Schiller Institute files 'amicus' brief

*On Nov. 6, 1996, the Schiller Institute filed a friend of the court (*amicus curiae*) brief with the Supreme Court of the United States, October Term, 1996, in the case of* State of Washington, Christine O. Gregoire, Attorney General of Washington, Petitioners, v. Harold Glucksberg, MD, Abigail Halperin, MD, Thomas A. Preston, MD, and Peter Shalit MD, PhD, Respondents, *On Writ of Certiorari to the United States Court of Appeals for the Second Circuit. As attorney for Amicus Curiae Schiller Institute, Max Dean of Flint, Michigan, submitted the motion and brief, reproduced in full below.*

Motion of Schiller Institute for Leave to File Brief as Amicus Curiae

Pursuant to Rule 37 of the Rules of this Court, the Schiller Institute respectfully moves for leave to file the accompanying brief amicus curiae in the above-captioned case.

The Schiller Institute, founded in May 1984, has national organizations in the United States of America, Canada, most of the nations of Europe, Ibero-America, Australia, Thailand, India, and Japan.

The Schiller Institute has a deep and abiding interest in the principles and spirit of the American Revolution as an inspiration for all people, including elected officials and jurists in the United States, and urges them to reaffirm the Federal Constitution's dedication to the preservation and extension of the lives of its population, thus leading the rest of humanity on such a course.

Because of the Schiller Institute's past activities and its cultural optimism, its brief will bring to this case a perspective not currently before the Court. The accompanying proposed brief advances an argument not developed by Petitioners: the extent to which allowing physician-assisted suicide on any of the alleged grounds, or permitting the various states to do as they please, would be an act of world-wide negative significance. It would expose all those physicians acting in reliance upon such rulings to be adjudged criminally responsible for crimes against humanity in future proceedings similar to those had under the Four Power Agreement establishing the international tribunals at Nuremberg at the conclusion of World War II.

The Schiller Institute's brief supports the position of Petitioners and points out where such Nazi policies have led in the past and where they will lead again. It is the writer's expectation that this amici brief alone will address this issue directly and for that reason urges this brief be accepted.

The counsels for either party have not consented to the amicus curiae brief of the Schiller Institute.

For the above reasons, the Schiller Institute moves this Court to grant leave to file the accompanying brief amicus curiae in support of Petitioners.

Question presented

Amici Curiae will address the following question:

Whether judicially according a terminally ill, competent individual a constitutionally protected right to obtain the assistance of a physician to commit suicide will lead to punishable acts under future Nuremberg type tribunals established to punish those who commit such acts as being crimes against humanity.

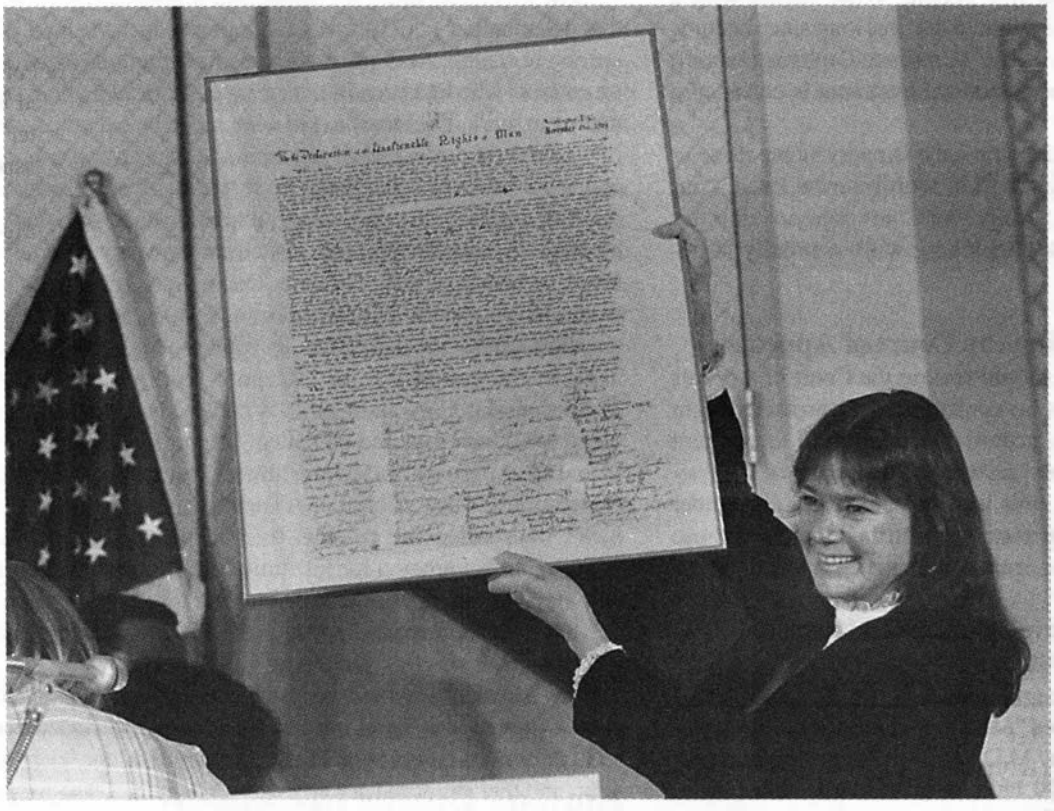
Brief of Schiller Institute as Amicus Curiae in Support of Petitioners

Interest of the amicus curiae

Helga Zepp-LaRouche, the founder of the Schiller Institute, and chairman of its Board of Directors in the United States, chose the German poet of freedom, Friedrich Schiller, as the namesake for the Institute, because his belief in the beauty and power of human reason provides a strong and clear antidote to the "cultural pessimism" which led to fascist economic and social measures.

The Institute currently has chapters throughout Eastern and Western Europe, Asia, Ibero-America, the Middle East, and Australia. Its international scope provides a constant reminder of the importance of decisions taken in the United States for the rest of the world. This perspective is particularly important in matters of the right to life, such as the one placed before the Supreme Court in *Vacco v. Quill* and *State of Washington v. Glucksberg, et al.* It is the Institute's belief that if the Supreme Court were to uphold assisted suicide, it would put the United States on a course which threatens the very existence of many Third World nations, as well as whole classes of individuals considered "useless eaters" in the United States itself.

At a major conference in November 1984, the Institute adopted a "Declaration of the Inalienable Rights of Man," modeled on the U.S. Declaration of Independence, but adapted with reference to the tyranny that has been established



Helga Zepp LaRouche, founder of the Schiller Institute, holds up the "Declaration of the Inalienable Rights of Man," at the institute's November 1984 conference. Prominent in the Declaration were the right to "life, freedom, material conditions worthy of man, and the right to develop fully all potentialities of their intellect and their souls." All these are jeopardized by legalization of "physician-assisted suicide."

by the international financial institutions. Prominent among these rights, of course, were the rights to "life, freedom, material conditions worthy of man, and the right to develop fully all potentialities of their intellect and their souls." These rights would clearly be threatened should the U.S. Supreme Court decide in favor of "physician-assisted suicide."

Mrs. LaRouche, a German citizen, has shown a special interest in analyzing the dangers of the resurgence of Nazism and fascism today, and the Institute has joined her efforts. In a 1984 book called *The Hitler Book,* published by the Schiller Institute, she analyzed the philosophical roots of fascism, and pointed to the philosophies of irrationalism, and a wide range of attacks against the Judeo-Christian humanist concept of man being created in the image of God, as constituting a growing threat to mankind. She attacked the Social Darwinists, and such theorists as Colorado Governor Richard Lamm, as exemplary of this thinking today.

In a series of other books and conferences, the Schiller Institute has promoted economic development plans, space colonization, and classical culture as means to overcome cultural pessimism and solve the problems of economic devolution that mankind faces. These conferences have generally featured the economic theories and programs of Mrs. LaRouche's husband, economist Lyndon LaRouche, and have attracted considerable support, particularly within nations under the thumb of International Monetary Fund conditionalities.

The Schiller Institute and Mrs. LaRouche have often pointed to the standard of the Nuremberg Military Tribunal, which tried the Nazis for crimes against humanity after World War II, in contrast to the rapidly decreasing valuation on individual human life that has been evident over the last 20 years in particular. A close study of this standard shows that, at the bar of civilization—as Justice Robert Jackson would say—the trend of judicial decisions, and medical practice have been rapidly converging on the "ethics" of the Nazis and their Nazi doctors. Dr. Leo Alexander, who was the chief medical witness to the Nuremberg war crimes trial, forcefully reiterated that point to the Schiller Institute on several occasions. Dr. Alexander, who wrote the Nuremberg Code that established the moral, ethical, and legal principles defining crimes against humanity, emphasized that the acceleration of the tendency nowadays to accept euthanasia, this time in the form of the right-to-die movement, "parallels what occurred in Nazi Germany."

In November 1985, the Institute held a commemoration of the Nuremberg Tribunal in that German city, and announced the formation of a new commission to investigate crimes against humanity, dedicated to founding a new Nuremberg Tribunal. Among the areas identified for investigation was "the euthanasia campaign in the industrialized countries, modeled on the 'mercy killing' campaign of the Nazis, which

is targetting the old and sick people. What started with a campaign for the dubious 'right to die' has long since become a campaign for the 'duty to die' (Colorado Governor Lamm) for the old and sick, whose medical treatment is considered not 'cost effective.' "

Since 1985, the decline down the slippery slope of viewing more and more lives as "not worthy to be lived," has been dramatic. If the U.S. Supreme Court does not stop this descent, the U.S. role at Nuremberg will essentially be reversed.

Reasons for reversing the Court of Appeals

The Supreme Court should reverse the Court of Appeals on grounds that there is no constitutionally protected right to suicide. To judicially accord a terminally ill, competent individual, a constitutional right to the assistance of a physician to commit suicide will lead to punishable acts under future Nuremberg type tribunals established to punish those who commit such crimes against humanity.

Background—physician-assisted suicide: the German experience

The *New England Journal of Medicine,* Vol. 241: 39-47 of July 14, 1949, published "Medical Science Under Dictatorship" by Leo Alexander, M.D. Born in Vienna, graduating from its university in 1929, he came to America and became a medical investigator for Secretary of War Robert P. Patterson and a consultant to the U.S. Chief of Counsel at Nuremberg. As a psychiatrist and neurologist, Dr. Alexander became chief medical witness at the Nuremberg trials and showed that crimes against humanity can occur at any time, in any nation, as the outcome of putting Hegelian "rational utility" above Judeo-Christian morality.

In his article, he recounts that a preparatory propaganda barrage was commenced even before the Nazis openly took charge. It was directed against the traditional compassionate 19th century attitudes toward the chronically ill. He points out that sterilization and euthanasia were discussed at a meeting of Bavarian psychiatrists in 1931. By 1936, extermination of the physically or socially unfit was so openly accepted, that its practice was mentioned incidentally in an article published in an official German medical journal.

Dr. Alexander describes in his article motion pictures dealing with euthanasia, including one depicting a woman suffering from multiple sclerosis, with her husband, a doctor, finally killing her to the accompaniment of soft piano music rendered by a sympathetic colleague in an adjoining room. He describes indoctrination in which high school mathematics books included problems stating the cost of caring for and rehabilitating the chronically sick and crippled. Math problems asked how many new housing units and how many marriage allowance loans could be given to newly wedded couples for the amount of money it cost the state to care for "the crippled, the criminal, and the insane."

The first direct order for euthanasia was issued by Hitler, dated September 1, 1939. Dr. Karl Brandt headed the medical section in charge. All state institutions were required to report on patients who had been ill five years or more and who were unable to work. Decisions to kill were made by experts, most of whom were professors of psychiatry in the key universities and who never saw the patients. Decisions were based on questionnaires giving name, race, marital status, nationality, next-of-kin, whether regularly visited and by whom, who bore financial responsibility, et cetera. One expert consultant between November 14 and December 1, 1940 evaluated 2,109 questionnaires. The semantics in vogue then prompted the name of this program to be "Realm's Work Committee of Institutions for Cure and Care." A parallel organization devoted to killing children was called "Realm's Committee for Scientific Approach to Severe Illness Due to Heredity and Constitution." The "Charitable Transport Company for the Sick" transported the patients to the killing centers. The "Charitable Foundation for Institutional Care" was in charge of collecting the cost of the killings from the relatives, without, however, informing them what the charges were for. The cause of death was falsified on the death certificates.

Dr. Alexander quoted verbatim what a member of the court of appeals at Frankfurt-am-Main wrote in December 1939 of constant discussion of the destruction of the socially unfit, and that abnormal activity was taking place. The judge said people were:

> . . . disquieted by the question of whether old folk who have worked hard all their lives and may merely have come into their dotage were also to be liquidated. . . . The people are said to be waiting for legislative regulation providing some orderly method that will ensure especially that the aged feeble-minded are not included in the program.

Dr. Alexander described the early warning signs in the changes in medical attitudes:

> Whatever proportions these crimes finally assumed, it became evident to all who investigated them that they had started from small beginnings. The beginnings at first were merely a subtle shift in emphasis in the basic attitude of the physicians. It started with the acceptance of the attitude, basic in the euthanasia movement, that *there is such a thing as life not worthy to be lived.* This attitude in its early stages concerned itself merely with the severely and chronically sick. Gradually, the sphere of those to be included in this category was enlarged to encompass the socially unproductive, the ideologically unwanted, the racially unwanted and finally all non-Germans. But it is important to realize that the infinitely small wedged-in lever from which this entire trend of mind received its impetus was the

attitude toward the nonrehabilitable sick.

It is, therefore, the subtle shift in emphasis of the physicians' attitude that one must thoroughly investigate. It is a recent significant trend in medicine, including psychiatry, to regard prevention as more important than cure. Observation and recognition of early signs and symptoms have become the basis for prevention of further advance of disease.

In looking for these early signs one may well retrace the early steps of propaganda on the part of the Nazis in Germany as well as in the countries that they overran and in which they attempted to gain supporters by means of indoctrination, seduction and propaganda. (Emphasis added)

Background—Nuremberg Tribunal: The case of Dr. Karl Brandt

It was America alone who brought the Nazi doctors to trial. The U.S. Tribunal made clear that the crime of euthanasia was so abhorrent to the civilized world, that the U.S. had to prosecute it. The U.S. military constituted special tribunals to try the doctors for euthanasia, and made it clear from the outset that these particular men were on trial, not for having murdered Jews and Gypsies, not for having murdered Poles—they had not, others had—but for having murdered Germans. Furthermore, the murdered Germans have no one to speak for them, since they had been murdered at the hands of their own government.[1]

Prior to Hitler's formal euthanasia order of October 1939, back-dated to September 1, 1939, the day of the invasion of Poland, each case of "mercy killing" was decided by Hitler in response to letters from parents and doctors asking for his approval to "grant" a euthanasia death to retarded or disabled children. The first such request came in 1938, from a couple named Knauer, whose infant was born blind, with a leg and part of an arm missing, and "who seems to be an idiot." Hitler had his own physician, Karl Brandt, consult with the child's doctors and parents; then he gave his permission for the child to be killed.

In 1973, the father of the child described Brandt's discussion with him: "He explained to me that . . . the Fuehrer wanted to [solve] the problems of people who had no future—whose lives were worthless." Knauer said Hitler was "like a savior to us—the man who could deliver us from a heavy burden."[2]

After the Knauer child's case, Hitler ordered the Reichschancery Secretariat and Brandt to investigate each new case, and to make recommendations.

The lives of such unfortunates, Hitler told his intimates, "are not worth living." He continued, these people deserve "mercy—in their case, death."

In the summer of 1939, Hitler called in his Secretary for Health in the Interior Ministry, and Reichschancery Secretary Lammers to tell them that, "He considered it to be proper that the 'life unworthy of life' of severely mentally ill persons be eliminated by actions that bring about death." In this way, Hitler said, "a certain cost-saving in hospital, doctors, and nursing personnel could be brought about." But, Hitler also clearly enunciated one more reason: he considered these euthanasia killings "humane." He insisted that the euthanasia deaths be absolutely painless; he insisted that only doctors perform the euthanasia. And, he specifically disallowed Jews from benefitting from this "mercy killing." Euthanasia, or a "mercy death," was allowed only for Aryans. Jewish patients in German psychiatric hospitals were deported to concentration camps to deny them the *Gnadentod* of euthanasia.

The Nuremberg Tribunal indictment of Dr. Karl Brandt, charged that the Nazi euthanasia program "murdered hundreds of thousands of human beings. . . . This program involved the systematic and secret execution of the aged, insane, incurably ill, of deformed children, and other persons, by gas, lethal injections, and diverse other means in nursing homes, hospitals, and asylums. . . ."

In October 1939, Hitler handwrote his secret euthanasia order. "Reichsleiter [Philip] Bouhler and Dr. [Karl] Brandt are charged with the responsibility for expanding the authority of physicians, to be designated by name, to the end that patients considered incurable according to the best available human judgment of their state of health, can be accorded a mercy death."

At the top of the order, Hitler wrote: *"Vernichtung lebensunwerten Lebens"* or, "The Destruction of Lives Unworthy of Life."

Before the International Military Tribunal, one of the cases brought for crimes against humanity for which individuals were indicted, tried, and executed, was the crime of euthanasia committed by Germans against German civilians. This

1. Molly Hammett Kronberg, *Hitler's Euthanasia Program—More Like Today's Than You Might Imagine,* from "How to Stop the Resurgence of Nazi Euthanasia Today; Including Transcripts of the International Club of Life Conference, Munich, West Germany, June 11-12, 1988," *EIR Special Report,* pp. 129-142 (September 1988).

2. *Supra,* pp. 139-140, *EIR Special Report.*

charge was based on Control Council Law No. 10 of December 20, 1945, issued to implement the Four Power Agreement by the United States, United Kingdom, French Provisional Government and Soviet Union through their commanding generals at Berlin. Article II 1.(C) defined crimes against humanity as:

> Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population . . . whether or not in violation of the domestic laws of the country where perpetrated.

The U.S. Military Tribunal specifically applied the definition of a crime against humanity to cover German victims, not just conquered civilians:

> The words "civilian population" cannot possibly be construed to exclude German civilians. If Germans are deemed excluded [from the class of victims], there is little or nothing left to give purpose to the concept of crimes against humanity. . . . It is one of the very purposes of the concept of crimes against humanity . . . to reach the systematic commission of atrocities and offenses by a state against its own people.

Count III of the indictment in the case, *United States of America v. Karl Brandt, et al.,* charged in pertinent part:

> Defendants Karl Brandt, Blome, Brack and Hoven unlawfully, willfully, and knowingly committed crimes against humanity, as defined by Article II of Control Council Law No. 10 in that they were principles in, accessories to, ordered, abetted, took a consenting part in, and were connected with plans and enterprises involving the execution of the so-called "euthanasia" program of the German Reich, in the course of which the defendants herein murdered hundreds of thousands of human beings, including German civilians, as well as civilians of other nations.
>
> This program involved the systematic and secret execution of the aged, insane, incurably ill, of deformed children, and other persons, by gas, lethal injections, and diverse other means in nursing homes, hospitals, and asylums. Such persons were regarded as "useless eaters" and a burden to the German war machine.

Evidence presented in the course of the *Brandt* trial included evidence that deformed or defective newborn infants were among the victims of the euthanasia program.

> The names of newly born children who were deformed or partly paralyzed, or mentally deficient, were submitted to the health authorities and finally to a Reich agency of Berlin. . . . A short time after the reports were filed, the County Health Authorities of the respective districts received an order that these children should be sent to a special institution for special modern therapy. I know from hundreds of cases, that this "special modern therapy" was nothing less than the killing of these children. . . . Another method of killing so-called "useless eaters" was to starve them. . . . This method was apparently considered very good, because the victims would appear to have died a "natural death." This was a way of camouflaging the killing procedure.
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> —Affidavit of Gerhard Schmidt, Director of the Haar-Eglfing Insane Asylum, dated 28 March 1946, Document No. 3816-PS.

Dr. Karl Brandt, like Dr. Jack Kevorkian, also clothed acts of genocide and euthanasia in "humanitarian" garb, saying at sentencing:

> . . . I am fully conscious that when I said "Yes" to euthanasia I did so with the deepest conviction, just as it is my conviction today, that it was right. Death can mean deliverance. Death is life—just as much as birth. It was never meant to be murder. I bear a burden, but it is not the burden of a crime. I bear this burden of mine, though with a heavy heart, as my responsibility. I stand before it, and before my conscience, as a man and as a doctor.
>
> —Final Statement of defendant Karl Brandt, 19 July 1947, Transcript of *Trials of War Criminals before the Nuremberg Military Tribunals under Code Council Law.* No. 10, trans. pp. 11311-11314.

On August 20, 1947, Dr. Karl Brandt was adjudged guilty of war crimes, guilty of crimes against humanity, of conspiring to commit war crimes and crimes against humanity, and of membership in an illegal organization, and was sentenced to "death by hanging" by order of the U.S. Military Tribunal. It is only just that it is no defense to be a sincere Nazi.

There is no difference between Hitler's perspective and that of the Second and Ninth Circuit. The Second Circuit cites New York's long-standing contention that its principal interest is in preserving the life of all its citizens at all times and under all conditions. But, the Second Circuit asks: "Of what interest can the state possibly have in requiring the prolongation of a life that is all but ended? Surely, the state's interest lessens as the potential for life diminishes." *Quill, et al. v. Vacco,* 80 F.3d, 716, 729.

The Ninth Circuit states:

> While the state has a legitimate interest in preventing suicides in general, that interest, like the state's interest in preserving life, is substantially diminished in the case of terminally ill, competent adults who wish to die.

—*Compassion in Dying v. Washington,* under the State's Interest, 2, a; 79 F.3d 790, 829

The "lives not worthy of life" ethic, as the Ninth Circuit finds, is already established within state statutes and we ask the Court not to compound that wrong with another.

> As the laws in state after state demonstrate, even though the protection of life is one of the state's most important functions, the state's interest is dramatically diminished if the person it seeks to protect is terminally ill or permanently comatose and has expressed a wish that he be permitted to die. . . .
>
> —*Compassion in Dying v. Washington, supra,* 820.

The Ninth Circuit continues:

> When participants are no longer able to pursue liberty or happiness and do not wish to pursue life, the state's interest in forcing them to remain alive is clearly less compelling. Thus, while the state may still seek to prolong the lives of terminally ill or comatose patients . . . the strength of the state's interest is substantially reduced in such circumstances.
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> —*Compassion in Dying v. Washington, supra,* 820.

If anything, the Ninth Circuit's perspective is a chilling embrace of Hitler's, as Hitler wrote in his second book, unpublished until the 1960s after his death:

> In truth that struggle for daily bread, both in peace and in war, is an eternal battle against thousands upon thousands of obstacles, just as life itself is an eternal struggle against death. For men know as little why they live, as does any other creature of the world. Only life is filled with the longing to preserve itself. . . .
>
> Countless are the species of all the Earth's organisms, unlimited at any moment in all individuals is their instinct for self-preservation as well as their longing for continuance. . . . *Therefore, he who wants to live must fight and he who does not want to fight in this world of eternal struggle, does not deserve to be alive.*
>
> —*Hitler's Secret Book,* Grove Press, New York, 1962 (emphasis added).

Is Hitler's social Darwinian ethic all that different from that of the Ninth Circuit's? Effectively, the Ninth Circuit said that when a patient is too ill or no longer wishes to fight for his life, then he no longer is fit to live within the embrace of society's protection and support. Hitler explicitly wrote: "If the power to fight for one's own health is no longer present, *the right to live in this world of struggle ends.*" (Emphasis added.)

Such is the premise, whenever a state or a court bestows the "right" for an individual to take his life, or, to allow others to do so for him. That physicians are called upon to act to render that "right" out of some misplaced compassion, does not stand the historic test of Nuremberg.

> It should be noted that Dr. Timothy Quill, a forceful and eloquent proponent of physician-assisted suicide, would not limit that right to the terminally ill. As he explains, he does not want "to *arbitrarily* exclude persons with incurable, but not imminently terminal, progressive illness." But why stop there? Is it any less arbitrary to exclude the quadriplegic? The victim of a paralytic stroke? The mangled survivor of a road accident?
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> —Yale Kamisar, *Against Assisted Suicide—Even a Very Limited Form,* U. Det. Mercy L. Rev., Vol. 72, Issue 4 (1995) (emphasis added).

For America, the Nuremberg judgments have precedential value. The United States led in the establishment of the Nuremberg Tribunals. By January of 1945, the United States government had decided to conduct international trials. The three other major allied powers accepted the American program at the San Francisco United Nations Conference. Associate Justice Robert Jackson was appointed by President Truman as head of the United States delegation and future chief counsel for the American prosecution, who was the guiding spirit and practical planner. Nineteen other governments, members of the United Nations, adhered to the Four Power Agreement.

William J. Bosch, *Judgment on Nuremberg,* University of North Carolina Press, 1970, analyzed the response of international law jurists and wrote at page 235:

> International lawyers condemning the Tribunal often reached their conclusions because they subscribed to the doctrine of legal positivism. This judicial theory maintains that the sovereign state was the only subject of international law and that a nation has no obligations except those created by explicit agreements or clear compliance with a general custom. Legal positivism, therefore, looked askance on Nuremberg's indictment for crimes against peace and humanity derived from an alleged international common law, on the court's principle of individual responsibility, and on the judges' affirmation of a progressive, dynamic law of the nations which could not be emasculated by uncompromising demands for precedence.
>
> Adherents of the natural-law philosophy generally endorsed Nuremberg because the court supposedly vindicated their theory. This theory declared that law was derived from the ontological nature of things, that rights and duties were discovered by reason rather than made by the sovereign's will, and that consequently there existed immutable, inalienable human rights and a fun-

damental law above all human legislation.

Nuremberg embodied tenets of the natural-law philosophy, for the court affirmed individual accountability, claimed to be speaking for a rule of reason which judged the actions of all men and nations, and decided that, whatever the lack of statutory enactments, the laws of God and nature were enough to condemn the Nazis.

It is submitted to this Court that the Tribunal's actions taken at Nuremberg were just, necessary, and legally valid under international law and our own Constitution. Additional authority was provided when, on December 11, 1946, the General Assembly of the United Nations "affirmed" the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal. The Nuremberg ban on aggressive war has been repeatedly invoked by the United Nations. The prosecutions for crimes against humanity, including governmentally sanctioned euthanasia, are such a national expression of the American concept of the good, that to turn one's back on Nuremberg is tantamount to retreating in the face of the enemy.

It is submitted that Kevorkian's activities have continued because of this subtle shift that Dr. Alexander describes. The shift has been reinforced by the massive propaganda (major media coverage) which treats Kevorkian as a victim and angel of mercy, whose offense lies merely in being unregulated. The Ninth and Second Circuit Courts of Appeals majorities contribute to the institutionalization of Kevorkian's conduct, providing a gloss of legality and aim at striking down state laws, such as Michigan's statute prohibiting assisted suicide, which specifically forbids prescribing, dispensing, or administering medications or procedures if done with the intent to cause death. MCL 752.1027 (WEST) 1995, upheld by the Michigan Supreme Court in *People v. Kevorkian,* 447 Mich. 436 (1994); 527 N.W.2d 714, (1994).

It is submitted by this writer, that the veterans of World War II made possible this nation's ability to survive as the greatest and finest experiment in democratic republican representative self-government under the longest living constitution that has ever existed. Its continuance depends upon people who will live by and die for the principles of the American Constitution and the Declaration of Independence. This nation, acting through its Supreme Court, cannot approve of or allow its citizens to believe that they have a *protected* right to commit suicide. The American population has a right to life, liberty, and the pursuit of happiness, but should be encouraged by decisions of this Court to live that life contributing to the common good of their fellows, their posterity, and their country, thereby providing an example to all nations of the world and showing that the Judgment at Nuremberg was not a mere act of vengeance against losers. Almost a million Americans since 1776 have died fighting to uphold this nation and its Constitution, and they did not die fighting to protect a fundamental right to commit suicide.

Conclusion

Wherefore, the members of the Court are respectfully urged, on behalf of the world membership of the Schiller Institute, including Germans liberated from German Nazis, not to forget them and their struggle to hold up the spirit of our Revolution and our Constitution as guides in building nation states to exist in peace with the lives of their citizens enriched by our national example of not allowing Americans to kill Americans in Hitler's footsteps.

For the foregoing reasons of law and policy, the Schiller Institute urges this Court to reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,
Max Dean
Attorney for the Schiller Institute
Dated: November 6, 1996

Appendix

Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis.

Whereas the United Nations have from time to time made declaration of their intention that War Criminals shall be brought to justice;

And Whereas the Moscow Declaration of the 30th October 1943 on German atrocities in Occupied Europe stated that those German Officers and men and members of the Nazi Party who have been responsible for or have taken a consenting part in atrocities and crimes will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free Governments that will be created therein;

And Whereas this Declaration was stated to be without prejudice to the case of major criminals whose offenses have no particular geographic location and who will be punished by the joint decision of the Governments of the Allies;

Now Therefore the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics (hereinafter called "the Signatories") acting in the interests of all the United Nations and by their representatives duly authorized thereto have concluded this Agreement.

Article 1. There shall be established after consultation with the Control Council for Germany an International Mili-

Dr. Leo Alexander (right) examines evidence of Nazi crimes against humanity with Father Leo Michalowski, who had been tortured at Dachau.

tary Tribunal for the trial of war criminals whose offenses have no particular geographical location whether they be accused individually or in their capacity as members of organizations or groups or in both capacities.

Article 2. The constitution, jurisdiction and functions of the International Military Tribunal shall be those set out in the Charter annexed to this Agreement, which Charter shall form an integral part of this Agreement.

Article 3. Each of the Signatories shall take the necessary steps to make available for the investigation of the charges and trial the major war criminals detained by them who are to be tried by the International Military Tribunal. The Signatories shall also use their best endeavors to make available for investigation of the charges against and the trial before the International Military Tribunal such of the major war criminals as are not in the territories of any of the Signatories.

Article 4. Nothing in this Agreement shall prejudice the provisions established by the Moscow Declaration concerning the return of war criminals to the countries where they committed their crimes.

Article 5. Any Government of the United Nations may adhere to this Agreement by notice given through the diplomatic channel to the Government of the United Kingdom, who shall inform the other Signatory and adhering Governments of each such adherence.

Article 6. Nothing in this Agreement shall prejudice the jurisdiction or the powers of any national or occupation court established or to be established in any allied territory or in Germany for the trial of war criminals.

Article 7. This Agreement shall come into force on the day of signature and remain in force for the period of one year and shall continue thereafter, subject to the right of any Signatory to give, through the diplomatic channel, one month's notice of intention to terminate it. Such termination shall not prejudice any proceedings already taken or any findings already made in pursuance of this Agreement.

In Witness Whereof the Undersigned have signed the present Agreement.

Done in quadruplicate in London this 8th day of August 1945 each in English, French and Russian, and each text to have equal authenticity.

For the Government of the United States of America
Robert H. Jackson
For the Provisional Government of the French Republic
Robert Falco
For the Government of the United Kingdom of Great Britain and Northern Ireland
Jowitt
For the Government of Union of Soviet Socialist Republics
I.T. Nikitchenko (and) A.N. Trainin

Charter of the International Military Tribunal

I. Constitution of the Tribunal

Article 1. In pursuance of the Agreement signed on the 8th day of August 1945 by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics, there shall be established an International Military Tribunal (hereinafter called "the Tribunal") for the just and prompt trial and punishment of the major war criminals of the European Axis.

Article 2. The Tribunal shall consist of four members, each with an alternate. One member and one alternate shall be appointed by each of the Signatories. The alternates shall, so far as they are able, be present at all sessions of the Tribunal. In case of illness of any member of the Tribunal or his incapacity for some other reason to fulfill his functions, his alternate shall take his place.

Article 3. Neither the Tribunal, its members nor their alternates can be challenged by the prosecution, or by the Defendants or their Counsel. Each Signatory may replace its member of the Tribunal or his alternate for reasons of health or for other good reasons, except that no replacement may take place during a Trial, other than by an alternate.

Article 4.

(a) The presence of all four members of the Tribunal or the alternate for any absent member shall be necessary to constitute the quorum.

(b) The members of the Tribunal shall, before any trial begins, agree among themselves upon the selection from their number of a President, and the President shall hold office during that trial, or as may otherwise be agreed by a vote of not less than three members. The principle of rotation of presidency for successive trials is agreed. If, however, a session of the Tribunal takes place on the territory of one of the four Signatories, the representative of that Signatory on the Tribunal shall preside.

(c) Save as aforesaid the Tribunal shall take decisions by a majority vote and in case the votes are evenly divided, the vote of the President shall be decisive: provided always that convictions and sentences shall only be imposed by the affirmative votes of at least three members of the Tribunal.

Article 5. In case of need and depending on the number of the matters to be tried, other Tribunals may be set up; and the establishment, functions, and procedure of each Tribunal shall be identical and shall be governed by this Charter.

II. Jurisdiction and General Principles

Article 6. The Tribunal established by the Agreement referred to in Article I hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

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

(c) Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated.

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

Article 7. The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

Article 8. The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determine that justice so requires.

Article 9. At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization.

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

Article 10. In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individu-

als 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.

Article 11. Any person convicted by the Tribunal may be charged before a national, military or occupation court, referred to in Article 10 of this Charter, with a crime other than of membership in a criminal group or organization and such court may, after convicting him, impose upon him punishment independent of and additional to the punishment imposed by the Tribunal for participation in the criminal activities of such group or organization.

Article 12. The Tribunal shall have the right to take proceedings against a person charged with crimes set out in Article 6 of this Charter in his absence, if he has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence.

Article 13. The Tribunal shall draw up rules for its procedure. These rules shall not be inconsistent with the provisions of this Charter.

III. Committee for the Investigation and Prosecution of Major War Criminals

Article 14. Each Signatory shall appoint a Chief Prosecutor for the investigation of the charges against and the prosecution of major war criminals.

The Chief Prosecutors shall act as a committee for the following purposes:

(a) to agree upon a plan of the individual work of each of the Chief Prosecutors and his staff,

(b) to settle the final designation of major war criminals to be tried by the Tribunal,

(c) to approve the Indictment and the documents to be submitted therewith,

(d) to lodge the Indictment and the accompanying documents with the Tribunal.

(e) to draw up and to recommend to the Tribunal for its approval draft rules of procedure, contemplated by Article 13 of this Charter. The Tribunal shall have power to accept, with or without amendments, or to reject, the rules so recommended.

The Committee shall act in all the above matters by a majority vote and shall appoint a Chairman as may be convenient and in accordance with the principle of rotation provided that if there is an equal division of vote concerning the designation of a Defendant to be tried by the Tribunal, or the crimes with which he shall be charged, that proposal will be adopted which was made by the party which proposed that the particular Defendant be tried, or the particular charges be preferred against him.

Article 15. The Chief Prosecutors shall individually, and acting in collaboration with one another also undertake the following duties:

(a) investigation, collection and production before or at the Trial of all necessary evidence,

(b) the preparation of the Indictment for approval by the Committee in accordance with paragraph (c) of Article 14 hereof,

(c) the preliminary examination of all necessary witnesses and of the Defendants,

(d) to act as prosecutor at the Trial,

(e) to appoint representatives to carry out such duties as may be assigned to them,

(f) to undertake such other matters as may appear necessary to them for the purposes of the preparation for and conduct of the Trial.

It is understood that no witness or Defendant detained by any Signatory shall be taken out of the possession of that Signatory without its assent.

IV. Fair Trial for Defendants

Article 16. In order to ensure fair trial for the Defendants, the following procedure shall be followed:

(a) The Indictment shall include full particulars specifying in detail the charges against the Defendants. A copy of the Indictment and of all the documents lodged with the Indictment, translated into a language which he understands, shall be furnished to the Defendant at a reasonable time before the Trial.

(b) During any preliminary examination or trial of a Defendant he shall have the right to give any explanation relevant to the charges made against him.

(c) A preliminary examination of a defendant and his Trial shall be conducted in, or translated into, a language which the Defendant understands.

(d) A defendant shall have the right to conduct his own defense before the Tribunal or to have the assistance of Counsel.

(e) A defendant shall have the right through himself or through his counsel to present evidence at the Trial in support of his defense, and to cross-examine any witness called by the Prosecution.

V. Powers of the Tribunal and Conduct of the Trial

Article 17. The Tribunal shall have the power

(a) to summon witnesses to the Trial and to require their attendance and testimony and to put questions to them,

(b) to interrogate any Defendant,

(c) to require the production of documents and other evidentiary material,

(d) to administer oaths to witnesses,

(e) to appoint officers for the carrying out of any task designated by the Tribunal including the power to have evidence taken on commission.

Article 18. The Tribunal shall

(a) confine the Trial strictly to an expeditious hearing of the issues raised by the charges,

(b) take strict measures to prevent any action which will

cause unreasonable delay, and rule out irrelevant issues and statements of any kind whatsoever,

(c) deal summarily with any contumacy, imposing appropriate punishment, including exclusion of any Defendant or his Counsel from some or all further proceedings, but without prejudice to the determination of the charges.

Article 19. The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and nontechnical procedure, and shall admit any evidence which it deems to have probative value.

Article 20. The Tribunal may require to be informed of the nature of any evidence before it is offered so that it may rule upon the relevance thereof.

Article 21. The Tribunal shall not require proof of facts of common knowledge but shall take judicial notice thereof. It shall also take judicial notice of official governmental documents and reports of the United Nations, including the acts and documents of the committees set up in the various allied countries for the investigation of war crimes, and the records and findings of military or other Tribunals of any of the United Nations.

Article 22. The permanent seat of the Tribunal shall be in Berlin. The first meetings of the members of the Tribunal and of the Chief Prosecutors shall be held at Berlin in a place to be designated by the Control Council for Germany. The first trial shall be held at Nürnberg, and any subsequent trials shall be held at such places as the Tribunal may decide.

Article 23. One or more of the Chief Prosecutors may take part in the prosecution at each Trial. The function of any Chief Prosecutor may be discharged by him personally, or by any person or persons authorized by him. The function of Counsel for a Defendant may be discharged at the Defendant's request by any Counsel professionally qualified to conduct cases before the Courts of his own Country, or by any other person who may be specially authorized thereto by the Tribunal.

Article 24. The proceedings at the Trial shall take the following course:

(a) The Indictment shall be read in court.

(b) The Tribunal shall ask each Defendant whether he pleads "guilty" or "not guilty."

(c) The prosecution shall make an opening statement.

(d) The Tribunal shall ask the prosecution and the defense what evidence (if any) they wish to submit to the Tribunal, and the Tribunal shall rule upon the admissibility of any such evidence.

(e) The witnesses for the Prosecution shall be examined and after that the witnesses for the Defense. Thereafter such rebutting evidence as may be held by the Tribunal to be admissible shall be called by either the Prosecution or the Defense.

(f) The Tribunal may put any question to any witness and to any Defendant, at any time.

(g) The Prosecution and the Defense shall interrogate and may cross examine any witnesses and any Defendant who gives testimony.

(h) The Defense shall address the court.

(i) The Prosecution shall address the court.

(j) Each Defendant may make a statement to the Tribunal.

(k) The Tribunal shall deliver judgment and pronounce sentence.

Article 25. All official documents shall be produced, and all court proceedings conducted, in English, French, and Russian, and in the language of the Defendant. So much of the record and of the proceedings may also be translated into the language of any country in which the Tribunal is sitting, as the Tribunal considers desirable in the interests of justice and public opinion.

VI. Judgment and Sentence

Article 26. The judgment of the Tribunal as to the guilt or the innocence of any Defendant shall give the reasons on which it is based, and shall be final and not subject to review.

Article 27. The Tribunal shall have the right to impose upon a Defendant on conviction, death or such other punishment as shall be determined by it to be just.

Article 28. In addition to any punishment imposed by it, the Tribunal shall have the right to deprive the convicted person of any stolen property and order its delivery to the Control Council for Germany.

Article 29. In case of guilt, sentences shall be carried out in accordance with the orders of the Control Council for Germany, which may at any time reduce or otherwise alter the sentences, but may not increase the severity thereof. If the Control Council for Germany, after any Defendant has been convicted and sentenced, discovers fresh evidence which, in its opinion would found a fresh charge against him, the Council shall report accordingly to the Committee established under Article 14 hereof, for such action as they may consider proper, having regard to the interests of justice.

VII. Expenses

Article 30. The expenses of the Tribunal and of the Trials, shall be charged by the Signatories against the funds allotted for maintenance of the Control Council for Germany.

VIII. Evidence and Arguments on Important Aspects of the Case

A. Applicability of Control Council Law No. 10 to Offenses Against Germans During the War

a. Introduction

Under Count III of the indictment, "Crimes against Humanity," the prosecution alleged that the defendants had engaged in medical experiments "*upon German civilians* and nationals of other countries" and that the defendants had participated in executing "the so-called 'euthanasia program' of the German Reich in the course of which the defendants herein murdered hundreds of thousands of human beings,

including German civilians, as well as civilians of other nations." [Emphasis added.] Insofar as these offenses involved German nationals, the defense argued that international law was not applicable. The defense argued that under the Charter annexed to the London Agreement, crimes against humanity within the meaning of the Charter do not exist unless offenses are committed "in the execution of, or in connection with, any crime within the jurisdiction of the Tribunal." Although the analogous provision of Control Council Law No. 10 does not include the words of limitation "in the execution of, or in connection with any crime within the jurisdiction of the Tribunal," the defense argued that Control Council Law No. 10 was only "an implementation law" of the London Agreement and Charter, and hence could not increase the scope of the offenses defined by the London Charter. Pointing to the section of the judgment of the International Military Tribunal entitled "The law relating to war crimes and crimes against humanity,"[3] the defense noted that the IMT stated: "to constitute crimes against humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal,"[4] that is crimes against peace or war crimes. Although the indictment in the Medical Case did not allege that crimes were committed against German nationals before the outbreak of the war on 1 September 1939, the defense further argued that any offenses against German nationals committed after 1939 had not been shown to be "in execution of, or in connection with" crimes against peace and war crimes and hence were not cognizable as crimes within the jurisdiction of the Tribunal.

Extracts of the closing statement of the prosecution appear below on pages 910 to 915. A summation of the evidence on this question by the defense has been taken from the closing brief for defendant Karl Brandt. It appears below on pages 915-925.

b. Selection from the Argumentation of The Prosecution

Extracts from the Closing Statement of the Prosecution[5]

Law of the Case

Before proceeding to outline the prosecution's case, it may perhaps be desirable to anticipate several legal questions which will undoubtedly be raised with respect to war crimes and crimes against humanity, as defined in Article II of Control Council Law No. 10. Law No. 10 is of course the law of this case and its terms are conclusive upon every party to this proceeding. This tribunal is, we respectfully submit, bound by the definitions in Law No. 10, just as the International Military Tribunal was bound by the definitions in the London Charter. It was stated in the IMT judgment that:[6]

> "The jurisdiction of the Tribunal is defined in the Agreement and Charter, and the crimes coming under the jurisdiction of the Tribunal, for which there shall be individual responsibility, are set out in Article 6. The law of the Charter is decisive and binding upon the Tribunal. . . ."

In outlining briefly the prosecution's conception of some of the legal principles underlying war crimes and crimes against humanity, I shall, with the Tribunal's permission, adopt some of the language from the opening statement of the prosecution in the case against Friedrich Flick, et al., now pending before Tribunal IV. [See Vol. VI.] General Taylor there said:

"Law No. 10 is . . . a legislative enactment by the Control Council and is therefore part of the law of and within Germany. One of the infirmities of dictatorship is that, when it suffers irretrievable and final military disaster, it usually crumbles into nothing and leaves the victims of its tyranny leaderless amidst political chaos. The Third Reich had ruthlessly hunted down every man and woman in Germany who sought to express political ideas or develop political leadership outside of the bestial ideology of nazism. When the Third Reich collapsed, Germany tumbled into a political vacuum. The declaration by the Allied Powers of 5 June 1945 announced the 'assumption of supreme authority' in Germany 'for the maintenance of order' and 'for the administration of the country', and recited that—

> 'There is no central government authority in Germany capable of accepting responsibility for the maintenance of order, the administration of the country, and compliance with the requirements of the victorious powers.'

"Following this declaration, the Control board was constituted as the repository of centralized authority in Germany. Law No. 10 is an enactment of that body and is the law of Germany, although its substantive provisions derive from and embody the law of nations. The Nürnberg Military Tribunals are established under this authority of Law No. 10,[7] and they render judgment not only under international law as enacted in Law No. 10, but under the law of Germany as enacted in Law No. 10. The Tribunals, in short, enforce both international law and German law, and in interpreting and applying Law No. 10, they must view Law No. 10 not only as a declaration of international law, but as an enactment of the occupying powers for the governance of and administration of Justice in Germany. The enactment of Law No. 10 was an exercise of

3. Trial of the Major War Criminals, vol. I, pp. 253-255, Nuremberg, 1947.

4. *Ibid.*, p. 254.

5. Closing statement is recorded in mimeographed transcript, 14 July 1947, pp. 10718-10794.

6. Trial of the Major War Criminals, vol. I, p. 218, Nuremberg, 1947.

7. Control Council Law No. 10, Article III, par. 1(d) and 2, Military Government Ordinance No. 7, Article II.

legislative powers by the four countries to which the Third Reich surrendered, and, as was held by the International Military Tribunal:[8]

'. . . the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world.' "

War crimes are defined in Law No. 10 as atrocities or offenses in violation of the laws of customs of war. This definition is based primarily upon the Hague Convention of 1907 and the Geneva Convention of 1929, which declare the law of nations at those times with respect to land warfare, the treatment of prisoners of war, the rights and duties of a belligerent power when occupying territory of a hostile state and other matters. The laws and customs of war apply between belligerents, but not domestically or among allies. Crimes by German nationals against other German nationals are not war crimes, nor are acts by German nationals against Hungarians or Romanians. The war crimes charged in this indictment occurred after 1 September 1939, and it is therefore unnecessary to consider the somewhat narrow limitation of the scope of war crimes by the International Military Tribunal to the acts committed after the outbreak of war. One might argue that the occupations of Austria and the Sudetenland in 1938 and of Bohemia and Moravia in March 1939, were sufficiently similar to a state of belligerency to bring the laws of war into effect, but such questions are academic for purposes of this case.

In connection with the charge of crimes against humanity, it is also anticipated that an argument will be made by the defense to the effect that crimes committed by German nationals against other nationals cannot constitute crimes against humanity as defined by Article II of Control Council Law No. 10 and hence are not within the jurisdiction of this Tribunal. The evidence of the prosecution has proved that in substantially all of the experiments prisoners of war or civilians from German-occupied territories were used as subjects. This proof stands uncontradicted save by general statements of the defendants that they were told by Himmler or some unidentified person that the experimental subjects were all German criminals or that the subjects all spoke fluent German. Thus, for the most part the acts here in issue constitute war crimes and hence, at the same time crimes against humanity. Certainly there has been no proof whatever that an order was ever issued restricting the experimental subjects to German criminals as distinguished from non-German nationals. If, in this or that minor instance, the proof has not disclosed the precise nationality of the unfortunate victims or has even shown them to be Germans, we may rest assured that it was merely a chance occurrence.

Be that as it may, the prosecution does not wish to ignore a challenge to the jurisdiction of the Tribunal even though it is of minor importance to this case. One thing should be made clear at the outset: We are not here concerned with any question as to jurisdiction over crimes committed before 1 September 1939, whether against German nationals or otherwise. That subject has been mooted and is an issue in another case now on trial, but the crimes in this case all occurred after the war began.

Moreover, we are not concerned with the question whether crimes against humanity must have been committed "in execution of or in connection with any crimes within the jurisdiction of the Tribunal." The International Military Tribunal construed its Charter as requiring that crimes against humanity be committed in execution of, or in connection with, the crime of aggressive war. Whatever the merit of that holding, the language of the Charter of the International Military Tribunal which led to it is not included in the definition of crimes against humanity in Control Council Law No. 10. There can be no doubt that crimes against humanity as defined in Law No. 10 stand on an independent footing and constitute crimes *per se*. In any event, the crimes with which this case is concerned were in fact all "committed in execution of, or in connection with, the aggressive war." This is true not only of the medical experiments, but also of the Euthanasia Program, pursuant to which a large number of non-German nationals were killed. The judgment of the International Military Tribunal expressly so holds.[9]

Thus, it is clear that the only issue which is raised in this as to crimes against humanity is whether the Tribunal has jurisdiction over crimes committed by Germans against Germans. Does the definition of crimes against humanity in Control Council Law No. 10 comprehend crimes by Germans against Germans of the type with which this case is concerned? The provisions of Law No. 10 are binding upon the Tribunal as the law to be applied to the case.[10] The provisions of Section 1(c) of Article II are clear and unambiguous. Crimes against humanity are there defined as—

> "Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape or other inhumane acts committed against any *civilian population,* or persecutions on political, racial, or religious grounds whether or not in violation of the domestic laws of the country where perpetrated." [Emphasis supplied.]

The words "any civilian population" cannot possibly be construed to exclude German civilians. If Germans are deemed to be excluded, there is little or nothing left to give purpose to the concept of crimes against humanity. War crimes include all acts listed in the definition of crimes against humanity when committed against prisoners of war and the civilian population of occupied territory. The only remaining significant groups are Germans and nationals of the satellite coun-

8. Trial of the Major War Criminals, vol. I, p. 218, Nuremberg, 1947.

9. *Ibid.*, pp. 231, 247, 252, 254, 301.

10. *Ibid.*, pp. 174, 253.

tries, such as Hungary or Romania. It is one of the very purposes of the concept of crimes against humanity, not only as set forth in Law No. 10 but also as long recognized by international law, to reach the systematic commission of atrocities and offenses by a state against its own people. The concluding phrase of the definition of crimes against humanity, *which is in the alternative,* makes it quite clear that crimes by Germans against Germans are within the jurisdiction of this Tribunal. It reads "or persecutions on political, racial, or religious grounds *whether or not in violation of the domestic laws of the country where perpetrated.*" This reference to "domestic laws" can only mean discriminatory and oppressive legislation directed against a state's own people, as for example, the Nuremberg Laws against German Jews. [Emphasis supplied.]

The matter is put quite beyond doubt by Article III of Law No. 10 which authorizes each of the occupying powers to arrest persons suspected of having committed crimes defined in Law No. 10, and to bring them to trial "before an appropriate tribunal." Paragraph 1(d) of Article III further provides that—

> "Such Tribunal may, in the case of crimes committed by persons of German citizenship or nationality against other persons of German citizenship or nationality, or stateless persons by a German court, if authorized by the occupying authorities."

This constitutes an explicit recognition that acts committed by Germans against other Germans are punishable as crimes under Law No. 10 according to the definitions contained therein in the discretion of the occupying power. This has particular reference to crimes against humanity, since the application of crimes against peace and war crimes while possible, is almost entirely theoretical. If the occupying power fails to authorize German courts to try crimes committed by Germans against other Germans (and in the American zone of occupation no such authorization has been given), then these cases are tried only before non-German tribunals, such as these Military Tribunals.

What would be the effect of a holding that crimes by Germans against Germans under no circumstances be within the jurisdiction of the Tribunal? Is this Tribunal to ignore the proof that tens of thousands of Germans were exterminated pursuant to a secret decree, because a group of criminals in control of a police state thought them "useless eaters" and an unnecessary burden, or that German prisoners were murdered and mistreated by thousands in concentration camps, in part by medical experimentation? Military Tribunal II in the Milch case held that crimes against nationals of Hungary and Romania were crimes against humanity. There is certainly no reason in saying that there is jurisdiction over crimes by Germans against Hungarians but not against Germans.

The judgment of the International Military Tribunal shows a clear recognition of its jurisdiction over crimes by Germans against Germans. After reviewing a large number of inhumane acts in connection with war crimes and crimes against humanity, the Tribunal concluded by saying that—

> ". . . from the beginning of the war in 1939 war crimes were committed on a vast scale, which were also crimes against humanity, and insofar as the inhumane acts charged in the indictment, and committed after the beginning of the war, did not constitute war crimes, they were all committed in execution of, or in connection with the aggressive war, and therefore constituted crimes against humanity."[11]

Since war crimes are necessarily also crimes against humanity, the broader definition of the latter can only refer to crimes not covered by the former, namely, crimes against Germans and nationals of countries other than those occupied by Germany. Moreover, the prosecution in that case maintained that the inhumane treatment of Jews and political opponents *in Germany* before the war constituted crimes against humanity. The Tribunal said in this connection—

> "With regard to crimes against humanity there is no doubt whatever that political opponents were murdered in Germany before the war, and that many of them were kept in concentration camps in circumstances of great horror and cruelty. The policy of terror was certainly carried out on a vast scale, and in many cases was organized and systematic. The policy of persecution, repression, and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the government, was most ruthlessly carried out. The persecution of Jews during the same period is established beyond all doubt."[12]

The Tribunal was there speaking exclusively of crimes by Germans against Germans. It held that such acts were not crimes against humanity, as defined by the Charter, not because they were crimes against Germans, but because they were not committed in execution of, or in connection with, aggressive war. Indeed, the Tribunal went on to hold that the very same acts committed after the war began were crimes against humanity. No distinction was drawn between the murder of German Jews and Polish or Russian Jews. And, moreover, no distinction was drawn between criminal medical experimentation on German and non-German concentration camp inmates or the murder of German and non-German civilians under the Euthanasia program. The Tribunal held them all to be war crimes and/or crimes against humanity.

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11. *Ibid.*, pp. 254, 255.
12. *Ibid.*