

THE LAW UNDER WHICH NAZI ORGANIZATIONS ARE
ACCUSED OF BEING CRIMINAL

By

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May it please the Tribunal:

The unconditional surrender of Germany created, for the victors, novel and difficult problems of law and administration. Since it is the first such surrender of an entire and modernly organized society; precedents and past experiences are of little help in guiding our policy toward the vanquished. The responsibility implicit in demanding and accepting capitulation of a whole people must of necessity include a duty to discriminate justly and intelligently between opposing elements of the population which bore dissimilar relations to the policies and conduct which led to the catastrophe. This differentiation is the objective of those provisions of the Charter which authorize this Tribunal to declare organizations or groups to be criminal. Understanding of the problem which the instrument attempts to solve is essential to its interpretation and application.

I. THE PROBLEM OF THE NAZI ORGANIZATIONS

One of the sinister peculiarities of German society at the time of the surrender was that the State itself played only a subordinate role in the exercise of political power, while the really drastic controls over German society were organized outside its nominal government. This was accomplished through an elaborate network of closely knit and exclusive organizations of selected volunteers, oath-bound to execute without delay and without question the commands of the Nazi leaders.

These organizations penetrated the whole German life. The country was subdivided into little Nazi principalities of about fifty households each, and every such community had its recognized party leaders, its party police, and its undercover party spies. These were combined into larger units with higher ranking leaders, executioners, and spies. The whole formed a pyramid of power outside of the law, with the Fuehrer at its apex, and with the local party officials as its broad base resting heavily on the German population. The Nazi despotism, therefore, did not consist of these individual defendants alone. A thousand little fuehrers dictated, a thousand imitation Goerings strutted, a thousand Schirachs incited the youth, a thousand Sauckels worked slaves, a thousand Streichers and Rosenbergs stirred hate, a thousand Kaltenbrunnners and Franks tortured and killed, a thousand Schachts and Speers and Funks administered, financed, and supported the movement. The Nazi movement was an integrated force in city and county and hamlet. The party power resulting from this system of organizations first rivaled, and then dominated, the power of the State itself.

The primary vice of this web of organizations was that they were used to transfer the power of coercing men from the government and the law to the Nazi leaders. Liberty, self-government, and security of person and property do not exist except where the power of coercion is possessed only by the State and is exercised only in obedience to law. The Nazis, however, set up a private system of coercion, outside of and immune from law, with party-controlled concentration camps and firing squads to administer privately decreed sanctions. Without responsibility to law and without warrant from any court, they were enabled to seize property, take away liberty, and even take life itself.

These organizations had a calculated and decisive part in the barbaric extremes of the Nazi movement. They served cleverly to exploit mob psychology and to manipulate the mob. Multiplying the numbers of persons in a common enterprise tends to diminish each individual's sense of moral responsibility and to increase his sense of security. The Nazi leaders were masters of this technique. They manipulated these organizations to make before the German populace impressive exhibitions of numbers and of power. These were used to incite a mob spirit and then riotously to gratify the popular hates they had inflamed and the Germanic ambition they had inflated.

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These organizations indoctrinated and practiced violence and terrorism. They provided the systematized, aggressive, and disciplined execution throughout Germany and the occupied countries of the whole catalogue of crimes we have proven. The flowering of the system is represented in the fanatical S. S. General Ohlendorf, who told this Tribunal without shame or trace of pity how he personally directed the putting to death of 90,000 men, women, and children. No tribunal ever listened to a recital of such wholesale murder as this Tribunal heard from him and from Wisliceny, a fellow officer of the S. S. Their own testimony shows the responsibility of the S. S. for the extermination program which took the lives of five million Jews, a responsibility the organization welcomed and discharged methodically, remorselessly, and thoroughly. These crimes are unprecedented ones because of the shocking numbers of victims. They are even more shocking and unprecedented because of the large number of persons who united to perpetrate them. All scruple or conscience of a very large segment of the German people was committed to Nazi keeping, and its devotees felt no personal sense of guilt as they went from one extreme measure to another. On the other hand, they developed a contest in cruelty and a competition in crime. Ohlendorf from the witness stand accused other S. S. commanders, whose killings exceeded his, of "exaggerating" their figures.

There could be no justice and no wisdom in an occupation policy which imposed upon passive and unorganized and inarticulate Germans the same burdens as it placed upon those who voluntarily banded themselves together in these powerful and notorious gangs. One of the basic requirements, both of justice and of successful administration of the occupation responsibility of the victors, is a segregation of these organized elements from the masses of Germans for separate treatment.

It seems beyond controversy that to punish a few top leaders but to leave this web of organized bodies unscotched in the midst of German postwar society, would be to foster the nucleus of a new Nazidom. The members are accustomed to an established chain of centralized command; they have formed a habit and developed a technique of both secret and open cooperation. They still nourish a blind devotion to the suspended, but not abandoned, Nazi program. They will keep alive the hates and ambitions which generated the orgy of crime we have proved. They are carriers, from this generation to the next, of the infection of aggressive and ruthless war. The Tribunal has seen on the screen how easily an assemblage that ostensibly is only a common labor force can be in fact a military training unit drilling with shovels. The next war and the next pogroms will be hatched in the nests of these organizations as surely as we leave their membership with its prestige and influence undiminished by condemnation and punishment.

The menace of these organizations is the more impressive when we consider the demoralized state of German society. It will be years before there can be established in the German State any political authority that is not inexperienced and provisional. It cannot quickly acquire the stability of a government aided by long habits of obedience and traditional respect. The intrigue, obstruction, and possible overthrow, which older and established governments fear from conspiratorial groups, is a real and present danger to any stable social order in the Germany of today and of tomorrow.

Insofar as the Charter of this Tribunal contemplates a justice of retribution, it is obvious that it could not overlook these organized instruments and instigators of past crimes. In opening this case, I said that the United States does not seek to convict the whole German people of crime. But it is equally important that this trial shall not serve to absolve the whole German people except the 22 men in the dock. The wrongs that have been done to the world by these defendants and their top confederates was not done by their will or by their strength alone. The success of their designs was made possible because great numbers of Germans organized themselves to become the fulcrum and the lever by which the power of these leaders was extended and magnified. If this trial fails to condemn these organized confederates for their share of responsibility for this catastrophe, it will be construed as their exoneration.

But the Charter was not concerned with retributive justice alone. It manifests a constructive policy influenced by exemplary and preventive considerations. The primary objective of requiring that the surrender be unconditional was to clear the way for reconstruction of German society on such a basis that it will not again threaten the peace of Europe and of the world. Temporary measures of the occupation authorities may, by necessity, have been more arbitrary and applied with less

discrimination than befits a permanent policy. Under existing denazification policy, no member of the Nazi party or its formations may be employed in any position, other than ordinary labor, or in any business enterprise unless he is found to have been only a nominal Nazi. Persons in certain categories, whose standing in the community is one of prominence or influence, are required to meet this standard, and those who do not may be denied further participation in their businesses or professions. It is mandatory to remove or exclude from public office, and from positions of importance in quasi-public and private enterprises, persons falling within approximately 90 specified categories deemed to consist of either active Nazis, Nazi supporters, or militarists. The property of such persons is blocked.

It is recognized by the Control Council, as it was by the framers of the Charter, that a permanent, long-term program should be based on a more careful and more individual discrimination than was possible with sweeping temporary measures. There is a movement now within the Control Council for reconsideration of its whole denazification policy and procedure. The action of this Tribunal in declaring, or in failing to declare, the accused organizations criminal has a vital bearing on future occupation policy.

It was the intent of the Charter to utilize the hearing processes of this Tribunal to identify and condemn those Nazi and militaristic forces that were so organized as to constitute a continuing menace to the long-term objectives for which our respective countries have spent the lives of their young men. It is in the light of this great purpose that we must examine the provisions of the Charter.

II. THE PROCEDURE FOR CONDEMNING ORGANIZATIONS

It was obvious that the conventional litigation procedures could not, without some modification, be adapted to this task. No system of jurisprudence has yet evolved any satisfactory technique for handling a great multiplicity of common charges against a multitude of accused persons. The number of individual defendants that fairly can be tried in a single proceeding probably does not greatly exceed the number now in your dock. Moreover, the number of separate trials in which the same voluminous evidence as to common plan must be repeated is very limited as a practical matter. Yet adversary hearing procedures are the best assurance the law has evolved that decisions will be well considered and just. The task of the framers of the Charter was to find a way to overcome these obstacles to practicable and early decision without sacrificing the fairness implicit in hearings. The solution prescribed by the Charter is certainly not faultless, but not one of its critics has ever proposed an alternative that would not either deprive the individual of any hearing or contemplate such a multitude of long trials as to be impracticable. In any case, it is the plan adopted by our respective governments, and our duty here is to make it work.

The plan which was adopted in the Charter essentially is a severance of the general issues which would be common to all individual trials from the particular issues which would differ in each trial. The plan is comparable to that employed in certain wartime legislation of the United States (Yakus v. United States, 321 U.S. 414, 64 Sup. Ct. 660). The general issues are to be determined with finality in one trial before the International Tribunal. In this trial, every accused organization must be defended by counsel and must be represented by at least one leading member, and other individual members may apply to be heard. Their applications may be granted if the Tribunal thinks justice requires it. The only issue in this trial concerns the collective criminality of the organization or group. It is to be adjudicated by what amounts to a declaratory judgment. It does not decree any punishment, either against the organization or against the individual members.

The only specification as to the effect of this Tribunal's declaration that an organization is criminal is contained in Article 10 of the Charter, which provides:

"In cases where a group or organization 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 organization is considered proved and shall not be questioned."

Unquestionably, it would be competent for the Charter to have declared flatly that membership in any of these named organizations is criminal and should be punished accordingly. If there had been such an enactment, it would not have been open to an individual who was being tried for membership in the organization to contend that the organization was not in fact criminal. The framers of the Charter, at a time before the evidence adduced here was available, did not care to find organizations criminal by fiat. They left that issue to determination after relevant facts were developed by adversary proceedings. Plainly, the individual member is better off because of the procedure of the Charter, which leaves that finding of criminality to this body after hearings at which the organization must and the individual may be represented.

The groups and organizations named in the Indictment are not "on trial" in the conventional sense of that term. They are more nearly under investigation as they might be before a Grand Jury in Anglo-American practice. Article 9 recognizes a distinction between the declaration of a group or organization as criminal and "the trial" of any individual member thereof." The power of the Tribunal to try is confined to "persons," and the Charter does not expand that term by definition, as statutes sometimes do, to include other than natural persons. The groups or organizations named in the Indictment were not as entities served with process. The Tribunal is not empowered to impose any sentence upon them as entities, nor to convict any person because of membership.

It is to be observed that the Charter does not require subsequent proceedings against anyone. It provides only that the competent national authorities "shall have the right" to bring individuals to trial for membership therein."

The Charter is silent as to the form these trials should take. It was not deemed wise, on the information available when the Charter was drawn up, that the Charter should regulate subsequent proceedings. Nor was it necessary to do so. There is a continuing legislative authority, representing all four signatory nations, competent to take over where the Charter leaves off. Legislative supplementation of the Charter is necessary to confer jurisdiction on local courts, to define procedures, and to prescribe different penalties for different forms of activity.

Fear has been expressed, however, that the Charter's silence as to future proceedings means that great numbers of members will be rounded up and automatically punished as a result of a declaration of an organization to be criminal. It also has been suggested that this is, or may be, the consequence of Article II, 1(d) of Control Council Act No. 10, which defines as a crime "membership in categories of a criminal group or organization declared criminal by the International Military Tribunal." A purpose to inflict punishments without a right of hearing cannot be spelled out of the Charter, and would be offensive to both its letter and its spirit. And I do not find in Control Council Act No. 10 any inconsistency with the Charter. Of course, to reach all individual members will require numerous hearings. But they will involve only narrow issues; many accused will have no answers to charges if they are clearly stated, and the proceedings should be expeditious and non-technical.

But I think it is clear that before any person is punishable for membership in a criminal organization, he is entitled to a hearing on the facts of his case. The Charter does not authorize the national authorities to punish membership without a hearing. It gives them only the right to "bring individuals to trial." That means what it says. A trial means there is something to try.

As to trials of the individual members, the Charter denies only one of the possible defenses of an accused: he may not relitigate the question whether the organization itself was a criminal one. Nothing precludes him from denying that his participation was voluntary and proving he acted under duress; he may prove that he was deceived or tricked into membership; he may show that he had withdrawn; he may prove that his name on the rolls is a case of mistaken identity; or he may show that he personally openly opposed the criminal acts.

The membership which the Charter and the Control Council Act make criminal, of course, implies a genuine membership involving the volition of the member. The act of affiliation with the organization must have been knowing, intentional, and voluntary. Legal compulsion or illegal duress, actual fraud or trick of which one is a

victim has never been thought to be the victim's crime, and such an unjust result is not to be implied now. The extent of the member's knowledge of the criminal character of the organization is, however, another matter. He may not have known on the day he joined but may have remained a member after learning the fact. And he is chargeable not only with what he knew but with all of which he reasonably was put on notice.

There are safeguards to assure that this program will be carried out in good faith. Prosecution under the declaration is discretionary, and if there were purpose to punish without trial, it would have been already done without waiting for the declaration. We think the Tribunal will presume that signatory powers which have voluntarily submitted to this process will carry it out faithfully.

The Control Council Act applies only to "categories of membership declared criminal." This language recognizes a power in this Tribunal to limit the effect of its declaration. I do not think, for reasons I will later state, that this should be construed or availed of so as to try here any issues as to sub-groups or sections or individuals, which can be tried later. It should, I think, be construed to mean, not those limitations which must be defined by detailed evidence, but limitations of principle such as those I have outlined as already implied. It does not require this Tribunal to delve into evidence to condition its judgment, if it sees fit, to apply only to intentional, voluntary and knowing membership. It does not supplant later trials but guides them.

It cannot be said that a plan, such as we have here, for the severance of general issues common to many cases from particular issues applicable only to individual defendants and for the litigation of each type of issue in separate Tribunals specially adapted to their different tasks, is lacking in reasonableness or fair play. And while it presents unusual procedural difficulties, I do not think it presents any insurmountable ones.

III. CRITERIA, PRINCIPLES, AND PRECEDENTS FOR DECLARING COLLECTIVE CRIMINALITY

The substantive law which governs the inquiry into the criminality of organizations is, in its large outline, old and well settled and fairly uniform in all systems of law. It is true that we are dealing with a procedure easy to abuse, and one often feared as an interference with liberty of assembly or as an imposition of "guilt by association." It also is true that proceedings against organizations are closely akin to the conspiracy charge, which is the great dragnet of the law, rightly watched by courts lest it be abused.

The fact is, however, that every form of government has considered it necessary to treat some organizations as criminal. Not even the most tolerant of governments can permit the accumulation of power in private organizations to a point where it rivals, obstructs, or dominates the government itself. To do so would be to grant designing men a liberty to destroy liberty. It was the very complacency and tolerance as well as the impotence of the Weimar Republic towards the growing organization of Nazi power, which spelled the death of German freedom.

Protection of the citizen's liberty has required even free governments to enact laws making criminal those aggregations of power which threaten to impose their will on unwilling citizens. Every one of the nations signatory to this Charter has laws making certain types of organizations criminal. The Ku Klux Klan in the United States flourished at about the same time as the Nazi movement in Germany. It appealed to the same hates, practiced the same extra-legal coercions, and likewise terrorized by weird nighttime ceremonials. Like the Nazi Party it was composed of a core of fanatics, but enlisted support of some respectable persons who knew it was wrong, but thought it was winning. It eventually provoked a variety of legislative acts directed against such organizations.

The Congress of the United States also has enacted legislation outlawing certain organizations. A recent example is the Act of June 28, 1940 (c. 439, Title I, Section 2, 54 Stat. 671, 18 USCA 10) which provides in part as follows:

"(a) It shall be unlawful for any person...

- (3) to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage

the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof."

There is much legislation by States of the American union creating analogous offenses. An example is to be found in the Act of California, (Statutes 1919, Chapter 188, p. 281), which, after defining "criminal syndicalism," provides:

"Section 2. Any person who...(4) organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to teach or aid and abet criminal syndicalism...

"Is guilty of a felony and punishable by imprisonment."

Precedents in English law for outlawing organizations and punishing membership therein are old and consistent with the Charter. One of the first is the British India Act No. 30, enacted November 14, 1836. Section 1 provides:

"It is hereby enacted that whoever shall be proved to have belonged either before or after the passing of this Act to any gang of thugs either within or without the territories of the East India Company shall be punished with imprisonment for life with hard labor."

Other precedents in English legislation are the Unlawful Societies Act of 1799 (3 George III, Chapter 79); the Seditious Meetings Act of 1817 (57 George III, Chapter 19); the Seditious Meetings Act of 1846 (9 and 10 Victoria, Chapter 33); the Public Order Act of 1936, and Defense Regulation 18(b). This latter, not without opposition, was intended to protect the integrity of the British Government against the fifth-column activities of this same Nazi conspiracy.

Soviet Russia punishes as a crime the formation of and membership in a criminal gang. Criminologists of the U.S.S.R. call this crime the "crime of banditry," a term appropriate to the German organizations.

French criminal law makes membership in subversive organizations a crime. Membership of the criminal gang is a crime in itself. (Articles 265-268, French Penal Code, "Association de Malfaiteurs," Garaud, *Precis de Droit Criminel*, 1934 Edition Sirey, p. 1518 et seq. See also Act of December 18, 1893.)

For German precedents it is neither seemly nor necessary to go to the Nazi regime. Under the Empire and the Weimar Republic, however, German jurisprudence deserved respect, and it presents both statutory and juridical examples of declarations of the criminality of organizations. Among statutory examples are:

1. The German Criminal Code enacted in 1871. Section 128 was aimed against secret associations, and section 129 was directed against organizations inimical to the State.
2. The law of March 22, 1921, against paramilitary organizations.
3. The law of July 21, 1922, against organizations aimed at overthrowing the constitution of the Reich.

Section 128 of the Criminal Code of 1871 is especially pertinent. It reads:

"The participation in an organization 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, is punishable by imprisonment up to six months for the members and from one month to one year for the founders and officers. Public officials may be deprived of the right to hold public office for a period of from one to five years."

Under the Empire, various Polish national unions were the subject of criminal prosecution. Under the Republic judicial judgments, in 1927-1928, held criminal the entire Communist Party of Germany. In 1922 and 1928, judgments were entered

against the political Leadership Corps of the Communist Party, which included all its so-called "body of functionaries," corresponding to the Leadership Corps of the Nazi Party which we have accused. The judgment included every cashier, every employee, every delivery boy and messenger, and every district leader. In 1930 a judgment of criminality against the "Union of Red Front Fighters" of the Communist Party made no discrimination between leaders and ordinary members.

Most significant of all is the fact that on May 30, 1924, the German courts rendered judgment that the whole Nazi Party was a criminal organization. This decision referred not only to the Leadership Corps, which we are indicting here, but to all other members as well. The whole subsequent rise to power of the Nazi Party was in the shadow of this judgment of illegality.

The German courts, in dealing with criminal organizations, proceeded on the theory that all members were held together by a common plan in which each one participated even though at various levels. Moreover, the fundamental principles of the responsibility of members, as stated by the German Supreme Court, are strikingly like the principles that govern the Anglo-American law of conspiracy. Among them were these:

1. "It is a matter of indifference whether all the members pursued the forbidden aims. It is enough if a part exercised the forbidden activity." (R.G. VI(a) 97/22 of 8.5.22.)
2. "It is a matter of indifference whether the members of the group or association agree with the aims, tasks, means of working and means of fighting." (R.G. 58, 401 of the 24.10.24.)
3. "The real attitude of mind of the participants is a matter of indifference. Even if they had the intention of not participating in criminal efforts, or hindering them, this can not eliminate their responsibility." (R.G. 58, 401 of the 24.10.24.)

Organizations with criminal ends are everywhere regarded as in the nature of criminal conspiracies, and their criminality is judged by the application of conspiracy principles. The reason why they are offensive to law-governed people has been succinctly stated as follows:

"The reason for finding criminal liability in case of a combination to effect an unlawful end or to use unlawful means, where none would exist, even though the act contemplated were actually committed by an individual, is that a combination of persons to commit a wrong, either as an end or as a means to an end, is so much more dangerous, because of its increased power to do wrong, because it is more difficult to guard against and prevent the evil designs of a group of persons than of a single person, and because of the terror which fear of such a combination tends to create in the minds of people." (Miller on Criminal Law, 1932, p. 110.)

The Charter, in Article 6, provides that "Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan." The individual defendants are arraigned at your bar on this charge which, if proved, makes them responsible for the acts of others in execution of the common plan.

The Charter did not define responsibility for the acts of others in terms of "conspiracy" alone. The crimes were defined in non-technical but inclusive terms, and embraced formulating and executing a "common plan" as well as participating in a "conspiracy." It was feared that to do otherwise might import into the proceedings technical requirements and limitations which have grown up around the term, "conspiracy." There are some divergences between the Anglo-American concept of conspiracy and that of either Soviet, French, or German jurisprudence. It was desired that concrete cases be guided by the broader considerations inherent in the nature of the social problem, rather than controlled by refinements of any local law.

Now, except for procedural difficulties arising from their multitude, there is no reason why every member of any Nazi organization accused here could not have been indicted and convicted as a part of the conspiracy under Article 6 even if the Charter had never mentioned organizations at all. Voluntary affiliation constituted a definite act of adherence to some common plan and purpose. These did not pretend to be merely social or cultural groups; admittedly, they were united for action. In the case of several of the Nazi organizations, the fact of confederation was evidenced by formal induction into membership, the taking of an oath, the wearing of a distinctive uniform, the submission to a discipline. That all members of each Nazi organization did combine under a common plan to achieve some end by combined efforts, is abundantly established.

The criteria for determining the collective guilt of those who thus adhered to a common plan obviously are those which would test the legality of any combination or conspiracy. Did it contemplate illegal methods or aim at illegal ends? If so, the liability of each member of one of these Nazi organizations for the acts of every other member is not essentially different from the liability for conspiracy enforced in Courts of the United States against business men who combine in violation of the anti-trust laws, or of other defendants accused under narcotic drugs laws, sedition acts, or other federal penal enactments.

Among the principles every day enforced in courts of Great Britain and the United States in dealing with conspiracy are these:

1. No meeting or formal agreement is necessary. It is sufficient, although one performs one part and other persons other parts, if there be concert of action, and working together understandingly with a common design to accomplish a common purpose.
2. One may be liable even though he may not have known who his fellow-conspirators were, or just what part they were to take, or what acts they committed, and though he did not take personal part in them or was absent when criminal acts occurred.
3. There may be liability for acts of fellow-conspirators although the particular acts were not intended or anticipated, if they were done in execution of the common plan.
4. It is not necessary to liability that one be a member of a conspiracy at the same time as other actors, or at the time of criminal acts. When one becomes a party to it, he adopts and ratifies what has gone before and remains responsible until he abandons the conspiracy with notice to his fellow-conspirators.

Of course, members of criminal organizations or conspiracies who personally commit crimes are individually punishable for those crimes exactly as are those who commit the same offenses without organizational backing. But the very gist of the crime of conspiracy or membership in a criminal association is liability for acts one did not personally commit but which his acts facilitated or abetted. The crime is to combine with others and to participate in the unlawful common effort, however innocent the personal acts of the participant when considered by themselves.

The very innocent act of mailing a letter is enough to implicate one in a conspiracy if the purpose of the letter is to advance a criminal plan. There are countless examples of this doctrine in Anglo-American jurisprudence.

The sweep of the law of conspiracy is an important consideration in determining the criteria of guilt for organizations. Certainly the vicarious liability imposed in consequence of voluntary membership, formalized by oath, dedicated to a common organizational purpose and submission to a discipline and chain of command, cannot be less than that which follows from informal cooperation with a nebulous group to a common end, as is sufficient in conspiracy. This meets the suggestion that the prosecution is required to prove every member, or every part, fraction, or division of the membership to be guilty of criminal acts. The suggestion ignores the conspiratorial nature of the charge. Such an interpretation also would reduce the Charter to an unworkable absurdity. To concentrate in one International Tribunal inquiries requiring such detailed evidence as to each member would set a task not possible of completion within the lives of living men.

It is easy to toss about such a plausible but superficial cliché as, "One should be convicted for his activities, not for his membership." But this ignores the fact that membership in Nazi bodies was itself an activity. It was not something passed out to a passive citizen like a handbill. Even a nominal membership may aid and abet a movement greatly. Does any one believe that Hjalmar Schacht, sitting in the front row of the Nazi Party Congress of 1935, wearing the insignia of the Party, was included in the Nazi propaganda films merely for artistic effect? This great banker's mere loan of his name to this shady enterprise gave it a lift and a respectability in the eyes of every hesitating German. There may be instances in which membership did not aid and abet the organizational ends and means, but individual situations of that kind are for appraisal in the later hearings and not by this Tribunal. By and large, the use of organization affiliation is a quick and simple, but at the same time fairly accurate outline of the contours of a conspiracy to do what the organization actually did. It is the only one workable at this stage of the trial. It can work no injustice because before any individual can be punished, he can submit the facts of his own case to further and more detailed judicial scrutiny.

While the Charter does not so provide, we think that on ordinary legal principles the burden of proof to justify a declaration of criminality is upon the prosecution. It is discharged, we think, when we establish the following:

1. The organization or group in question must be some aggregation of persons associated in some identifiable relationship with a collective general purpose.
2. While the Charter does not so declare, we think it implied that membership in such an organization must be generally voluntary. That does not require proof that every member was a volunteer. Nor does it mean that an organization is not to be considered voluntary if the defense proves that some minor fraction or small percentage of its membership was compelled to join. The test is a common-sense one: Was the organization, on the whole, one which persons were free to join or to stay out of? Membership is not made involuntary by the fact that it was good business or good politics to identify one's self with the movement. Any compulsion must be of the kind which the law normally recognizes.
3. The aims of the organization must be criminal in that it was designing to perform acts denounced as crimes in Article 6 of the Charter. No other act would authorize conviction of an individual, and therefore no other act would authorize conviction of an organization in connection with the conviction of the individual.
4. The criminal aims or methods of the organization must have been of such character that its membership in general knew of them or were so widespread and notorious that a reasonable man ought to have known what he was joining. This, again, is not specifically required by the Charter. Of course, it is not incumbent on the prosecution to establish the individual knowledge of every member of the organization or to rebut the possibility that some may have joined in ignorance of its true character.
5. Some individual defendant must have been a member of the organization and must be convicted of some act on the basis of which the organization is declared to be criminal.

IV. DEFINITION OF ISSUES FOR TRIAL

The progress of this trial will be expedited by clear definition of the issues to be tried. I have indicated what we consider to be the proper criteria of guilt. There are also subjects which we think are not relevant before this Tribunal, some of which are mentioned in the specific questions asked by the Tribunal.

Only a single ultimate issue is before this Tribunal for decision. That is, whether accused organizations properly may be characterized as criminal ones or as innocent ones. Nothing is relevant here that does not bear on a question that would be common to the case of every member. Any matter which would be exculpatory for some members but not for all is irrelevant here.

We think it is not relevant to this proceeding at this stage that one or many members were conscripted if in general the membership was voluntary. It may be

conceded that conscription is a good defense for an individual charged with membership in a criminal organization, but an organization can have criminal purposes and commit criminal acts even if a portion of its membership consists of persons who were compelled to join it. What constitutes legal duress is a question which can be decided only in view of the facts pertaining to each individual who is brought to trial for membership in a criminal organization. The issue of conscription is not pertinent to this proceeding, but it is pertinent to the trials of individuals for membership in organizations declared criminal by this Tribunal.

We also think it not relevant to this proceeding that one or more members of the named organizations were ignorant of its criminal purposes or methods if its purposes or methods were open and notorious. An organization may have criminal purposes and commit criminal acts although one or many of its members were without personal knowledge thereof. If a person joined what he thought was a social club but what in fact was a gang of cutthroats and murderers, his lack of knowledge would not exonerate the gang considered as a group, although it certainly would be a factor in extenuation of a charge of criminality brought against him for mere membership in the organization. Even then the test would be not what the man knew, but what, as a person of common understanding, he should have known.

It is not relevant to this proceeding that one or more members of the named organizations were themselves innocent of unlawful acts. This proposition is basic to the entire theory of the declaration of organizational criminality. The purpose of declaring the criminality of organizations, as in every conspiracy charge, is punishment for aiding crimes, although the precise perpetrators may never be found or identified. We know that the Gestapo and SS, as organizations, were given principal responsibility for the extermination of the Jewish people in Europe. But beyond a few isolated instances we can never establish which members of the Gestapo or SS actually carried out the murders. Any member guilty of direct participation in such crimes can be tried on the charge of having committed specific crimes, in addition to the general charge of membership in a criminal organization. Therefore, it is wholly immaterial that one or more members of the organizations were themselves allegedly innocent of specific wrongdoing. The purpose of this proceeding is not to reach instances of individual criminal conduct, even in subsequent trials, and therefore such considerations are irrelevant here.

Another question raised by the Tribunal is the period of time during which the groups or organizations named in the Indictment are claimed by the Prosecution to have been criminal. The Prosecution believes that each organization should be declared criminal during the period referred to in the Indictment. We do not contend that the Tribunal is without power to condition its declaration so as to cover a lesser period of time than that set forth in the Indictment. The Prosecution feels, however, that there is in the record at this time adequate evidence to support the charge of criminality with respect to each of the named organizations during the full period of time set forth in the Indictment.

Another question raised by the Tribunal is whether any classes of persons included within the accused groups or organizations should be excluded from the declaration of criminality. It is, of course, necessary that the Tribunal relate its declaration to some identifiable group or organization. The Tribunal, however, is not expected or required to be bound by formalities of organization. In framing the Charter, the use was deliberately avoided of terms or concepts which would involve this trial in legal technicalities about "juristic persons" or "entities." Systems of jurisprudence are not uniform in the refinements of these fictions. The concept of the Charter, therefore, is a non-technical one. "Group" or "organization" should be given no artificial or sophistical meaning. The word "group" was used in the Charter as a broader term, implying a looser and less formal structure or relationship than is implied in the term "organization." The terms mean in the context of the Charter what they mean in the ordinary speech of people. The test to identify a group or organization is, we submit, a natural and common-sense one.

It is important to bear in mind that while the Tribunal no doubt has power to make its own definition of the groups it will declare criminal, the precise composition and membership of groups and organizations is not an issue for trial here. There is no Charter requirement and no practical need for the Tribunal to define a group or organization with such particularity that its precise composition or membership is thereby determined. The creation of a mechanism for later trial of such issues was a recognition that the declaration of this Tribunal is not decisive of

such questions and is likely to be so general as to comprehend persons who on more detailed inquiry will prove to be outside of it. An effort by this Tribunal to try questions of the exculpation of individuals, few or many, would unduly protract the trial, transgress the limitation of the Charter, and quite likely do some mischief by attempting to adjudicate precise boundaries on evidence which is not directed to that purpose.

The prosecution stands upon the language of the Indictment and contends that each group or organization should be declared criminal as an entity, and that no inquiry should be entered upon and no evidence entertained as to the exculpation of any class or classes of persons within such descriptions. Practical reasons of conserving the Tribunal's time combine with practical considerations for the defendants. A single trial held in one city to deal with questions of excluding thousands of defendants living all over Germany could not be expected to do justice to each member unless it was expected to endure indefinitely. Provision for later, local trial of individual relationships protects the rights of members better than can possibly be done in proceedings before this Tribunal.

With respect to the Gestapo, the prosecution feels that the phrase, "All the forces and personnel of the Geheime Staatspolizei" should be interpreted to exclude persons employed in purely clerical, stenographic, janitorial, or similar unofficial routine tasks. As to the Nazi Leadership Corps we abide by the position taken at the time of submission of the evidence, that the following should be included: the Fuehrer; the Reichsleitung (i.e., the Reichsleiters, main departments and office holders); the Gauleiters and their staff officers; the Kreisleiters and their staff officers; the Ortsgruppenleiters, the Zellenleiters, and the Blockleiters, but not members of the staffs of the last three officials. As regards the S.A., it is considered advisable that the Declaration expressly exclude (1) wearers of the S.A. Sports Badge; (2) S.A.-controlled Home Guard Units (S.A. Wehrmannschaften) which were not strictly part of the S.A.; (3) The Marchabteilungen of the N.S.K.O.V. (National Socialist League for Disabled Veterans), and (4) the S.A. Reserve, so as to include only the active part of the organization, and so that members who were never in any part of that organization other than the Reserve should be excluded.

The Prosecution does not feel that there is evidence of the severability of any class or classes of persons within the organizations accused which would justify any further concessions, and feels that no other part of the named groups should be excluded. In this connection, we would again stress the principles of conspiracy. The fact that a section of an organization itself committed no criminal act, or may have been occupied in technical or administrative functions, does not relieve that section of criminal responsibility if its activities contributed to the accomplishment of the criminal enterprise.

V. FURTHER STEPS BEFORE THIS TRIBUNAL

Over 45,000 persons have joined in communications to this Tribunal asking to be heard in connection with the accusations against organizations. The volume of these applications has caused apprehension as to further proceedings. No doubt there are difficulties yet to be overcome, but my study indicates that the difficulties are greatly exaggerated.

The Tribunal is vested with wide discretion as to whether it will entertain an application to be heard. The prosecution would be anxious, of course, to have every application granted that is necessary, not only to do justice but to avoid the appearance of doing anything less than justice. And we do not consider that expediting this trial is so important as affording a fair opportunity to present all really pertinent facts.

Analysis of the conditions which have brought about this flood of applications indicates that their significance is not proportionate to their numbers. The Tribunal sent out 200,000 printed notices of the right to appear before it and defend. They were sent to Allied prisoner of war and internment camps. The notice was published in all German language papers and was repeatedly broadcast over the radio. The 45,000 persons who responded with applications to be heard came principally from about 15 prisoner of war and internment camps in British or United States control. Those received included an approximate 12,000 from Dachau, 10,000 from Langwasser, 7,500 from Auerbach, 4,000 from Staumuehle, 2,500 from Garmisch, and several hundred from each of the others.

We undertook investigation of these applications from Auerbach camp as probably typical of all. This camp is for prisoners of war, predominantly S.S. members, and its prisoners number 16,964 enlisted men and 923 officers. The notice of the International Tribunal was posted in each barracks and was read to all inmates. The applications to the Tribunal were forwarded without censorship. Applications to defend were made by 7,509 S.S. members.

Investigation indicates that these were filed in direct response to the notice and that no action was directed or inspired from any other source within the camp. All who were interrogated professed no knowledge of any S.S. crimes or of S.S. criminal purpose, but expressed interest only in their individual fate. Our investigators report no indication that the S.S. members had additional evidence or information to submit on the general question of the criminality of the S.S. as an organization. They seemed to think it necessary to make the application to this Tribunal in order to protect themselves.

Examination of the applications made to the Tribunal indicates that most members do not profess to have evidence on the general issue triable here. They assert that the writer has neither committed, witnessed, nor known of the crimes charged against the organization. On a proper definition of the issues such an application is insufficient on its face.

A careful examination of the Tribunal's notice, to which these applications respond, will indicate that the notice contains no word which would inform a member, particularly if a layman, of the narrowness of the issues here, or of the later opportunity of each member, if and when prosecuted, to present personal defenses. On the other hand, I think the notice creates the impression that every member may be convicted and punished by this Tribunal and that his only chance to be heard is here.

In view of these facts we suggest consideration of the following program for completion of this trial as to organizations.

1. That the Tribunal formulate and express in an order the scope of the issues and the limitations on the issues to be heard by it.
2. That a notice adequately informing members as to the limitation on issues and the opportunity for later, individual trial be sent to all applicants and published as was the original notice.
3. That a panel of masters be appointed, as authorized in Article 17 (e) of the Charter, to examine applications and report those insufficient on their own statements, and to go to the camps and supervise the taking of any relevant evidence. Defense counsel and prosecution representatives should of course attend and be heard before the masters. The masters should reduce any evidence to deposition form and report the whole to the Tribunal to be introduced as a part of its record.
4. The representative principle may also be employed to simplify this task. Members of particular organizations in particular camps might well be invited to choose one or more to represent them in presenting evidence.

It may not be untimely to remind the Tribunal and defense counsel that the prosecution has omitted from evidence many relevant documents which show repetition of crimes by these organizations, in order to save time by avoiding cumulative evidence. It is not too much to expect that cumulative evidence of a negative character will likewise be limited.

Some concern has been expressed as to the number of persons who might be affected by the declarations of criminality we have asked. Some people seem more susceptible to the shock of a million punishments than to the shock of five million murders. At most, the number of punishments will never catch up with the number of crimes. However, it is impossible to state even with approximate accuracy the number of persons who might be affected. Figures from German sources seriously exaggerate the number, because they do not take account of heavy casualties in the latter part of the war, and make no allowance for duplication of membership, which was large. For example, the evidence is to the effect that 75% of the Gestapo men also were members of the S.S. We know that the United States forces have in detention a roughly estimated 130,000 persons who appear to be members of accused organizations. I have no figures from other Allied forces, But how many of these

actually would be prosecuted, instead of being dealt with under the denazification program, no one can foretell. Whatever the number, of one thing we may be sure: it is so large that a thorough inquiry by this Tribunal into each case would prolong its session beyond endurance. All questions as to whether individuals or subgroups of accused organizations should be excepted from the Declaration of Criminality should be left for local courts, located near the home of the accused and near sources of evidence. These courts can work in one or at most in two languages instead of four, and can hear evidence which both parties direct to the specific issues.

VI. CONCLUSION

This is not the time to review the evidence against particular organizations which, we take it, should be reserved for summation after all the evidence is presented. But it is timely to say that the selection of the six organizations named in the Indictment was not a matter of chance. The chief reasons they were chosen are these: collectively they were the ultimate repositories of all power in the Nazi regime; they were not only the most powerful, but the most vicious organizations in the regime; and they were organizations in which membership was generally voluntary.

The Nazi Leadership Corps consisted of the directors and principal executors of the Nazi Party, which was the force lying behind and dominating the whole German state. The Reichs Cabinet was the facade through which the Nazi Party translated its will into legislative, administrative, and executive acts. The two pillars on which the security of the regime rested were the Armed Forces, directed and controlled by the General Staff and High Command, and the police forces--the Gestapo, the S.A., the S.D., and the S.S. These organizations exemplify all the evil forces of the Nazi regime.

These organizations were also selected because, while representative, they were not so large or extensive as to make it probable that innocent, passive, or indifferent Germans might be caught up in the same net with the guilty. State officialdom is represented, but not all administrative officials or department heads or civil servants; only the Reichsregierung, the very heart of Nazidom within the Government, is named. The armed forces are accused, but not the average soldier or officer, no matter how high-ranking. Only the top policy makers--the General Staff and High Command--are named. The police forces are accused, but not every policeman--not the ordinary police which performed only normal police functions. Only the most terroristic and repressive police elements--the Gestapo and S.D.--are named. The Nazi Party is accused, but not every Nazi voter, not even every member; only the leaders, the Politische Leiter. And not even every Party official or worker is included; only "the bearers of sovereignty," in the metaphysical jargon of the Party, who were the actual commanding officers, and their staff officers on the highest levels, are accused. The "formations" or strong arms of the Party are accused, but not every one of the seven formations, nor any of the twenty or more supervised or affiliated party groups. Nazi organizations in which membership was compulsory, either legally or in practice (like the Hitler Youth and the Deutsche Studentenschaft); Nazi professional organizations (like the Civil Servants Organization, the National Socialist Teachers Organization, and the National Socialist Lawyers Organization); Nazi organizations having some legitimate purpose (like the welfare organizations)--these have not been indicted. Only two formations are named, the S.A. and the S.S., the oldest of the Nazi organizations, groups which had no purpose other than carrying out the Nazi schemes, and which actively participated in every crime denounced in the Charter.

In administering preventive justice with a view to forestalling repetition of these crimes against peace, crimes against humanity, and war crimes, it would be a greater catastrophe to acquit these organizations than it would be to acquit the entire twenty-two individual defendants in the box. These defendants' power for harm is spent. That of these organizations goes on. If they are exonerated here, the German people will infer that they did no wrong and will easily be regimented in reconstituted organizations under new names behind the same program.

In administering retributive justice it would be possible to exonerate these organizations only by concluding that no crimes have been committed by the Nazi regime. Their sponsorship of every Nazi purpose and their confederation to execute every measure to attain those ends is beyond denial. A failure to condemn these organizations under the terms of the Charter can only mean that such Nazi ends and means cannot be considered criminal, and that the Charter of the Tribunal is considered a nullity.