement regarding a uniform procedure to be devised upon the Nuremberg Judgment's general ruling and recommendations, particularly concerning the rules of evidence. It approached the War Crimes Commission on the same subject and submitted memoranda defining the issues which ought to be solved.(1) Special French representatives held meetings with the Commission and discussed the problem with its members.(2) These attempts did not bear fruit. The conference was not convened, and the Commission did not feel that it could do much in the matter in view of its limited terms of reference. As a consequence the French proposals were withdrawn.

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(1) A.30, 10th December, 1946, Questions which the French representatives wish to discuss with the United Nations War Crimes Commission in London. Also A.31, 13th December, 1946; and C.242, 22nd January, 1947, French proposals regarding the prosecution of members of Criminal Organizations and of concentration camp personnel.

(2) Meetings of 11th December, 1946, (M.119) and 29th January, 1947, (M.122).