XI. JUDGMENT

Official transcript of the American Military Tribunal [Tribunal V] in the matter of the *United States of America*, vs. *Wilhelm von Leeb, et al.*, defendants, sitting at Nuernberg, Germany, on 27 October 1948, Justice John C. Young, presiding.

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PRESIDING JUDGE YOUNG: The Tribunal will now proceed to read the judgment.

This Tribunal is composed of Presiding Judge John C. Young (formerly Chief Justice of the Supreme Court of Colorado), and Associate Judges Justin W. Harding (formerly U. S. District Judge First Division, District of Alaska) and Winfield B. Hale (Justice Tennessee Court of Appeals, on leave of absence).

It was created under and by virtue of Military Government Ordinance No. 7, effective 18 October 1946, adopted pursuant to Control Council Law No. 10, enacted 20 December 1945, in order to give effect to the London Agreement of 8 August 1945, and the Charter issued pursuant thereto for the prosecution of war criminals.

In Nuernberg, on 28 November 1947, in accordance with Ordinance No. 7 (Article III(*a*)) supra, an indictment was lodged against the defendants by Telford Taylor, Brigadier General, U.S.A., Chief of Counsel for War Crimes, acting in behalf of the United States of America. A copy of the indictment in the German language was served upon each defendant at least thirty days prior to arraignment on 30 December 1947, at which time each, in the presence of counsel of his own selection, entered a plea of "not guilty."

The indictment named as defendants:

Generalfeldmarschall (General of the Army) Wilhelm von Leeb, Generalfeldmarschall (General of the Army) Hugo Sperrle, Generalfeldmarschall (General of the Army) Georg Karl Friedrich-Wilhelm von Kuechler, Generaloberst (General) Johannes Blaskowitz, Generaloberst (General) Hermann Hoth, Generaloberst (General) Hans Reinhardt, Generaloberst (General) Hans von Salmuth, Generaloberst (General) Karl Hollidt, Generaladmiral (Admiral) Otto Schniewind, General der Infanterie (Lieutenant General Infantry) Karl von Roques, General der Infanterie (Lieutenant General, Infantry) Hermann Reinecke, General der Artillerie (Lieutenant General, Artillery) Walter Warlimont, General der Infanterie (Lieutenant General, Infantry) Otto Woehler, and Generaloberstabsrichter (Lieutenant General, Judge Advocate) Rudolf Lehmann.

The defendant General Johannes Blaskowitz committed suicide in prison on 5 February 1948, and thereby the case against him was terminated.

THE INDICTMENT

The indictment is in four counts charging (1) crimes against peace; (2) war crimes; (3) crimes against humanity; and (4) a common plan or conspiracy to commit the crimes charged in counts one, two, and three.

Count One—Crimes against Peace—The first count of the indictment, paragraphs 1 and 2 is as follows:

> "1. All of the defendants, with divers other persons, including the co-participants listed in Appendix A, during a period of years preceding 8 May 1945, committed crimes against peace as defined in Article II of Control Council Law No. 10, in that they participated in the initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to the planning, preparation, initiation, and waging of wars of aggression, and wars in violation of international treaties, agreements, and assurances.
>
> "2. The defendants hold high military positions in Germany and committed crimes against peace in that they were principals in, accessories to, ordered, abetted, took a consenting part in, were connected with plans and enterprises involving, and were members of organizations and groups connected with, the commission of crimes against peace."

Then follow paragraphs 3 to 44, inclusive, covering plans of aggressions, and wars and invasions against Austria, Czechoslovakia, Poland, Great Britain, France, Denmark, Norway, Belgium, The Netherlands, Luxembourg, Yugoslavia, Greece, the U.S.S.R., and the United States of America, and undertook to show the unfolding of these plans of aggression and to particularize the participation of the defendants in the formulation, distribution, and execution thereof.

Count Two—War Crimes—Count two of the indictment, paragraph 45, is as follows:

> "45. Between September 1939, and May 1945, all of the defendants herein, with divers other persons including the co-participants listed in Appendix A, committed war crimes and crimes against humanity, as defined in Article II of Control Council Law No. 10, in that they participated in the commission of atrocities and offenses against prisoners of war and members of armed forces of nations then at war with the Third Reich

or under the belligerent control of or military occupation by Germany, including but not limited to murder, ill-treatment, denial of status and rights, refusal of quarter, employment under inhumane conditions and at prohibited labor of prisoners of war and members of military forces, and other inhumane acts and violations of the laws and customs of war. The defendants committed war crimes and crimes against humanity in that they were principals in, accessories to, ordered, abetted, took a consenting part in, were connected with plans and enterprises involving, and were members of organizations and groups connected with, the commission of war crimes and crimes against humanity."

Then follows paragraph 46, which in general terms sets out the unlawful acts as follows:

"46. Unlawful orders initiated, drafted, distributed, and executed by the defendants directed that certain enemy troops be refused quarter and be denied the status and rights of prisoners of war, and that certain captured members of the military forces of nations at war with Germany be summarily executed. Such orders further directed that certain members of enemy armed forces be designated and treated by troops of the German armed forces, subordinate to the defendants, either as, 'partisans, Communists, bandits, terrorists' or by other terms denying them the status and rights of prisoners of war. Prisoners of war were compelled to work in war operations and in work having a direct relation to war operations, including the manufacture, transport, and loading of arms and munitions, and the building of fortifications. This work was ordered within the combat zone as well as in rear areas. Pursuant to a 'total war' theory and as part of the program to exploit all non-German peoples, prisoners of war were denied rights to which they were entitled under conventions and the laws and customs of war. Soldiers were branded, denied adequate food, shelter, clothing and care, subjected to all types of cruelties and unlawful reprisals, tortured, and murdered. Special screening and extermination units, such as Einsatz groups of the Security Police and Sicherheitsdienst (commonly known as the 'SD'), operating with the support and under the jurisdiction of the Wehrmacht, selected, and killed prisoners of war for religious, political, and racial reasons. Many recaptured prisoners were ordered executed. The crimes described in paragraphs 45 and 46 included, but were not limited to, those set forth hereafter in this count."

This is followed by paragraphs 47 to 58, inclusive, which particularize certain unlawful acts, such as the issuance and execution of the, "Commissar Order," the "Commando Order," etc., and the participation of the defendants in the formulation, distribution, and execution of these unlawful plans.

Count Three—Paragraph 59 of the indictment, is as follows:

"59. Between September 1939, and May 1945, all of the defendants herein, with divers other persons including the coparticipants listed in Appendix A, committed war crimes and crimes against humanity as defined in Article II of Control Council Law No. 10, in that they participated in atrocities and offenses, including murder, extermination, ill-treatment, torture, conscription to forced labor, deportation to slave labor or for other purposes, imprisonment without cause, killing of hostages, persecutions on political, racial and religious grounds, plunder of public and private property, wanton destruction of cities, towns and villages, devastation not justified by military necessity, and other inhumane and criminal acts against German nationals and members of the civilian populations of countries and territories under the belligerent occupation of, or otherwise controlled by Germany. The defendants committed war crimes and crimes against humanity, in that they were principals in, accessories to, ordered, abetted, took a consenting part in, were connected with plans and enterprises involving, and were members of organizations and groups which were connected with, the commission of war crimes and crimes against humanity."

The following paragraphs 60 to 82 set forth generally and particularly the unlawful acts, such as enslavement of the population, plunder of public and private property, murder, etc., and participation of the defendants in the formulation, distribution and execution of these unlawful plans.

Count Four—Paragraphs 83 and 84, are as follows:

"83. All the defendants, with divers other persons, during a period of years preceding 8 May 1945, participated as leaders, organizers, instigators, and accomplices in the formulation and execution of a common plan and conspiracy to commit, and which involved the commission of crimes against peace (including the acts constituting war crimes and crimes against humanity, which were committed as an integral part of such crimes against peace) as defined in Control Council Law Number 10, and are individually responsible for their own acts and for all acts committed by any persons in the execution of such common plan or conspiracy.

"84. The acts and conduct of the defendants set forth in counts one, two and three of this indictment formed a part of said common plan or conspiracy and all the allegations made in said counts are incorporated in this count."

The trial began 5 February 1948, and the prosecution's case was substantially completed on 5 March at which time a recess was taken until 12 April 1948 to enable counsel to prepare their defense, then resumed and completed on 13 August 1948. Each defendant has been represented by German lawyers of his own selection who have conducted the defense with great ability, energy, and zeal.

A huge mass of evidence has been submitted in behalf of the prosecution and defense. The trial was conducted in two languages—English and German—and all documents submitted were duly translated and given counsel. The defense was also furnished with photostat copies of the original captured documents.

The prosecution's case, including those introduced on cross-examination and rebuttal, was made in part by the introduction of 1,778 documents, the vast majority of which were taken from German records and documents captured by the Allied Armies. The defendants complained that the context of many of these documents was necessary to their proper understanding and evaluation and that other documents would tend to explain or refute any inference of criminality that might be drawn from the documents relied upon by the prosecution. The defendants requested that they be supplied with additional material for their defense specified by them in their application. To this end the Tribunal ordered the Secretary General to procure such thereof as it was possible to procure, and as a result of this order there were procured from Washington 1,503 document folders which filled 37 footlockers. These the defense council and the defendants were permitted to examine and they have used such thereof as they deemed necessary in the presentation of their case either as new evidence or to supplement and explain the documents introduced by the prosecution.

The material used for such purpose by the defendants was taken from 259 different document folders and comprised 2,058 pages which were photostated and used as exhibits in the case. Such material was received at different times. The first shipment from Washington was received on 10 April, and the last on 27 May 1948. The case was not closed for the taking of testimony until 6 August 1948. In addition the defense counsel and the defendants were allowed access to all of the captured records and documents not yet sent over to the United States and still

stored in the Court Archives in Nuernberg for the purpose of using such portions thereof as they might deem material. The defendants introduced a total of 2,130 documents and affidavits as exhibits in the presentation of their defense. The transcript of the record contains 10,000 pages.

Insofar as lay within its power, the Tribunal directed and aided in procuring all the witnesses that defense counsel requested, that their testimony might be heard in open court.

One hundred sixty-five witnesses were ordered summoned for the defendants. One hundred five of those summoned it was possible to procure and they were brought to Nuernberg and were available for the defendants to call to the witness stand. Of these only 80 in fact were called by the defendants. That so many of those requested were in fact procured is a tribute to the efficiency and to the cooperation that the administrative officers of the courthouse have rendered in this trial.

At many times during the progress of the case, counsel for the defendants insisted there were many and damaging errors made in the translations of the many documents offered in evidence by the prosecution. The Tribunal repeatedly advised counsel that if any errors had been made and were called to the Tribunal's attention, all efforts would be made to obtain a correct translation.

In the closing statement Dr. Surholt, counsel for the defendant General Reinecke, said:

> "The documents must be properly translated, that is, the American translation must convey to the Tribunal the sense of the German text correctly and without omissions. This cannot be said of any of the document books. The English text in the hands of the Tribunal contains such a vast number of mistakes that to correct even the essential points is a task the defense is unable to cope with.
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> "The reviewing of the document books arranged by the defense went as far as document books 1–9Q, which is about half of the material. The number of mistakes so far established amounts to 1,936."

And then he gave a few examples of the supposed erroneous translations.

Before the trial ended, the Tribunal again pointed out to counsel the advisability of submitting lists of the translations questioned. Dr. Frohwein, representing the defendant General Reinhardt, submitted a list consisting of thirty-one documents in which there were claimed errors of translation. This list was handed over to the prosecution which agreed to all of the contentions with the

exception of three which were left to the decision of the Tribunal. Dr. Mueller-Torgow, for the defendant Hoth, submitted to the Tribunal a list of eighteen documents containing erroneous translations. All were agreed to by the prosecution.

Dr. Leverkuehn, representing the defendant Warlimont, submitted one item which was agreed to by the prosecution. Dr. von Keller, representing the defendant Dr. Lehmann, submitted a list consisting of twelve documents containing alleged errors, all of which were corrected by agreement with the prosecution.

These were the only corrections submitted by any of the counsel and many were of minor, if any, importance. For instance, we notice in one spot there were deleted the words: "These prisoners were shot on the spot after short interrogation." And there was substituted: "These prisoners are shot on the scene of action after short interrogation". At other points, the word "partisan" is deleted and the word "franc-tireur" substituted. In other places, the word "officials" was deleted and the word "functionaries" substituted in lieu thereof. Other criticisms were of more importance but this shows that many were more captious than material.

Such errors and ambiguities as were material and were not cleared up by agreement of counsel were noted and in accordance with proper rules of criminal procedure, any doubts and ambiguities are resolved in favor of the defendants.

A. Control Council Law No. 10.—The preamble to Control Council Law No. 10 reads as follows:

> "In order to give effect to the terms of the Moscow Declaration of the 30 October 1943, and the London Agreement of 8 August 1945, and the Charter issued * * *."

I will repeat two lines.

> "In order to give effect to the terms of the Moscow Declaration of 30 October 1943 and the London Agreement of 8 August 1945, and the Charter issued pursuant thereto and in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal, the Control Council enacts as folows:

"Article I

> "The Moscow Declaration of 30 October 1943 'Concerning Responsibility of Hitlerites for Committed Atrocities' and the London Agreement of 8 August 1945. 'Concerning Prosecution and Punishment of Major War Criminals of the European Axis' are made integral parts of this Law. Adherence to the

provisions of the London Agreement by any of the United Nations, as provided for in Article V of that Agreement, shall not entitle such Nation to participate or interfere in the operation of this Law within the Control Council area of authority in Germany.

"Article II

"1. Each of the following acts is recognized as a crime:

"(*a*) *Crimes against Peace.* Initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation or waging 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.* Atrocities or offences against persons or property constituting violations of the laws or customs of war, including but not limited to, murder, ill treatment or deportation to slave labour or for any other purpose, of civilian population from 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.* Atrocities and offences, 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.

"(*d*) Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal.

"2. Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (*a*) a principal or (*b*) was an accessory to the commission of any such crime or ordered or abetted the same or (*c*) took a consenting part therein or (*d*) was connected with plans or enterprises involving its commission or (*e*) was a member of any organization or group connected with the commission of any such crime or (*f*) with reference to paragraph 1 (*a*), if he held a high political, civil or military (including General Staff) position in Germany or in one of its allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country."

In the judgment rendered by the International Military Tribunal it is said:*

"The jurisdiction of the Tribunal is defined in the Agreement and Charter, and the crimes coming within 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.

"The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world. The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution of international law.

"The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law. With regard to the constitution of the Court, all that the defendants are entitled to ask is to receive a fair trial on the facts and law.

"The Charter makes the planning or waging of a war of aggression or a war in violation of international treaties a crime; and it is therefore not strictly necessary to consider whether and to what extent aggressive war was a crime before the execution of the London Agreement. But in view of the great importance of the question of law involved, the Tribunal has heard full argument from the prosecution and the defense, and will express its view on the matter.

"It was urged on behalf of the defendants that a fundamental principle of all law—international and domestic—is that there can be no punishment of crime without a preexisting law. '*Nullum crimen sine lege, nulla poena sine lege.*' It was submitted that *ex post facto* punishment is abhorrent to the law of all civilized nations, that no sovereign power had made aggressive war a crime at the time that the alleged criminal acts were committed, that no statute had defined aggressive war, that no penalty had been fixed for its commission, and no court had been created to try and punish offenders.

* Trial of the Major War Criminals, *op. cit. supra*, vol. I, pp. 218–224.

"In the first place, it is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished. Occupying the positions they did in the government of Germany, the defendants or at least some of them must have known of the treaties signed by Germany, outlawing recourse to war for the settlement of international disputes; they must have known that they were acting in defiance of all international law when in complete deliberation they carried out their designs of invasion and aggression. On this view of the case alone, it would appear that the maxim has no application to the present facts.

"This view is strongly reinforced by a consideration of the state of international law in 1939, so far as aggressive war is concerned. The General Treaty for the Renunciation of War of 27 August 1928, more generally known as the Pact of Paris or the Kellogg-Briand Pact, was binding on 63 nations, including Germany, Italy, and Japan at the outbreak of war in 1939. In the preamble, the signatories declared that they were:

" 'Deeply sensible of their solemn duty to promote the welfare of mankind; persuaded that the time has come when a frank renunciation of war as an instrument of national policy should be made to the end, that the peaceful and friendly relations now existing between their peoples should be perpetuated; * * * all changes in their relations with one another should be sought only by pacific means * * * thus uniting civilized nations of the world in a common renunciation of war as an instrument of their national policy * * *.' "

The first two articles are as follows:

" 'Article I. The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations to one another.

" 'Article II. The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or whatever origin they may be, which may arise among them, shall never be sought except by pacific means.'

"The question is what was the legal effect of this Pact? The nations who signed the Pact or adhered to it unconditionally

condemned recourse to war for the future as an instrument of policy, and expressly renounced it. After the signing of the Pact, any nation resorting to war as an instrument of national policy breaks the Pact. In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing. War for the solution of international controversies undertaken as an instrument of national policy certainly includes a war of aggression, and such a war is therefore outlawed by the Pact. As Mr. Henry L. Stimson, then Secretary of State of the United States, said in 1932:

" 'War between nations was renounced by the signatories of the Kellogg-Briand Treaty. This means that it has become throughout practically the entire world * * * an illegal thing. Hereafter, when nations engage in armed conflict, either one or both of them must be termed violators of this general treaty law * * *. We denounce them as law breakers.'

"But it is argued that the Pact does not expressly enact that such wars are crimes, or set up courts to try those who make such wars. To that extent the same is true with regard to the laws of war contained in the Hague Convention. The Hague Convention of 1907, prohibited resort to certain methods of waging war. These included the inhumane treatment of prisoners, the employment of poisoned weapons, the improper use of flags of truce, and similar matters. Many of these prohibitions had been enforced long before the date of the Convention; but since 1907, they have certainly been crimes punishable as offenses against the laws of war; yet the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders. For many years past, however, military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this convention. In the opinion of the Tribunal those who wage aggressive war are doing that which is equally illegal, and of much greater moment than a breach of one of the rules of the Hague Convention. In interpreting the words of the Pact, it must be remembered that international law is not the product of an international legislature, and that such international agreements as the Pact of Paris have to deal with general principles of law and not with administrative matters of procedure. The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and

from the general principles of justice applied by jurists and practiced by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing.

"The view which the Tribunal takes of the true interpretation of the Pact is supported by the international history which preceded it. In the year 1923, the draft of a Treaty of Mutual Assistance was sponsored by the League of Nations. In Article I the Treaty declared 'that aggressive war is an international crime', and that the parties would 'undertake that no one of them will be guilty of its commission'. The draft treaty was submitted to 29 states, about half of whom were in favor of accepting the text. The principle objection appeared to be in the difficulty of defining the acts which would constitute 'aggression', rather than any doubt as to the criminality of aggressive war. The preamble to the League of Nations 1924, Protocol for the Pacific Settlement of International Disputes ('Geneva Protocol'), after 'recognizing the solidarity of the members of the international community', declared that 'a war of aggression constitutes a violation of this solidarity and is an international crime.' It went on to declare that the contracting parties were 'desirous of facilitating the complete application of the system provided for in the Covenant of the League of Nations for the pacific settlement of disputes between the states and of ensuring the repression of international crimes.' The Protocol was recommended to the members of the League of Nations by a unanimous resolution in the assembly of the 48 members of the League. These members included Italy and Japan, but Germany was not then a member of the League.

"Although the Protocol was never ratified, it was signed by the leading statesmen of the world, representing the vast majority of the civilized states and peoples, and may be regarded as strong evidence of the intention to brand aggressive war as an international crime.

"At the meeting of the Assembly of the League of Nations on 24 September 1927, all the delegations then present (including the German, the Italian, and the Japanese), unanimously adopted a declaration concerning wars of aggression. The preamble to the declaration stated:

" 'The Assembly:

" 'Recognizing the solidarity which unites the community of nations;

Being inspired by a firm desire for the maintenance of general peace;

Being convinced that a war of aggression can never serve as a means of settling international disputes, and is in consequence an international crime * * *.'

"The unanimous resolution of 18 February 1928, of 21 American republics at the Sixth (Havana) Pan-American Conference, declared that, 'war of aggression constitutes an international crime against the human species'.

"All these expressions of opinion, and others that could be cited, so solemnly made, reinforce the construction which the Tribunal placed upon the Pact of Paris, that resort to a war of aggression is not merely illegal, but is criminal. The prohibition of aggressive war demanded by the conscience of the world, finds its expression in the series of pacts and treaties to which the Tribunal has just referred.

"It is also important to remember that Article 227 of the Treaty of Versailles provided for the constitution of a special tribunal, composed of representatives of five of the Allied and Associated Powers which had been belligerents in the First World War opposed to Germany, to try the former German Emperor, 'for a supreme offense against international morality and the sanctity of treaties.' The purpose of this trial was expressed to be, 'to vindicate the solemn obligations of international undertakings, and the validity of international morality'. In Article 228 of the Treaty, the German Government expressly recognized the right of the Allied Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war.

"It was submitted that international law is concerned with the actions of sovereign states, and provides no punishment for individuals; and further, that where the act in question is an act of state, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the state. In the opinion of the Tribunal, both these submissions must be rejected. That international law imposes duties and liabilities upon individuals as well as upon States has long been recognized. In the recent case of *ex parte* Quirin (1942 317 U.S. 1), before the Supreme Court of the United States, persons were charged during the war with landing in the United States for purposes of spying and sabotage. The late Chief Justice Stone, speaking for the Court, said:

" 'From the very beginning of its history this Court has applied the law of war as including that part of the law of nations

which prescribes for the conduct of war, the status, rights, and duties of enemy nations, as well as enemy individuals.'

"He went on to give a list of cases tried by the courts, where individual offenders were charged with offenses against the laws of nations, and particularly the laws of war. Many other authorities could be cited, but enough has been said to show that individuals can be punished for violations of international law. Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.

"The provisions of Article 228 of the Treaty of Versailles already referred to illustrate and enforce this view of individual responsibility.

"The principle of international law, which, under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings. Article 7 of the Charter expressly declares:

" '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.'

"On the other hand the very essence of the Charter is that individuals have international duties which transcend the national obligations of the obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under international law.

"It was also submitted on behalf of most of these defendants that in doing what they did they were acting under the orders of Hitler, and therefore cannot be held responsible for the acts committed by them in carrying out these orders. The Charter specifically provides in 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.'

"The provisions of this article are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality, though, as the

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Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible."

Here ends the quotation from the "Trial of the Major War Criminals".

This reasoning applies also to Control Council Law No. 10. The same authority creating the London Agreement created this Control Council law. As was said by Tribunal III in the Justice Case:[1]

"It can scarcely be argued that a court which owes its existence and jurisdiction solely to the provisions of a given statute could assume to exercise that jurisdiction and then, in the exercise thereof, declare invalid the act to which it owes its existence. Except as an aid to construction we cannot and need not go behind the statute."

That is the end of the quotation.

The Charter, supplemented by Control Council Law No. 10, is not an arbitrary exercise of power, but "it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law." (*Judgment, IMT, supra.*) As a matter of interest to students we might point out that this general principle is sustained by the following extract from Grotius, written in 1625:

"It is proper also to observe that Kings and those who are possessed of sovereign power have a right to exact punishment not only for injuries affecting immediately themselves or their own subjects, but for gross violations of the law of nature and of nations, done to other states and subjects."[2]

We also refer to an article from the Manchester Guardian of 28 September 1946, containing a description of the trial of Sir Peter of Hagenbach held at Breisach in 1474. The charges against him were analogous to "Crimes against Humanity" in modern concept. He was convicted.

However, these citations are of academic interest only, merely given to show the soundness of the judgment of the IMT. We think it may be said the basic law before mentioned simply declared, developed, and implemented international common law.

[1] United States *vs.* Josef Altstoetter, et al., Case No. 3, Vol. III.

[2] Grotius, The Rights of War and Peace, translated from the Latin by A. C. Campbell, A.M. (1901), M. Walter Dume, publisher, Washington and London, chap. XX, p. 247.

By so construing it, there is eliminated the assault made upon it as being an *ex post facto* enactment.

Our view is fortified by the judgment rendered in Case No. 7, United States *vs.* Wilhelm List, et al., where it is said (*Tr. p. 10434*):

> "We conclude that *preexisting international law* has declared the acts constituting the crimes herein charged and included in Control Council Law No. 10 to be unlawful, both under the conventional law and the practices and usages of land warfare that had ripened into recognized customs which belligerents were bound to obey. Anything in excess of existing international law therein contained is a utilization of power and not of law. It is true, of course, that courts authorized to hear such cases were not established nor the penalties to be imposed for the violations set forth. But this is not fatal to their validity. The acts prohibited are without deterrent effect unless they are punishable as crimes." [Emphasis supplied]

Then there is quoted the language of the IMT heretofore[1] set out in this opinion. (*Tr. p. 10,015.*)

Many of the questions in the IMT case are presented in this case. The same unlawful orders, acts, and practices are involved; only the defendants are different. Hitler was the very center of vast expanding concentric rings of influence that touched every person in Germany. The defendants in this case are only one or two steps removed from Goering, Keitel, Jodl, Doenitz, and Raeder, defendants in the IMT case. Much of the evidence introduced in this case was introduced in the IMT hearing. Consequently, the great importance of the judgment of that trial as applying to the issues of law involved in this case, is readily apparent.

The IMT judgment contains an elaborate account of Hitler's rise to power, the plans and acts of aggression, and the barbarities and crimes perpetrated upon the armed forces and civilians of the countries with which Germany was at war. In view of the fact that these general findings are supported by the record in the instant case, we shall make further liberal quotations from and references to it in this judgment.

At this point Judge Harding will continue with the reading of the judgment.

JUDGE HARDING: B. International treaties.—In the judgment of the International Military Tribunal it is said:[2]

[1] See pp. 472–473.

[2] Trial of the Major War Criminals, *op. cit. supra*, vol. I, pp. 216–18.

"The Charter defines as a crime the planning or waging of war that is a war of aggression or a war in violation of international treaties. The Tribunal has decided that certain of the defendants planned and waged aggressive wars against 12 nations, and were therefore guilty of this series of crimes. This makes it unnecessary to discuss the subject in further detail, or even to consider at any length the extent to which these aggressive wars were also, 'wars in violation of international treaties, agreements, or assurances'.

"These treaties are set out in Appendix C of the indictment. Those of principal importance are the following.

"Hague Conventions

"In the 1899, Convention the signatory powers agreed: 'before an appeal to arms * * * to have recourse, as far as circumstances allow, to the good offices or mediation of one or more friendly powers.' A similar clause was inserted in the Convention for Pacific Settlement of International Disputes of 1907. In the accompanying Convention Relative to Opening of Hostilities, Article I contains this far more specific language: 'The Contracting Powers recognize that hostilities between them must not commence without a previous and explicit warning, in the form of either a declaration of war, giving reasons, or an ultimatum with a conditional declaration of war.' Germany was a party to these conventions.

"Versailles Treaty

"Breaches of certain provisions of the Versailles Treaty are also relied on by the prosecution—Not to fortify the left bank of the Rhine (Articles 42–44); to, 'respect strictly the independence of Austria', (Article 80); renunciation of any rights in Memel (Article 99) and the Free City of Danzig (Article 100); the recognition of the independence of the Czechoslovak State; and the military, naval, and air clauses against German rearmament found in part V. There is no doubt that action was taken by the German Government contrary to all these provisions, the details of which are set out in Appendix C. With regard to the Treaty of Versailles, the matters relied on are:

"1. The violation of Articles 42 to 44 in respect of the demilitarized zone of the Rhineland;

"2. The annexation of Austria on 13 March 1938, in violation of Article 80;

"3. The incorporation of the district of Memel on 22 March 1939, in violation of Article 99;

"4. The incorporation of the Free City of Danzig on 1 September 1939, in violation of Article 100;

"5. The incorporation of the provinces of Bohemia and Moravia on 16 March 1939, in violation of Article 81;

"6. The repudiation of the military, naval, and air clauses of the Treaty, in or about March of 1935.

"On 21 May 1935, Germany announced that, while renouncing the disarmament clauses of the Treaty, she would still respect the territorial limitations, and would comply with the Locarno Pact. (With regard to the first five breaches alleged, therefore, the Tribunal finds the allegation proved.)

"Treaties of Mutual Guarantee, Arbitration, and Non-Aggression

"It is unnecessary to discuss in any detail the various treaties entered into by Germany with other powers. Treaties of mutual guarantee were signed by Germany at Locarno in 1925, with Belgium, France, Great Britain, and Italy, assuring the maintenance of the territorial *status quo*. Arbitration treaties were also executed by Germany at Locarno with Czechoslovakia, Belgium, and Poland.

"Article I of the latter treaty is typical, providing: 'All disputes of every kind between Germany and Poland * * * which it may not be possible to settle amicably by the normal methods of diplomacy, shall be submitted for decision to an arbitral tribunal * * *.'

"Conventions of Arbitration and Conciliation were entered into between Germany, The Netherlands, and Denmark in 1926; and between Germany and Luxembourg in 1929. Non-aggression treaties were executed by Germany with Denmark and Russia in 1939.

"Kellogg-Briand Pact

"The Pact of Paris was signed on 27 August 1928, by Germany, the United States, Belgium, France, Great Britain, Italy, Japan, Poland, and other countries; and subsequently by other powers. The Tribunal has made full reference to the nature of this Pact and its legal effect in another part of this judgment. It is therefore not necessary to discuss the matter further here, save to state that in the opinion of the Tribunal this Pact was violated by Germany in all the cases of aggressive war charged in the indictment. It is to be noted that on 26 January 1934, Germany signed a Declaration for the Maintenance of Permanent Peace with Poland, which was explicitly based on the Pact of Paris, and in which the use of force was outlawed for a period of 10 years.

"The Tribunal does not find it necessary to consider any of the other treaties referred to in the Appendix or the repeated agreements and assurances of her peaceful intentions entered into by Germany."

OBJECTIONS DURING THE TRIAL

The objection has been raised that this Tribunal is not a proper forum in which to try the defendants for the crimes charged. It is said that they were prisoners of war and that they are subject to trial only by a general court martial. We find no merit in such contention.

There is no doubt of the criminality of the acts with which the defendants are charged. They are based on violations of international law well recognized and existing at the time of their commission. True, no court had been set up for the trial of violations of international law. A state having enacted a criminal law may set up one or any number of courts and vest each with jurisdiction to try an offender against its internal laws. Even after the crime is charged to have been committed we know of no principle of justice that would give the defendant a vested right to a trial only in an existing forum. In the exercise of its sovereignty the state has the right to set up a tribunal at any time it sees fit and confer jurisdiction on it to try violators of its criminal laws. The only obligation a sovereign state owes to the violator of one of its laws is to give him a fair trial in a forum where he may have counsel to represent him—where he may produce witnesses in his behalf, and where he may speak in his own defense. Similarly, a defendant charged with a violation of international law is in no sense done an injustice if he is accorded the same rights and privileges. The defendants in this case have been accorded those rights and privileges.

As regards the contention that the defendants are prisoners of war and that the Geneva Convention, Article 63, requires that a prisoner of war be tried by a general court martial, we call attention to the fact that this provision referred to is found in an international agreement, that was entered into, and to which both the United States and Germany were signatories, to protect prisoners of war after they acquire such status and not to extend to them any special privileges or prerogatives with respect to crimes they may have committed before acquiring a prisoner of war status. Such is the reasoning of the Yamashita Case (*327 U.S. 1;66 Sup. Ct. 348*). We think the reasoning sound.

Article 63 of the Geneva Convention provides:

"Sentence may be pronounced against a prisoner of war only

by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining power."

Therefore, say defense counsel, the defendants must be tried by a general court martial since the defendants were prisoners of war taken by the United States, and members in the armed forces of the United States committing crimes are tryable by court martial. But the trial of men in the military forces of the United States by court martial can be only for crimes committed after the accused acquires and during the time he possesses the status of a member of the armed forces of the United States. One who committed murder and thereby violated the law of the state before he was inducted into the military service clearly could not be tried for that crime by a court martial for violating articles of war which did not apply to him when he committed the murder.

Nor do we think it necessary that defendants be discharged as prisoners of war before being brought to trial. Certainly if a man is arrested for violating a municipal traffic ordinance which subjects him only to a civil penalty in a magistrate's court and while he is in custody it is discovered that the day before he committed a murder, there is no violation of any principle of justice in holding him in custody and surrendering him to the officers of a court that has competency to try him for murder.

We are not deciding whether the United States or France or any other nation lawfully could or could not try the defendants in a court martial for a violation of international law. That is not before us. If that may be done, a court martial has not exclusive jurisdiction.

The crimes including the war crimes charged against the defendants are for violations of international criminal law. This Tribunal by Control Council Law No. 10 is vested with authority to try defendants for the crimes charged. That such jurisdiction possibly may be exercised by another military court is also of no consequence. If two courts have concurrent jurisdiction to try the same case the first court that exercises jurisdiction may properly dispose of the case.

The IMT said:*

"The jurisdiction of the Tribunal is defined in the Agreement and Charter, and the crimes coming within 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.

* * * * * * *

* Trial of the Major War Criminals, vol. I, pp. 218, 253.

"The Tribunal is of course bound by the Charter, in the definition which it gives both of war crimes and crimes against humanity."

What was held by the IMT with respect to the London Agreement and Charter, the basic laws under which it functioned, is authority for a similar holding by this Tribunal with respect to the basic law under which it was set up and under which it functions.

We deem it unnecessary to discuss the objection that Control Council Law No. 10 is in violation of the maxim *nullum crimen sine lege, nulla poena sine lege.* We find it without merit. It has been passed upon so many times by the Nuernberg Tribunals and held without merit, that further comment here is unnecessary.

The further objection was made that one of the nations, namely, the U.S.S.R., cooperated in the promulgation of Control Council Law No. 10 after it had engaged in a war of aggression which is made criminal under the law; this objection also is without merit. The London Agreement and Charter from which Control Council Law No. 10 stems has been approved by 19 nations other than the four signatories thereto. We need not and do not determine whether the charge that one of the signatories of the London Agreement and Charter and Control Council Law No. 10 is guilty of aggressive war for such determination could avail the defendants nothing. Under general principles of law, an accused does not exculpate himself from a crime by showing that another committed a similar crime, either before or after the alleged commission of the crime by the accused.

Various of the defendants by way of objection or motions have raised the question of the sufficiency of the evidence on the part of the prosecution to make out a *prima facie* case of the guilt of the respective defendants. Numbers of these motions were ruled upon during the course of the trial. As to such motions not heretofore ruled upon, the same are denied, in as much as the questions raised by such motions are involved in the final determination of the guilt or the innocence of the defendants.

CONSPIRACY COUNT

In view of the conclusions presently to be announced, we think it proper now to dispose of this count.

We have heretofore set out paragraph 2 of Article II of Control Council Law No. 10, which provides that any person who was an accessory to the commission of crimes against peace, war crimes, or crimes against humanity, as defined in said law by Article II, paragraphs 1(*a*), (*b*), and (*c*), or who ordered or abetted such

offense, or took a consenting part therein, or who was connected with any plans or enterprises involving its commission should be deemed guilty of the commission of said offenses. It is difficult to see, as the facts have developed in this case, how a conspiracy charge can be of the slightest aid to the prosecution. If the defendants committed the acts charged in this conspiracy count, they are guilty of crimes charged under counts one, two, and three and are punishable as principals.

The conspiracy count has not resulted in the introduction of any evidence that is not admissible under the other counts, nor does it, as the evidence has developed in this case, impose any criminality not attached to a violation under such preceding counts.

In as much as we hold that under the facts of this case no separate substantive offense is shown under count four, we strike it as tendering no issue not contained in the preceding counts, and proceed to determine the guilt or innocence of the defendants under counts one, two, and three of the indictment.

In so striking count four, we have reference only to the facts as they have been presented in this case and express no opinion as to whether in all cases and under all factual developments the charge of conspiracy should be disregarded. Such determination should depend upon the proof adduced in each case.

In this connection we desire to advert to the last paragraph of paragraph 2, Article II, Control Council Law No. 10, viz, "or (*f*) with reference to paragraph 1 (*a*), if he held a high political, civil, or military (including General Staff) position * * * or held high position in the financial, industrial, or economic life," in Germany, such person would be guilty under paragraph 1 (*a*) defining crimes against peace.

The prosecution does not undertake to fix liability upon this basis and we need not notice it further than to observe that we may draw from any known facts such inferences as we deem they warrant.

CONTROLLING PRINCIPLES IN TRIAL

The proper attitude to be observed in approaching a case of the character of the one before the Tribunal is so well stated by Judge Anderson in his concurring opinion in Case No. 10, the United States *vs.* Alfried Krupp, et al., that we set it forth, omitting only such portions as had particular application to that case, as a statement of the principles that we deem controlling in the approach to the instant case. Therein he said:

"There are certain matters of general application which must be stated in the outset of this investigation. They must be

borne in mind throughout the discussion. The first is that this Tribunal was created to administer the law. It is not a manifestation of the political power of the victorious belligerents which is quite a different thing. The second is that the fact that the defendants are alien enemies is to be resolutely kept out of mind. The third is that considerations of policy are not to influence a disposition of the questions presented. Of these there are but two; (*a*) what was the law at the time in question, and, (*b*) does the evidence show *prima facie* that the defendants or any of them violated it. The fourth is that the defendants throughout are presumed to be innocent and before they can be put to their defense, the prosecution must make out a *prima facie* case of guilt by competent and relevant evidence. It is true that the procedural ordinance of the Military Government for Germany (US) provides that, 'they (the Tribunals) shall adopt and apply to the greatest possible extent * * * non-technical procedure.' But neither the members of this Tribunal nor the people of the nation prosecuting this case regard the presumption of innocence as nothing more than a technical rule of procedure. Nor do they, or we, think it a mere rhetorical abstraction to which lip service will suffice. Upon the contrary, in addition to its procedural consequences, it is a substantive right which stands as a witness for every defendant from the beginning to the end of his trial * * *. The sixth is that it is a fundamental principle of criminal justice that criminal statutes are to be interpreted restrictively; that criminal responsibility is an individual matter; that criminal guilt must be personal. The seventh is that the application of *ex post facto* laws in criminal cases constitutes a denial of justice under international law (Quincy Wright: 'The Law of the Nuernberg Trial', American Journal of International Law, volume 41, January 1947, p. 53). Hence, if it be conceded that Control Council Law No. 10 is binding on the Tribunal, it nevertheless must be construed and applied to the facts in a way which will not conflict with this view." (*Case No. 10, Concurring Opinion, mimeographed pp. 6–7.*)

To the above we add that the burden rests upon the prosecution to present evidence that satisfies the Tribunal of the guilt of the defendants beyond a reasonable doubt. This rule also we have adhered to in arriving at our judgment. Where there was ambiguity in the testimony or uncertainty as to the defendants' connection with the transactions relied upon to establish their guilt, we have followed the well-recognized principle of criminal law and have accorded to the defendants the benefit of the doubt.

COUNT ONE OF THE INDICTMENT—AGGRESSIVE WAR

Count one of the indictment, heretofore set out, charges the defendants with crimes against peace.

Before seeking to determine the law applicable it is necessary to determine with certainty the action which the defendants are alleged to have taken that constitutes the crime. As a preliminary to that we deem it necessary to give a brief consideration to the nature and characteristics of war. We need not attempt a definition that is all-inclusive and all-exclusive. It is sufficient to say that war is the exerting of violence by one state or politically organized body against another. In other words, it is the implementation of a political policy by means of violence. Wars are contests by force between political units but the policy that brings about their initiation is made and the actual waging of them is done by individuals. What we have said thus far is equally as applicable to a just as to an unjust war, to the initiation of an aggressive and, therefore, criminal war as to the waging of a defensive and, therefore, legitimate war against criminal aggression. The point we stress is that war activity is the implementation of a predetermined national policy.

Likewise, an invasion of one state by another is the implementation of the national policy of the invading state by force even though the invaded state, due to fear or a sense of the futility of resistance in the face of superior force, adopts a policy of nonresistance and thus prevents the occurrence of any actual combat.

In the light of this general characterization and definition of war and invasions we now consider the charge contained in the indictment. The essence of the charge is *participation in the initiation of aggressive invasions and in the planning, preparation, and waging of aggressive wars.* The remaining parts of paragraph 1 are merely a statement of particular actions which are sufficient to constitute a commission of the crime charged. Paragraph 2 charges that the defendants were principals, or accessories to, or were in other ways involved in, the commission of the previously charged crimes against peace. These are charges as to the nature of their relationship to the crime otherwise charged in the indictment, and add no new element to the criminality charged in paragraph 1. The reference in paragraph 2 to the high military positions formerly held by the defendants has relevance in the indictment and in the law (Control Council Law No. 10, Art. II, par. 2), not to show or charge additional crimes against peace, but to show what persons may be included and what

persons may not be excluded from being charged and convicted of the offense set forth in paragraph 1 (*a*).

The prosecution does not seek, or contend that the law authorizes, a conviction of the defendants simply by reason of their positions as shown by the evidence, but it contends only that such positions may be considered by the Tribunal with all other evidence in the case for such light as they may shed on the personal guilt or innocence of the individual defendants. The prosecution does contend, and we think the contention sound, that the defendants are not relieved of responsibility for action which would be criminal in one who held no military position, simply by reason of their military positions. This is the clear holding of the judgment of the IMT, and is so provided in Control Council Law No. 10, Article II, paragraph 4 (*a*).

The initiation of war or an invasion is a unilateral operation. When war is formally declared or the first shot is fired the initiation of the war has ended and from then on there is a waging of war between the two adversaries. Whether a war be lawful, or aggressive and therefore unlawful under international law, is and can be determined only from a consideration of the factors that entered into its initiation. In the intent and purpose for which it is planned, prepared, initiated and waged is to be found its lawfulness or unlawfulness.

As we have pointed out, war whether it be lawful or unlawful is the implementation of a national policy. If the policy under which it is initiated is criminal in its intent and purpose it is so because the individuals at the policy-making level had a criminal intent and purpose in determining the policy. If war is the means by which the criminal objective is to be attained then the waging of the war is but an implementation of the policy, and the criminality which attaches to the waging of an aggressive war should be confined to those who participate in it at the policy level.

This does not mean that the Tribunal subscribes to the contention made in this trial that since Hitler was the Dictator of the Third Reich and that he was supreme in both the civil and military fields, he alone must bear criminal responsibility for political and military policies. No matter how absolute his authority, Hitler alone could not formulate a policy of aggressive war and alone implement that policy by preparing, planning, and waging such a war. Somewhere between the Dictator and Supreme Commander of the Military Forces of the nation and the common soldier is the boundary between the criminal and the excusable participation in the waging of an aggressive war by an individual engaged in it. Control Council Law No. 10 does not definitely draw such a line.

It points out in paragraph 2 of Article II certain fact situations and established relations that are or may be sufficient to constitute guilt and sets forth certain categories of activity that do not establish immunity from criminality. Since there has been no other prosecution under Control Council Law No. 10 with defendants in the same category as those in this case, no such definite line has been judicially drawn. This Tribunal is not required to fix a general rule but only to determine the guilt or innocence of the present defendants.

The judgment of the IMT held that:*

> "The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law."

We hold that Control Council Law No. 10 likewise is but an expression of international law existing at the time of its creation. We cannot therefore construe it as extending the international common law as it existed at the time of the Charter to add thereto any new element of criminality, for so to do would give it an *ex post facto* effect which we do not construe it to have intended. Moreover, that this was not intended is indicated by the fact that the London Charter of 8 August 1945, is made an integral part of the Control Council Law.

Since international common law grows out of the common reactions and the composite thinking with respect to recurring situations by the various states composing the family of nations, it is pertinent to consider the general attitude of the citizens of states with respect to their military commanders and their obligations when their nations plan, prepare for and initiate or engage in war.

While it is undoubtedly true that international common law in case of conflict with state law takes precedence over it and while it is equally true that absolute unanimity among all the states in the family of nations is not required to bring an international common law into being, it is scarcely a tenable proposition that international common law will run counter to the consensus within any considerable number of nations.

Furthermore, we must not confuse idealistic objectives with realities. The world has not arrived at a state of civilization such that it can dispense with fleets, armies, and air forces, nor has it arrived at a point where it can safely outlaw war under

* Trial of the Major War Criminals, *op. cit. supra*, vol. I, p. 218.

any and all circumstances and situations. In as much as all war cannot be considered outlawed then armed forces are lawful instrumentalities of state, which have internationally legitimate functions. An unlawful war of aggression connotes of necessity a lawful war of defense against aggression. There is no general criterion under international common law for determining the extent to which a nation may arm and prepare for war. As long as there is no aggressive intent, there is no evil inherent in a nation making itself militarily strong. An example is Switzerland which for her geographical extent, her population and resources is proportionally stronger militarily than many nations of the world. She uses her military strength to implement a national policy that seeks peace and to maintain her borders against aggression.

There have been nations that have initiated and waged aggressive wars through long periods of history, doubtless there are nations still disposed to do so; and if not, judging in the light of history, there may be nations which tomorrow will be disposed so to do. Furthermore, situations may arise in which the question whether the war is or is not aggressive is doubtful and uncertain. We may safely assume that the general and considered opinions of the people within states—the source from which international common law springs are not such as to hamper or render them impotent to do the things they deem necessary for their national protection.

We are of the opinion that as in ordinary criminal cases, so in the crime denominated aggressive war, the same elements must all be present to constitute criminality. There first must be actual knowledge that an aggressive war is intended and that if launched it will be an aggressive war. But mere knowledge is not sufficient to make participation even by high ranking military officers in the war criminal. It requires in addition that the possessor of such knowledge, after he acquires it shall be in a position to shape or influence the policy that brings about its initiation or it continuance after initiation, either by furthering, or by hindering or preventing it. If he then does the former, he becomes criminally responsible; if he does the latter to the extent of his ability, then his action shows the lack of criminal intent with respect to such policy.

If a defendant did not know that the planning and preparation for invasions and wars in which he was involved were concrete plans and preparations for aggressive wars and for wars otherwise in violation of international laws and treaties, then he cannot be guilty of an offense. If, however, after the policy to initiate and wage aggressive wars was formulated, a defendant came into possession of knowledge that the invasions and wars to be waged,

were aggressive and unlawful, then he will be criminally responsible if he, being on the policy level, could have influenced such policy and failed to do so.

If and as long as a member of the armed forces does not participate in the preparation, planning, initiating, or waging of aggressive war on a policy level, his war activities do not fall under the definition of crimes against peace. It is not a person's rank or status, but his power to shape or influence the policy of his state, which is the relevant issue for determining his criminality under the charge of crimes against peace.

International law condemns those who, due to their actual power to shape and influence the policy of their nation, prepare for, or lead their country into or in an aggressive war. But we do not find that, at the present stage of development, international law declares as criminals those below that level who, in the execution of this war policy, act as the instruments of the policy makers. Anybody who is on the policy level and participates in the war policy is liable to punishment. But those under them cannot be punished for the crimes of others. The misdeed of the policy makers is all the greater in as much as they use the great mass of the soldiers and officers to carry out an international crime; however, the individual soldier or officer below the policy level is but the policy makers' instrument, finding himself, as he does, under the rigid discipline which is necessary for and peculiar to military organization.

We do not hesitate to state that it would have been eminently desirable had the commanders of the German armed forces refused to implement the policy of the Third Reich by means of aggressive war. It would have been creditable to them not to contribute to the cataclysmic catastrophe. This would have been the honorable and righteous thing to do; it would have been in the interest of their State. Had they done so they would have served their fatherland and humanity also.

But however much their failure is morally reprimandable, we are of the opinion and hold that international common law, at the time they so acted, had not developed to the point of making the participation of military officers below the policy making or policy influencing level into a criminal offense in and of itself.

International law operates as a restriction and limitation on the sovereignty of nations. It may also limit the obligations which individuals owe to their states, and create for them international obligations which are binding upon them to an extent that they must be carried out even if to do so violates a positive law or directive of state. But the limitation which international common law imposes on national sovereignty, or on individual obliga-

tions, is a limitation self-imposed or imposed by the composite thinking in the international community, for it is by such democratic processes that common law comes into being. If there is no generality of opinion among the nations of the world as to a particular restriction on national sovereignty or on the obligations of individuals toward their own state, then there is no international common law on such matter.

By the Kellogg-Briand Pact 63 nations, including Germany, renounced war as an instrument of *national policy*. If this, as we believe it is, is evidence of a sufficient crystallization of world opinion to authorize a judicial finding that there exist crimes against peace under international common law, we cannot find that law to extend further than such evidence indicates. The nations that entered into the Kellogg-Briand Pact considered it imperative that existing international relationships should not be changed by force. In the preamble they state that they are:

> "Persuaded that the time has come when * * * all changes in their relationships with one another should be sought only by pacific means * * *."

This is a declaration that from that time forward each of the signatory nations should be deemed to possess and to have the right to exercise all the privileges and powers of a sovereign nation within the limitations of international law, free from all interference by force on the part of any other nation. As a corollary to this, the changing or attempting to change the international relationships by force of arms is an act of aggression and if the aggression results in war, the war is an aggressive war. It is, therefore, aggressive war that is renounced by the pact. It is aggressive war that is criminal under international law.

The crime denounced by the law is the use of war as an instrument of national policy. Those who commit the crime are those who participate at the policy making level in planning, preparing, or in initiating war. After war is initiated, and is being waged, the policy question then involved becomes one of extending, continuing or discontinuing the war. The crime at this stage likewise must be committed at the policy making level.

The making of a national policy is essentially political, though it may require, and of necessity does require, if war is to be one element of that policy, a consideration of matters military as well as matters political.

It is self-evident that national policies are made by man. When men make a policy that is criminal under international law, they are criminally responsible for so doing. This is the logical and inescapable conclusion.

The acts of commanders and staff officers below the policy level, in planning campaigns, preparing means for carrying them out, moving against a country on orders and fighting a war after it has been instituted, do not constitute the planning, preparation, initiation, and waging of war or the initiation of invasion that international law denounces as criminal.

Under the record we find the defendants were not on the policy level, and are not guilty under count one of the indictment. With crimes charged to have been committed by them in the *manner* in which they behaved in the waging of war, we deal in other parts of this judgment.

WAR CRIMES AND CRIMES AGAINST HUMANITY

In the judgment of the International Military Tribunal on pages 226–232, *et seq.**, is a statement of the war crimes committed by the Wehrmacht. Extracts from this are as follows:

> "The evidence relating to war crimes has been overwhelming, in its volume and its detail. It is impossible for this judgment adequately to review it, or to record the mass of documentary and oral evidence that has been presented. The truth remains that war crimes were committed on a vast scale never before seen in the history of war. They were perpetrated in all the countries occupied by Germany, and on the high seas, and were attended by every conceivable circumstance of cruelty and horror. There can be no doubt that the majority of them arose from the Nazi conception of, 'total war', with which the aggressive wars were waged. For in this conception of, 'total war', the moral ideas underlying the conventions which seek to make war more humane are no longer regarded as having force or validity. Everything is made subordinate to the overmastering dictates of war. Rules, regulations, assurances, and treaties all alike are of no moment; and so, freed from the restraining influence of international law, the aggressive war is conducted by the Nazi leaders in the most barbaric way. Accordingly, war crimes were committed when and wherever the Fuehrer and his close associates thought them to be advantageous. They were for the most part the result of cold and criminal calculation.
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> * * * * * * *
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> "Other war crimes, such as the murder of prisoners of war who had escaped and been recaptured, or the murder of commandos or captured airmen, or the destruction of the Soviet

* Trial of Major War Criminals, *op. cit. supra*, vol. I.

Commissars, were the result of direct orders circulated through the highest official channels * * *.

"Prisoners of war were ill-treated and tortured and murdered, not only in defiance of the well established rules of international law, but in complete disregard of the elementary dictates of humanity.

* * * * * * *

"In the course of the war, many Allied soldiers who had surrendered to the Germans were shot immediately, often as a matter of deliberate, calculated policy. On 18 October 1942, the defendant Keitel circulated a directive authorized by Hitler, which ordered that all members of Allied 'commando' units, often when in uniform and whether armed or not, were to be 'slaughtered to the last man', even if they attempted to surrender. It was further provided that if such Allied troops came into the hands of the military authorities after being first captured by the local police, or in any other way, they should be handed over immediately to the SD. This order was supplemented from time to time, and was effective throughout the remainder of the war, although after the Allied landings in Normandy in 1944, it was made clear that the order did not apply to 'commandos' captured within the immediate battle area. Under the provisions of this order, Allied 'commando' troops, and other military units operating independently, lost their lives in Norway, France, Czechoslovakia, and Italy. Many of them were killed on the spot, and in no case were those who were executed later in concentration camps ever given a trial of any kind.

* * * * * * *

"In March 1944, the OKH issued the 'Kugel', or, 'Bullet' decree, which directed that every escaped officer and NCO prisoner of war who had not been put to work, with the exception of British and American prisoners of war, should on recapture be handed over to the SIPO and SD. This order was distributed by the SIPO and SD to their regional offices. These escaped officers and NCO's were to be sent to the concentration camp at Mauthausen, to be executed upon arrival, by means of a bullet shot in the neck.

"In March 1944, fifty officers of the British Royal Air Force, who escaped from the camp at Sagan where they were confined as prisoners, were shot on recapture, on the direct orders of Hitler. Their bodies were immediately cremated, and the urns containing their ashes were returned to the camp. It was not

contended by the defendants that this was other than plain murder, in complete violation of international law.

"When Allied airmen were forced to land in Germany, they were sometimes killed at once by the civilian population. The police were instructed not to interfere with these killings, and the Ministry of Justice was informed that no one should be prosecuted for taking part in them.

"The treatment of Soviet prisoners of war was characterized by particular inhumanity. The death of so many of them was not due merely to the action of individual guards, or to the exigencies of life in the camps. It was the result of systematic plans to murder. More than a month before the German invasion of the Soviet Union, the OKW was making special plans for dealing with political representatives serving with the Soviet Armed Forces who might be captured. One proposal was that 'political commissars *of the army* are not recognized as *prisoners of war,* and are to be *liquidated* at the latest in the transient prisoner of war camps.' The defendant Keitel gave evidence that instructions incorporating this proposal were issued to the German Army.

"On 8 September 1941, regulations for the treatment of Soviet prisoners of war in all prisoner of war camps were issued, signed by General Reinecke, the head of the prisoner of war department of the High Command. Those orders stated:

" 'The Bolshevist soldier has therefore lost all claim to treatment as an honorable opponent, in accordance with the Geneva Convention * * * The order for ruthless and energetic action must be given at the slightest indication of insubordination, especially in the case of Bolshevist fanatics. Insubordination, active or passive resistance, must be broken immediately by force of arms (bayonets, butts, and firearms) * * * Anyone carrying out the order who does not use his weapons, or does so with insufficient energy, is punishable * * *. Prisoners of war attempting escape are to be fired on without previous challenge. No warning shot must ever be fired * * *. The use of arms against prisoners of war is as a rule legal.'

"The Soviet prisoners of war were left without suitable clothing; the wounded without medical care; they were starved, and in many cases left to die.

"On 17 July 1941, the Gestapo issued an order providing for the killing of all Soviet prisoners of war who were or might be dangerous to national socialism. The order recited:

" 'The mission of the commanders of the SIPO and SD stationed in Stalags is the political investigation of all camp inmates, the elimination and further, 'treatment', (*a*) of all politi-

cal, criminal, or in some other way unbearable elements among them, (*b*) of those persons who could be used for the reconstruction of the occupied territories * * *. Further, the commanders must make efforts from the beginning to seek out among the prisoners elements which appear reliable, regardless of whether there are Communists concerned or not, in order to use them for intelligence purposes inside of the camp, and, if advisable, later in the occupied territories also. By use of such informers, and by use of all other existing possibilities, the discovery of all elements to be eliminated among the prisoners must proceed step by step at once * * *.'

" 'Above all, the following must be discovered: all important functionaries of State and Party, especially professional revolutionaries * * * all People's Commissars of the Red Army, leading personalities of the State * * *, leading personalities of the business world, members of the Soviet Russian intelligence, all Jews, all persons who are found to be agitators or fanatical Communists. Executions are not to be held in the camp or in the immediate vicinity of the camp * * *. The prisoners are to be taken for special treatment if possible into the former Soviet Russian territory.'

"The affidavit of Warlimont, Deputy Chief of Staff of the Wehrmacht, and the testimony of Ohlendorf, former Chief of Amt III of the RSHA, and of Lahousen, the head of one of the sections of the Abwehr, the Wehrmacht's intelligence service, all indicate the thoroughness with which this order was carried out.

* * * * * * *

"In some cases Soviet prisoners of war were branded with a special permanent mark. There was put in evidence the OKW order dated 20 July 1942, which laid down that:

" 'The brand is to take the shape of an acute angle of about 45 degrees, with the long side to be 1 cm. in length, pointing upwards and burnt on the left buttock * * *. This brand is made with the aid of a lancet available in any military unit. The coloring used is Chinese ink.'

"The carrying out of this order was the responsibility of the military authorities, though it was widely circulated by the chief of the SIPO and SD to German police officials for information.

"Soviet prisoners of war were also made the subject of medical experiments of the most cruel and inhuman kind. In July 1943, experimental work was begun in preparation for a campaign of bacteriological warfare; Soviet prisoners of war were

used in these medical experiments, which more often than not proved fatal * * *.

"The argument in defense of the charge with regard to the murder and ill-treatment of Soviet prisoners of war, that the U. S. S. R. was not a party to the Geneva Convention, is quite without foundation. On 15 September 1941, Admiral Canaris protested against the regulations for the treatment of Soviet prisoners of war, signed by General Reinecke on 8 September 1941. He then stated:

" 'The Geneva Convention for the treatment of prisoners of war is not binding in the relationship between Germany and the U. S. S. R. Therefore only the principles of general international law on the treatment of prisoners of war apply. Since the 18th century these have gradually been established along the lines that war captivity is neither revenge nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war. This principle was developed in accordance with the view held by all armies that it is contrary to military tradition to kill or injure helpless people * * *. The decrees for the treatment of Soviet prisoners of war enclosed are based on a fundamentally different viewpoint.'

"This protest, which correctly stated the legal position, was ignored. The defendant Keitel made a note on this memorandum:

" 'The objections arise from the military concept of chivalrous warfare. This is the destruction of an ideology. Therefore I approve and back the measures.' "

All of these unlawful acts, as well as employment under inhumane conditions and at prohibited labor, is shown by the record in this case. They were deliberate, gross and continued violations of the customs and usages of war as well as the Hague Regulations (1907) and the Geneva Convention (1929) and of international common law.

CRIMES AGAINST CIVILIANS

The record in the instant case is replete with horror. Never in the history of man's inhumanity to man have so many innocent people suffered so much.

Millions of people whose only offense was that they were of Jewish blood, or Soviet nationals, or gypsies, or Poles, designated as social inferiors, subhumans, and beasts, received what the Hitlerites called "special treatment", or "liquidation", or "final solution" and were exterminated regardless of age or sex. No nation,

no army, and its leaders of any time, civilized or uncivilized, labor under so great a load of guilt as do Hitler's Germany, its army and its leaders in their treatment of these unfortunate people.

In addition, the civilian population of the countries overrun by German arms were enslaved, deported for forced labor, starved, tortured, murdered, executed as hostages and, by way of reprisal, were compelled to erect fortifications and remove live mines; their property, public and private, was plundered and destroyed, and they suffered other crimes at the hands of their conquerors.

In the IMT judgment it is said:*

"Article 6(*b*) of the Charter provides that, 'ill-treatment * * * of civilian population of or in occupied territory * * * killing of hostages * * * wanton destruction of cities, towns, or villages,' shall be a war crime. In the main, these provisions are merely declaratory of the existing laws of war as expressed by the Hague Convention, Article 46, which stated: 'Family honor and rights, the lives of persons and private property, as well as religious convictions and practice must be respected.'

"The territories occupied by Germany were administered in violation of the laws of war. The evidence is quite overwhelming of a systematic rule of violence, brutality, and terror. On 7 December 1941, Hitler issued the directive since known as 'Nacht und Nebel Erlass' (Night and Fog Decree), under which persons who committed offenses against the Reich or the German forces in occupied territories, except where the death sentence was certain, were to be taken secretly to Germany and handed over to the SIPO and SD for trial or punishment in Germany. This decree was signed by the defendant Keitel. After these civilians arrived in Germany, no word of them was permitted to reach the country from which they came, or their relatives; even in cases when they died awaiting trial the families were not informed, the purpose being to create anxiety in the minds of the family of the arrested person. Hitler's purpose in issuing this decree was stated by the defendant Keitel in a covering letter, dated 12 December 1941, to be as follows:

" 'Efficient and enduring intimidation can only be achieved either by capital punishment or by measures by which the relatives of the criminal and the population do not know the fate of the criminal. This aim is achieved when the criminal is transferred to Germany.'

"Even persons who were only suspected of opposing any of the policies of the German occupation authorities were arrested, and on arrest were interrogated by the Gestapo and the SD in

* Trial of the Major War Criminals, *op. cit. supra*, vol. I, pp. 232–238.

the most shameful manner. On 12 June 1942, the chief of the SIPO and SD published, through Mueller, the Gestapo Chief, an order authorizing the use of 'third degree' methods of interrogation, where preliminary investigation had indicated that the person could give information on important matters, such as subversive activities, though not for the purpose of extorting confessions of the prisoner's own crimes."

This order provided:

"* * * Third degree may, under this supposition, only be employed against Communists, Marxists, Jehovah's Witnesses, saboteurs, terrorists, members of resistance movements, parachute agents, antisocial elements, Polish or Soviet Russian loafers, or tramps; in all other cases my permission must first be obtained * * *. Third degree can, according to circumstances, consist among other methods of very simple diet (bread and water), hard bunk, dark cell, deprivation of sleep, exhaustive drilling, also in flogging (for more than twenty strokes a doctor must be consulted)'.

"The brutal suppression of all opposition to the German occupation was not confined to severe measures against suspected members of resistance movements themselves, but also extended to their families. On 19 July 1944, the commander of the SIPO and SD in the district of Radom, in Poland, published an order, transmitted through the Higher SS and Police Leaders, to the effect that in all cases of assassination or attempted assassination of Germans, or where saboteurs had destroyed vital installations, not only the guilty person, but also all his or her male relatives should be shot, and female relatives over 16 years of age put into a concentration camp.

* * * * * * *

"The practice of keeping hostages to prevent and to punish any form of civil disorder was resorted to by the Germans; an order issued by the defendant Keitel on 16 September 1941, spoke in terms of fifty or a hundred lives from the occupied areas of the Soviet Union for one German life taken. The order stated that 'it should be remembered that a human life in unsettled countries frequently counts for nothing, and a deterrent effect can be obtained only by unusual severity.' The exact number of persons killed as a result of this policy is not known, but large numbers were killed in France and the other occupied territories in the West, while in the East the slaughter was on an even more extensive scale. In addition to the killing of hostages, entire towns were destroyed in some cases; such massacres as those of Oradour-sur-Glane in France and Lidice

in Czechoslovakia, both of which were described to the Tribunal in detail, are examples of the organized use of terror by the occupying forces to beat down and destroy all opposition to their rule.

"One of the most notorious means of terrorizing the people in occupied territories was the use of concentration camps. They were first established in Germany at the moment of the seizure of power by the Nazi Government. Their original purpose was to imprison without trial all those persons who were opposed to the government, or who were in any way obnoxious to German authority. With the aid of a secret police force, this practice was widely extended, and in course of time concentration camps became places of organized and systematic murder, where millions of people were destroyed.

"In the administration of the occupied territories the concentration camps were used to destroy all opposition groups. The persons arrested by the Gestapo were as a rule sent to concentration camps. They were conveyed to the camps in many cases without any care whatever being taken for them, and great numbers died on the way. These who arrived at the camp were subject to systematic cruelty. They were given hard physical labor; inadequate food, clothes, and shelter; and were subject at all times to the rigors of a soulless regime, and the private whims of individual guards.

* * * * * * *

"A certain number of the concentration camps were equipped with gas chambers for the wholesale destruction of the inmates, and with furnaces for the burning of the bodies. Some of them were in fact used for the extermination of Jews as part of the 'final solution' of the Jewish problem. Most of the non-Jewish inmates were used for labor, although the conditions under which they worked made labor and death almost synonymous terms. Those inmates who became ill and were unable to work were either destroyed in the gas chambers or sent to special infirmaries, where they were given entirely inadequate medical treatment, worse food if possible than the working inmates, and left to die.

"The murder and ill-treatment of civilian populations reached its height in the treatment of the citizens of the Soviet Union and Poland. Some 4 weeks before the invasion of Russia began, special task forces of the SIPO and SD, called Einsatz Groups [Einsatzgruppen], were formed on the orders of Himmler for the purpose of following the German Armies into Russia, combating partisans and members of resistance groups, and exter-

minating the Jews, and Communist leaders, and other sections of the population. In the beginning, four such Einsatz groups were formed, one operating in the Baltic States, one toward Moscow, one towards Kiev, and one operating in the south of Russia. Ohlendorf, former Chief of Amt III of the RSHA, who led the fourth group, stated in his affidavit:

" 'When the German Army invaded Russia, I was leader of Einsatzgruppe D, in the southern sector, and in the course of the year during which I was leader of the Einsatzgruppe D it liquidated approximately 90,000 men, women, and children. The majority of those liquidated were Jews, but there were also among them some Communist functionaries.'

"In an order issued by the defendant Keitel on 23 July 1941 and drafted by the defendant Jodl, it was stated that:

" 'In view of the vast size of the occupied areas in the East, the forces available for establishing security in these areas will be sufficient only if all resistance is punished, not by legal prosecution of the guilty, but by the spreading of such terror by the armed forces as is alone appropriate to eradicate every inclination to resist among the population * * *. Commanders must find the means of keeping order by applying suitable Draconian measures.'

"The evidence has shown that this order was ruthlessly carried out in the territory of the Soviet Union and in Poland. A significant illustration of the measures actually applied occurs in the document which was sent in 1943 to the defendant Rosenberg by the Reich Commissar for Eastern Territories, who wrote:

" 'It should be possible to avoid atrocities and to bury those who have been liquidated. To lock men, women, and children into barns and set fire to them does not appear to be a suitable method of combating bands, even if it is desired to exterminate the population. This method is not worthy of the German cause, and hurts our reputation severely.'

* * * * * * *

"The foregoing crimes against the civilian population are sufficiently appalling, and yet the evidence shows that at any rate in the East, the mass murders and cruelties were not committed solely for the purpose of stamping out opposition or resistance to the German occupying forces. In Poland and the Soviet Union these crimes were part of a plan to get rid of whole native populations by expulsion and annihilation, in order that their territory could be used for colonization by Germans. Hitler had written in *Mein Kampf* on these lines, and the plan was clearly stated by Himmler in July 1942, when he wrote:

'It is not our task to Germanize the East in the old sense, that is to teach the people there the German language and the German law, but to see to it that only people of purely Germanic blood live in the East.'

"In August of 1942, the policy for the eastern territories as laid down by Bormann was summarized by a subordinate of Rosenberg as follows:

" 'The Slavs are to work for us. In so far as we do not need them, they may die. Therefore, compulsory vaccination and Germanic health services are superfluous. The fertility of the Slavs is undesirable.' It was Himmler again who stated in October 1943:

" 'What happens to a Russian, a Czech, does not interest me in the slightest. What the nations can offer in the way of good blood of our type, we will take. If necessary, by kidnaping their children and raising them here with us. Whether nations live in prosperity or starve to death interests me only in so far as we need them as slaves for our Kultur, otherwise it is of no interest to me.'

"In Poland the intelligentsia had been marked down for extermination as early as September 1939, and in May 1940, the defendant Frank wrote in his diary of 'taking advantage of the focussing of world interest on the western front, by wholesale liquidation of thousands of Poles, first leading representatives of the Polish intelligentsia'. Earlier, Frank had been directed to reduce the 'entire Polish economy to an absolute minimum necessary for bare existence. The Poles shall be the slaves of the Greater German World Empire.' In January 1940, he recorded in his diary that 'cheap labor must be removed from the Government General by hundreds of thousands. This will hamper the native biological propagation.' So successfully did the Germans carry out this policy in Poland that by the end of the war one third of the population had been killed, and the whole of the country devastated.

"It was the same story in the occupied area of the Soviet Union. At the time of the launching of the German attack in June 1941, Rosenberg told his collaborators:

" 'The object of feeding the German people stands this year without a doubt at the top of the list of Germany's claims on the East, and there the southern territories and the northern Caucasus will have to serve as a balance for the feeding of the German people * * *. A very extensive evacuation will be necessary, without any doubt, and it is sure that the future will hold very hard years in store for the Russians.' "

These findings of the IMT are sustained by the record in this case, and other offenses are shown as well.

The connection of the defendants with these offenses is disposed of in our discussion of the individual cases.

PRESIDING JUDGE YOUNG: Judge Hale will continue with the reading of the judgment.

GERMAN MILITARY SYSTEM

JUDGE HALE: Soon after Hitler came to power, an Air Ministry was established with Goering as the Minister. In 1935, the German Government openly denounced the military, naval, and air clauses of the Treaty of Versailles. At the same time, it was announced that Germany was building a military air force. The Reichswehr Ministry was renamed the "War Ministry", and the Minister, von Blomberg, assumed the title "Commander in Chief of the Armed Forces". Subordinate to von Blomberg were the Commanders in Chief of the Army (von Fritsch) and of the Navy (Raeder). In his capacity as Commander in Chief of the German Air Force, Goering was also subordinate to von Blomberg, but in his capacity as Minister for Air, he was of coequal cabinet rank and, needless to say, Goering was a very much more powerful figure in the Third Reich.

In February 1938, a crisis in the relations between Hitler and the army led to a drastic reorganization of the High Command. In place of the Ministry of War, over-all control and coordination of the three services was achieved through the newly created Armed Forces High Command (Oberkommando der Wehrmacht, known as "OKW"). Hitler himself assumed the title Commander in Chief of the Armed Forces", and the OKW was, in essence, Hitler's working staff for armed forces matters. Keitel was given the title "Chief" of the OKW and the rank of Minister. Von Brauchitsch replaced von Fritsch as Commander in Chief of the Army.

A. The OKW (Oberkommando der Wehrmacht)—Supreme Command of the Armed Forces

The OKW controlled all matters of inter-service policy. It was responsible for preparations for national defense in time of peace, and for the over-all conduct of operations during war. Directly under Hitler, Keitel served as Hitler's highest executive officer in the administration of the armed forces and in the application of Hitler's policies and plans.

There has been considerable testimony in the case relative to the powers of the OKW and to the effect that Hitler frequently operated directly through the commanders in chief of the OKH, the

OKL, and the OKM and obviously after he assumed command of the OKH, he, in many instances, operated directly as commander in chief of the OKH. It is nevertheless apparent that Hitler, through exercise of his functions as the Supreme Commander of the OKW, could, and in many instances did, exercise through the OKW the over-all command of the three branches of the armed services.

The most important section of the OKW, directly concerned with operations in the field, etc., was called the Armed Forces Operations Staff (Wehrmachtfuehrungsstab or WFSt). This was headed during the war by General Alfred Jodl. Jodl's immediate subordinate was the defendant, Warlimont, as Chief of Department National Defense (Landesverteidigung–L) in the Armed Forces Operations Staff. In addition, in January 1942, Warlimont was appointed Jodl's deputy with the title of Deputy Chief of the Armed Forces Operations Staff.

Besides the WFSt, there were numerous additional branches and sections within the OKW, all headed by senior officers, experts in their own fields, who were directly responsible to Keitel. However, these branches were mostly with the rear echelon (as distinguished from the WFSt, which usually was with the Fuehrer Headquarters in the "field"), and dealt with numerous administrative matters of joint interest to the three branches of the armed forces.

The General Armed Forces Office (Allgemeines Wehrmachtamt–AWA) was one of the principal administrative agencies within the OKW. The chief of this office was the defendant Reinecke who held this position continuously from December 1939 until May 1945. The primary responsibilities of this office were administrative and executive rather than operational.

One of the most important sections of AWA was the Office of the Chief of Prisoner of War Affairs (Chef des Kriegsgefangenenwesens—Chef Kriegsgef) which was in administrative charge of all matters relating both to German and Allied prisoners of war. The Office of the Chief of Prisoner of War Affairs remained a part of the General Armed Forces Office (AWA) until October 1944, at which time many functions of this office were transferred to SS supervision. Another section of AWA was the National Socialist Guidance Staff of the OKW (Nationalsozialistischer Fuehrungsstab des OKW—NSF/OKW), established in December 1943. This agency was to insure uniform political indoctrination in the armed forces in cooperation with the Nazi Party Chancellery. This office was placed under the direct control of the defendant Reinecke.

Another important branch of the OKW was the Armed Forces Legal Department (Wehrmachtrechtsabteilung—WR). From

1938 until 1945, it was headed by the defendant Lehmann. The Legal Department was charged with certain legal matters in the preparation of legal opinions of interest to all three branches of the armed forces, but the legal staffs of the three forces were not subordinate to him.

B. The OKL (Oberkommando der Luftwaffe)—High Command of the Air Force

The air force was the youngest of the three branches comprising the German armed forces. The creation of the German Air Force occurred officially in March 1935, and Goering was appointed as its commander in chief with the rank of air force general. Shortly after the announcement of the creation of an independent air force, all antiaircraft artillery and attached signal units were taken over from the army by the air force. Goering served in the dual capacity of Minister of Aviation (Reichsminister der Luftfahrt) and Commander in Chief of the German air force (Oberbefehlshaber der Luftwaffe) and continued to head the air force until shortly before the end of the war.

C. The OKM (Oberkommando der Kriegsmarine)—High Command of the Navy

The navy was the smallest of the services, and its personnel and units were numerically the smallest within the German armed forces. From 1928 until 1943, the OKM was headed by Admiral of the Fleet Erich Raeder. From 1943 to the end of the war in May 1945, Admiral of the Fleet Doenitz, succeeding Raeder, was Commander in Chief of the German Navy, having previously been in charge of its most important weapon, the submarine.

Within the OKM, performing functions somewhat analogous to the general staff of OKH, was the Naval War Staff (Seekriegsleitung–SKL) directly subordinate to the Commander in Chief of the Navy. It concerned itself mostly with operational and intelligence questions. Between the years 1938 and 1941, the defendant Schniewind was the Chief of Staff of the SKL, directly responsible to Raeder.

Under the OKM, the Naval Group Commands (Marinegruppen Befehlshaber) controlled all naval operations in a given sector, with the exception of the operations of the High Sea Fleet and the submarines, which by their very nature were too mobile to be restricted to a given area command. Between 1941 and 1944, the defendant Schniewind was commander of the High Sea Fleet.

D. The OKH (Oberkommando des Heeres)—High Command of the Army

The army was by far the largest and most important of the three branches of the Wehrmacht. From 1938 until December 1941, Field Marshal Walter von Brauchitsch was Commander in Chief of the German Army with General Franz Halder as his Chief of Staff. In December 1941, Hitler relieved von Brauchitsch of his assignment and himself took over command of the German army. Hitler retained his position as Commander in Chief of the German Army until his presumed death at the end of the war; and the result of unification of command, whereby Hitler was Supreme Commander in Chief of the German armed forces and Commander in Chief of the German Army, was a partial merger and overlapping of the functions of the OKW and OKH. In September 1942, Halder was relieved as Chief of Staff by General Kurt Zeitzler. Colonel General Heinz Guderian replaced Zeitzler in July 1944 and himself gave way to General Hans Krebs in February 1945.

After Hitler himself took command of the German Army, the highest field and occupational headquarters of the German Army were directly under Hitler, either in his capacity as Supreme Commander of the Wehrmacht, or in his capacity as Commander in Chief of the Army. Because of the partial merger arising from Hitler's dual capacity and command functions, it became difficult at times to delineate clearly between the responsibilities of the OKW and those of the OKH.

E. Army Field Headquarters

Army groups and armies—The largest field formation in the German Army was known as an army group, which was a headquarters controlling two or more armies. An army group was customarily commanded by a Generalfeldmarschall (five-star general), or more rarely by a Generaloberst (four-star general). An army might be commanded by a Generalfeldmarschall, a Generaloberst, or a General (three-star general).

At the beginning of the war, an army group headquarters was usually formed for a particular campaign or occupational theater. During actual operations, the principal purpose of an army group was to exercise operational command over the armies subordinated to it. It had at first a relatively small staff devoted purely to operational matters. As the war progressed, administrative functions were added and its staff increased. An army headquarters was a more permanent command framework. In addition to its operational and tactical control of subordinate units, the army

was the top field headquarters for matters of administration, supply, and other functions.

Corps and lower headquarters—An army controlled one or more (usually between two and seven) corps. The corps was a permanent headquarters which controlled as a rule from two to seven divisions. The division was the basic "self-contained" unit of the German Army and its structure varied according to its type.

Headquarters staff organization—The size and structure of an army headquarters varied to a considerable extent. All headquarters were, however, organized according to a uniform system and consisted basically of a commanding officer assisted by a staff. The staffs of corps and higher headquarters were headed by a chief of staff. At all German headquarters, the staff officer in charge of operations was known as "Ia", the chief supply officer as "Ib", and the chief intelligence officer as "Ic".

SS Field formations (Waffen SS)—When the war broke out in 1939, Himmler commenced the formation into divisions of units of the SS, armed and trained for employment with the army. Only two or three such divisions were formed prior to the Russian campaign, but by the end of the war there were many SS divisions.

For certain administrative purposes, the Waffen SS units remained part of the SS and under the control and command of Himmler as Reichsfuehrer SS. However, for operational purposes in combat and in occupied areas, the SS divisions were under the command of the army, and their employment differed little from that of the regular divisions of the army.

F. Occupational Headquarters and Units—Armed Forces Commander

In a territory occupied by German forces, the Germans sometimes found it desirable to appoint a senior over-all commander to whom the heads of the army, navy, and air force in the territory were all tactically responsible. Such commanders had strategic as well as administrative responsibility and were directly responsible to OKW.

Military commander—In German-occupied territory, the administration of the area in conformity with rules and policies laid down by the German authorities was entrusted to an army officer, usually a general, who was designated as military commander (Militaerbefehlshaber). The military commanders had the primary mission of insuring security and order within the region or country that they were responsible for, including the protection of roads, railroads, supply lines, and communications.

Rear area commanders—During wartime the operational area

of the army (Heer) was divided into various segments. The operational area of an army (Armee) consisted of the combat zone and an army rear area. The operational area of an army group consisted of the operational areas of the armies under it and an army group rear area. The boundaries of the army group rear area coincided with the boundaries of the army rear areas and extended to the territory under civil administration of the Reich, such as the Commissariat Ostland in the East.

The army group and army rear areas were commanded by general officers who were directly responsible to the commander in chief of the army group or army, respectively. The missions with which these commanders were charged can be summarized as follows:

1. Administration of the occupied area.
2. The maintenance of peace and order in these areas.
3. Responsibility for the security of the railroads and main supply routes leading to the front line, as well as for all supply agencies engaged on behalf of the front line troops.

In order to accomplish these missions, these commanders often had one or several of the following units at their disposal:

1. Security divisions (Sicherungsdivisionen).
2. Units of the German police.
3. Indigenous police and constabulary forces recruited from the native population.
4. Special security battalions (Landesschuetzenbataillone).

For the administration of the civilian population, the following subordinate headquarters were usually organized in an army or army group rear area:

1. District main headquarters (Oberfeldkommandanturen).
2. Sub-district headquarters (Feldkommandanturen).
3. Sub-district detachments (Ortskommandanturen).

In addition to these, numerous special staffs were at the disposal of the commanders of the rear areas, which were charged with such tasks as supervision over agricultural output, forestry service, mining, and industrial utilization.

The commanders of army rear areas were generally called "Koruecks" (Kommandeur des rueckwaertigen Armeegebietes). The commanders of army group rear areas were known as "Befehlshaber des rueckwaertigen Heeresgebietes", and they often carried after their titles the numerical designation identifying the army group rear area for administrative purposes. Thus, the defendant von Roques was known as the Commander of Army Group Rear Area 103 (South).

Higher SS and Police Leaders—During the course of the Nazi regime, Heinrich Himmler succeeded in bringing about an almost

complete merger of the regular German police forces with the police and intelligence components of the SS. This merger was reflected in Himmler's own title—Leader of the SS and Chief of the German Police (Reichsfuehrer SS and Chef der Deutschen Polizei). Thereafter, Himmler designated various of his subordinates to head the SS and police activities in specified areas of Germany and in German occupied territory. An individual thus designated was called a "Higher SS and Police Leader" (Hoeherer SS–und Polizeifuehrer, usually abbreviated HSSPF). In the occupied territories, the HSSPF's continued to be personally responsible to Himmler and had constant instructions from him, but they were, for operational purposes, responsible to the senior military commander stationed in that territory. The principal functions of the HSSPF's were to control the local police authorities, handle special police and intelligence matters, and carry out other special missions of a security nature for Himmler and for the military authorities. A HSSPF usually held the rank of Gruppenfuehrer or Obergruppenfuehrer in the SS, these ranks being respectively the equivalent of a two-star and a three-star general in the United States Army.

We now pass to superior orders.

SUPERIOR ORDERS

Control Council Law No. 10, Article II, paragraphs 4 (*a*) and (*b*), provides:

> "4 (*a*) The official position of any person, whether as Head of State or as a responsible official in a Government Department, does not free him from responsibility for a crime or entitle him to mitigation of punishment.
>
> "(*b*) The fact that any person acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation."

These two paragraphs are clear and definite. They relate to the crimes defined in Control Council Law No. 10, Article II, paragraphs 1(*a*), (*b*), and (*c*). All of the defendants in this case held official positions in the armed forces of the Third Reich. Hitler from 1938 on was Commander in Chief of the Armed Forces and was the supreme civil and military authority in the Third Reich, whose personal decrees had the force and effect of law. Under such circumstances to recognize as a defense to the crimes set forth in Control Council No. 10 that a defendant acted pursuant to the order of his government or of a superior would be in practical effect to say that all the guilt charged in the indictment was the guilt of Hitler alone because he alone possessed the law-making

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power of the state and the supreme authority to issue civil and military directives. To recognize such a contention would be to recognize an absurdity.

It is not necessary to support the provision of Control Council Law No. 10, Article II, paragraphs 4(*a*) and (*b*), by reason, for we are bound by it as one of the basic authorities under which we function as a judicial tribunal. Reason is not lacking.

In as much as one of the reiterated arguments advanced is the injustice of even charging these defendants with being guilty of the crimes set forth in the indictment, when they were, it is said, merely soldiers and acted under governmental directives and superior orders which they were bound to obey, we shall briefly note what we consider sound reasons for the rejection of such a defense.

The rejection of the defense of superior orders without its being incorporated in Control Council Law No. 10 that such defense shall not exculpate would follow of necessity from our holding that the acts set forth in Control Council Law No. 10 are criminal not because they are therein set forth as crimes but because they then were crimes under international common law. International common law must be superior to and, where it conflicts with, take precedence over national law or directives issued by any national governmental authority. A directive to violate international criminal common law is therefore void and can afford no protection to one who violates such law in reliance on such a directive.

The purpose and effect of all law, national or international, is to restrict or channelize the action of the citizen or subject. International law has for its purpose and effect the restricting and channelizing of the action of nations. Since nations are corporate entities, a composite of a multitude of human beings, and since a nation can plan and act only through its agents and representatives, there can be no effective restriction or channelizing of national action except through control of the agents and representatives of the nation, who form its policies and carry them out in action.

The state being but an inanimate corporate entity or concept, it cannot as such make plans, determine policies, exercise judgment, experience fear, or be restrained or deterred from action except through its animate agents and representatives. It would be an utter disregard of reality and but legal shadow-boxing to say that only the state, the inanimate entity, can have guilt, and that no guilt can be attributed to its animate agents who devise and execute its policies. Nor can it be permitted even in a dictatorship that the dictator, absolute though he may be, shall be the scapegoat on whom the sins of all his governmental and military subordi-

nates are wished; and that, when he is driven into a bunker and presumably destroyed, all the sins and guilt of his subordinates shall be considered to have been destroyed with him.

The defendants in this case who received obviously criminal orders were placed in a difficult position, but servile compliance with orders clearly criminal for fear of some disadvantage or punishment not immediately threatened cannot be recognized as a defense. To establish the defense of coercion or necessity in the face of danger there must be a showing of circumstances such that a reasonable man would apprehend that he was in such imminent physical peril as to deprive him of freedom to choose the right and refrain from the wrong. No such situation has been shown in this case.

Furthermore, it is not a new concept that superior orders are no defense for criminal action. Article 47 of the German Military Penal Code, adopted in 1872, was as follows:

> "If through the execution of an order pertaining to the service [Dienstsachen], a penal law is violated, then the superior giving the order is alone responsible. However, the obeying subordinate shall be punished as accomplice [Teilnehmer]: (1) if he went beyond the order given to him, or (2) if he knew that the order of the superior concerned an act which aimed at a civil or military crime or offense."

The amendment of this in 1940 omitted the last two words "to him" in paragraph (1) above, and in paragraph (2) changed the words "civil or military crime or offense" to "general or military crime or offense." If this amendment had any effect, it extended rather than restricted the scope of the preceding act.

It is interesting to note that an article by Goebbels, the Reich Propaganda Minister, which appeared in the "Voelkischer Beobachter", the official Nazi publication, on 28 May 1944, contained the following correct statement of the law:

> "It is not provided in any military law that a soldier in the case of a despicable crime is exempt from punishment because he passes the responsibility to his superior, especially if the orders of the latter are in evident contradiction to all human morality and every international usage of warfare."

ORDERS

A question of general interest to the various defendants in this case involves the criminal responsibility for drafting, transmitting, and implementing illegal orders of their superiors.

For the first time in history individuals are called upon to

answer criminally for certain violations of international law. Individual criminal responsibility has been known, accepted, and applied heretofore as to certain offenses against international law, but the Nuernberg trials have extended that individual responsibility beyond those specific and somewhat limited fields.

This Tribunal is therefore charged not only to determine whether certain acts infringe international law, but also whether criminal responsibility attaches to an individual for such infringement, and we must look not only to the international law itself but to fundamental principles of criminal law as generally accepted by the civilized nations of the world for determination of that question. Such has been the principle applied by the Tribunals which have preceded us and we conform to that standard. For a defendant to be held criminally responsible, there must be a breach of some moral obligation fixed by international law, a personal act voluntarily done with knowledge of its inherent criminality under international law.

Control Council Law No. 10 [Article II, paragraph 4(*b*)] provides that:

> "The fact that any person acted pursuant to the order of his government or of a superior does not free him from responsibility of a crime, but may be considered in mitigation."

It is urged that a commander becomes responsible for the transmittal in any manner whatsoever of a criminal order. Such a conclusion this Tribunal considers too far-reaching. The transmittal through the chain of command constitutes an implementation of an order. Such orders carry the authoritative weight of the superior who issues them and of the subordinate commanders who pass them on for compliance. The mere intermediate administrative function of transmitting an order directed by a superior authority to subordinate units, however, is not considered to amount to such implementation by the commander through whose headquarters such orders pass. Such transmittal is a routine function which in many instances would be handled by the staff of the commander without being called to his attention. The commander is not in a position to screen orders so transmitted. His headquarters, as an implementing agency, has been bypassed by the superior command.

Furthermore, a distinction must be drawn as to the nature of a criminal order itself. Orders are the basis upon which any army operates. It is basic to the discipline of an army that orders are issued to be carried out. Its discipline is built upon this principle. Without it, no army can be effective and it is certainly not incumbent upon a soldier in a subordinate position to screen

the orders of superiors for questionable points of legality. Within certain limitations, he has the right to assume that the orders of his superiors and the state which he serves and which are issued to him are in conformity with international law.

Many of the defendants here were field commanders and were charged with heavy responsibilities in active combat. Their legal facilities were limited. They were soldiers—not lawyers. Military commanders in the field with far reaching military responsibilities cannot be charged under international law with criminal participation in issuing orders which are not obviously criminal or which they are not shown to have known to be criminal under international law. Such a commander cannot be expected to draw fine distinctions and conclusions as to legality in connection with orders issued by his superiors. He has the right to presume, in the absence of specific knowledge to the contrary, that the legality of such orders has been properly determined before their issuance. He cannot be held criminally responsible for a mere error in judgment as to disputable legal questions.

It is therefore considered that to find a field commander criminally responsible for the transmittal of such an order, he must have passed the order to the chain of command and the order must be one that is criminal upon its face, or one which he is shown to have known was criminal.

While, as stated, a commanding officer can be criminally responsible for implementing an illegal order of his superiors, the question arises as to whether or not he becomes responsible for actions committed within his command pursuant to criminal orders passed down independent of him. The choices which he has for opposition in this case are few: (1) he can issue an order countermanding the order; (2) he can resign; (3) he can sabotage the enforcement of the order within a somewhat limited sphere.

As to countermanding the order of his superiors, he has no legal status or power. A countermanding order would not only subject him to the severest punishment, but would be utterly futile and in Germany, it would undoubtedly have focussed the eyes of Hitler on its rigorous enforcement.

His second choice—resignation—was not much better. Resignation in wartime is not a privilege generally accorded to officers in an army. This is true in the Army of the United States. Disagreement with a state policy as expressed by an order affords slight grounds for resignation. In Germany, under Hitler, to assert such a ground for resignation probably would have entailed the most serious consequences for an officer.

Another field of opposition was to sabotage the order. This

he could do only verbally by personal contacts. Such verbal repudiation could never be of sufficient scope to annul its enforcement.

A fourth decision he could make was to do nothing.

Control Council Law No. 10, Article II, paragraph 2, provides in pertinent part as follows:

> "Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this article, if he * * * (*b*) was an accessory to the commission of any such crime or ordered or abetted the same or (*c*) *took a consenting part therein* or (*d*) *was connected with* plans or enterprises involving its commission * * *." [Emphasis supplied.]

As heretofore stated, his "connection" is construed as requiring a personal breach of a moral obligation. Viewed from an international standpoint, such has been the interpretation of preceding Tribunals. This connection may however be negative. Under basic principles of command authority and responsibility, an officer who merely stands by while his subordinates execute a criminal order of his superiors which he knows is criminal violates a moral obligation under international law. By doing nothing he cannot wash his hands of international responsibility. His only defense lies in the fact that the order was from a superior which Control Council Law No. 10 declares constitutes only a mitigating circumstance.

In any event in determining the criminal responsibility of the defendants in this case, it becomes necessary to determine not only the criminality of an order in itself but also as to whether or not such an order was criminal on its face. Certain orders of the Wehrmacht and the German army were obviously criminal. No legal opinion was necessary to determine the illegality of such orders. By any standard of civilized nations they were contrary to the customs of war and accepted standard of humanity. Any commanding officer of normal intelligence must see and understand their criminal nature. Any participation in implementing such orders, tacit or otherwise, any silent acquiescence in their enforcement by his subordinates, constitutes a criminal act on his part.

There has also been much evidence and discussion in this case concerning the duties and responsibilities of staff officers in connection with the preparation and transmittal of illegal orders. In regard to the responsibility of the chief of staff of a field command, the finding of Tribunal V in Case No. 7 as to certain defendants has been brought to the attention of the Tribunal.

It is pointed out that the decision as to chiefs of staff in that case was a factual determination and constitutes a legal determination only insofar as it pertains to the particular facts therein involved. We adopt as sound law the finding therein made, but we do not give that finding the scope that is urged by defense counsel in this case to the effect that all criminal acts within a command are the sole responsibility of the commanding general and that his chief of staff is absolved from all criminal responsibility merely by reason of the fact that his commanding general may be charged with responsibility therefor. It is further pointed out that the facts in that case are not applicable to any defendant on trial in this case.

The testimony of various defendants in this case as to the functions of staff officers and chiefs of staff has not been entirely consistent. Commanding generals on trial have pointed out that there were certain functions which they necessarily left to the chiefs of staff and that at times they did not know of orders which might be issued under authority of their command. Staff officers on trial have urged that a commanding officer was solely responsible for what was done in his name. Both contentions are subject to some scrutiny.

In regard to the functions of staff officers in general as derived from various documents and the testimony of witnesses, it is established that the duties and functions of such officers in the German Army did not differ widely from the duties and functions in other armies of the world. Ideas and general directives must be translated into properly prepared orders if they are to become effective in a military organization. To prepare orders is the function of staff officers. Staff officers are an indispensable link in the chain of their final execution. If the basic idea is criminal under international law, the staff officer who puts that idea into the form of a military order, either himself or through subordinates under him, or takes personal action to see that it is properly distributed to those units where it becomes effective, commits a criminal act under international law.

Staff officers, except in limited fields, are not endowed with command authority. Subordinate staff officers normally function through the chiefs of staff. The chief of staff in any command is the closest officer, officially at least, to the commanding officer. It is his function to see that the wishes of his commanding officer are carried out. It is his duty to keep his commanding officer informed of the activities which take place within the field of his command. It is his function to see that the commanding officer is relieved of certain details and routine matters, that a policy having been announced, the methods and procedures for

carrying out such policy are properly executed. His sphere and personal activities vary according to the nature and interests of his commanding officer and increase in scope dependent upon the position and responsibilities of such commander.

Since a chief of staff does not have command authority in the chain of command, an order over his own signature does not have authority for subordinates in the chain of command. As shown by the record in this case, however, he signs orders for and by order of his commanding officer. In practice, a commanding officer may or may not have seen these orders. However, they are presumed to express the wishes of the commanding officer. While the commanding officer may not and frequently does not see these orders, in the normal process of command he is informed of them and they are presumed to represent his will unless repudiated by him. A failure to properly exercise command authority is not the responsibility of a chief of staff.

In the absence of participation in criminal orders or their execution within a command, a chief of staff does not become criminally responsible for criminal acts occurring therein. He has no command authority over subordinate units. All he can do in such cases is call those matters to the attention of his commanding general. Command authority and responsibility for its exercise rest definitely upon his commander.

Under normal military procedure a commanding officer signs communications to higher commanders. He also in certain cases signs orders to subordinates which are considered to establish basic policy or whose importance he wishes to emphasize; but the majority of orders issued in a command, as shown by the record, are issued "for" or "by order" and signed only by the chief of staff. All such orders are binding on subordinates. How far a chief of staff can go in issuing orders without previous authorization or without calling them to the attention of his commander depends upon many factors, including his own qualifications, his rank, the nature of the headquarters, his personal relationship with his commander, and primarily upon the personality of the commander. A chief of staff does not hold a clerical position. In the German army chiefs of staff were not used below an army corps. The rank and care with which staff officers were selected show in itself the wide scope of their responsibilities which could, and in many instances undoubtedly did, result in the chief of staff assuming many command and executive responsibilities which he exercised in the name of his commander.

One of his main duties was to relieve his commander of certain responsibilities so that such commander could confine himself to

those matters considered by him of major importance. It was of course the duty of a chief of staff to keep such commander informed of the activities which took place within the field of his command insofar at least as they were considered of sufficient importance by such commander. Another well accepted function of chiefs of staff and of all other staff officers is, within the field of their activities, to prepare orders and directives which they consider necessary and appropriate in that field and which are submitted to their superiors for approval.

As stated heretofore, the responsibility allowed a chief of staff to issue orders and directives in the name of his commander varied widely and his independent powers for exercising initiative therefore also varied widely in practice. The field for personal initiative as to other staff officers also varied widely. That such a field did exist however is apparent from the testimony of the various defendants who held staff positions and in their testimony have pointed out various cases in which they modified the specific desires of their superiors in the interests of legality and humanity. If they were able to do this, the same power could be exercised for other ends and purposes and they were not mere transcribers of orders.

Surely the staff officers of the OKW did not hold their high ranks and positions and did not bask in the bright sunlight of official favor of the Third and Thousand Year Reich by merely impeding and annulling the wishes of the Nazi masters whom they served.

It over-taxes the credulity of this Tribunal to believe that Hitler or Keitel or Jodl, or all three of these dead men, in addition to their many activities as to both military matters and matters of state, were responsible for the details of so many orders, words spoken in conferences, and even speeches which were made. We are aware that many of the evil and inhumane acts of the last war may have originated in the minds of these men. But it is equally true that the evil they originated and sponsored did not spread to the far flung troops of the Wehrmacht of itself. Staff officers were indispensable to that end and cannot escape criminal responsibility for their essential contribution to the final execution of such orders on the plea that they were complying with the orders of a superior who was more criminal.

COMMISSAR ORDER

This was one of the most obviously malevolent, vicious, and criminal orders ever issued by any army of any time. It called for the murder of Russian political functionaries and, like so much of the evils of the Third Reich, originated in Hitler's fertile brain.

As will be shown, it was issued prior to the opening of the campaign against Russia.

On 30 March 1941, Hitler held a conference at Berlin with leaders of the Wehrmacht. Von Leeb was present. At that time, according to the summary contained in General Halder's Diary, Hitler said:

> *"Clash of two ideologies.* Crushing denunciation of bolshevism, identified with asocial criminality. Communism is an enormous danger for our future. We must forget the concept of comradeship between soldiers. A Communist is no comrade before nor after the battle. This is a war of extermination. If we fail to grasp this, and though we are sure to beat the enemy, we shall again have to fight the Communist foe 30 years from now. We do not wage war to preserve the enemy.
>
> *"War against Russia.* Extermination of the Bolshevist commissars and of the Communist intelligentsia. The new states must be Socialist, but without intellectual classes of their own. Growth of a new intellectual class must be prevented. A primitive Socialist intelligentsia is all that is needed. We must fight against the poison of disintegration. This is no job for military courts. The individual troop commander must know the issues at stake. They must be leaders in the fight. The troops must fight back with the methods with which they are attacked. Commissars and GPU men are criminals and must be dealt with as such. This need not mean that the troops get out of hand. Rather the commander must give orders which express the common feelings of his troops.
>
> "This war will be very different from the war in the West. In the East, harshness today means leniency in the future. Commanders must make the sacrifice of overcoming their personal scruples."

This seemed to have caused quite a bit of excitement among those present who, of course, recognized it as being brutal, murderous, and uncivilized. After Hitler had made his speech and had departed to his inner sanctum, protests were uttered by the commanders to the effect [that] the extermination planned by Hitler would violate their soldierly principles and, further, would destroy discipline. Brauchitsch agreed with them and promised to express their opinion to the OKW and Hitler respectively. He tried through Keitel to obtain a change in the plans but was unable to do so. Subsequently, he lent his approval to the objections made by the field commanders, who, in some instances at least, expressed a negative opinion of the order to their subordinates and tried to avoid its execution as far as they could

do so without peril to themselves. One of the means to ameliorate the brutality of the Commissar Order was the issuance by von Brauchitsch of what is known as the "Maintenance of Discipline" order hereafter referred to.

On 6 June 1941, the Commissar Order was issued from the Fuehrer Headquarters as "Top Secret. Transmission only by officer!" and was captioned "Directives for the Treatment of Political Commissars." It was as follows [*NOKW-484, Pros. Ex. 56*]:*

"In the fight against bolshevism it is *not* to be expected that the enemy will act in accordance with the principles of humanity or of the international law. In particular, a vindictive, cruel, and inhuman treatment of our prisoners must be expected on the part of the *political commissars of all types*, as they are the actual leaders of the resistance.

"The troops must realize—

"1. In this fight, leniency and considerations of international law are out of place in dealing with these elements. They constitute a danger for their own safety and the swift pacification of the conquered territories.

"2. The originators of barbarous Asiatic methods of warfare are the political commissars. They must therefore be dealt with most severely, *at once* and summarily.

"Therefore, they are to be liquidated at once when taken in combat or offering resistance.

"For the rest, the following directives will apply:

"I. *Combat zone.*

"(1) Political commissars *who oppose our troops* will be treated in accordance with the, 'decree concerning the application of martial law in the Barbarossa area'. This applies to commissars of any type and grade, even if they are only suspected of resistance, sabotage, or of instigation thereto.

"Reference is made to the 'directive concerning the conduct of the troops in Russia.'

"(2) Political commissars as *organs of the enemy troops* are recognizable by special insignia—red star with interwoven gold hammer and sickle on the sleeves. (For particulars see 'The Armed Force of the U.S.S.R.', High Command of the Armed Forces General Staff of the Army, Qu. IV, Section Foreign Armies East, (II) No. 100/41 Secret of 15 January 1941, Appendix 9d.) They are to be segregated *at once*, e.g., still on the battlefield, from the prisoners of war. This is necessary to prevent them from influencing the prisoners of war in any

* Document reproduced above in section VII, A2.

way. These commissars will not be recognized as solders, the protection of prisoners of war by international law does not apply to them. They will be liquidated after segregation.

"(3) *Political commissars who have not committed, or are not suspected of hostile acts* will not be harmed for the time being. Only after deeper penetration of the country will it be possible to decide whether officials who were left behind may stay where they are or will be handed over to the Sonderkommandos. Preferably the latter should decide on this point. As a matter of principle, in deciding the question whether 'guilty or not guilty' the personal impression which the commissar makes of his mentality and attitude will have precedence over facts which may be unprovable.

"(4) In cases (1) and (2) a short message (message form) about the incident will be sent: (*a*) by divisional units to divisional headquarters (intelligence officer); (*b*) by troops directly under the command of a corps, an army, an army group or a Panzer group, to the respective headquarters (intelligence officer).

"(5) None of the above-mentioned measures must obstruct the operations. Methodical searches and mopping-up actions, therefore, will not be carried out by the troops.

"II. In the communication zone commissars who are arrested in the communications zone on account of a doubtful attitude will be handed over to the Einsatzgruppen and/or Einsatzkommandos of the Security Police (Security Service).

"III. *Limitations of courts martial and summary courts*— The courts martial and summary courts of the regimental and other commanders must not be entrusted with the execution or the measures as per I and II."

On 8 June 1941, von Brauchitsch sent out a supplement of two additional clauses to be added to the original, viz, to I number (1),

"Action taken against a political commissar must be based on the fact that the person in question has shown by a special recognizable act or attitude that he opposes or will in future oppose the Wehrmacht."

To I number (2),

"Political commissars attached to the troops should be segregated and dealt with *by order of an officer*, inconspicuously and *outside the proper battle zone.*"

On 24 May 1941, however, von Brauchitsch formulated the *Maintenance of Discipline* Order, in which as a supplement to the Fuehrer Order it is said:

"Subject: Treatment of enemy civilians and criminal acts of members of the Wehrmacht against enemy civilians

"Attached Fuehrer decree is (hereby) announced. It is to be distributed *in writing* down to the commanders with jurisdiction of their own, beyond that, the principles contained in it are to be made known *orally*.

"*Supplements to I*—I expect that all counterintelligence measures of the troops will be carried out energetically, for their own security and the speedy pacification of the territory won. It will be necessary to take into account the variety of ethnic strains within the population, its over-all attitude, and the degree to which they have been stirred up.

"*Movement and combat against the enemy's armed forces are the real tasks of the troops.* It demands the fullest concentration and the highest effort of all forces. This task must not be jeopardized in any place. Therefore, in general, special search and mopping-up operations will be out of question for the combat troops.

"The directives of the Fuehrer concern *serious* cases of rebellion, in which the most severe measures are required.

"*Criminal acts of a minor nature* are, always in accordance with the combat situation, to be punished according to detailed orders from an officer (if possible, a post commander) by resorting to *provisional measures* (for instance, temporary detention at reduced rations, roping-upon a tree, assignment to labor).

"The CinC's of the army groups are requested to obtain my approval prior to the reinstatement of Wehrmacht jurisdiction in the pacified territories. The CinC's of the armies are expected to make suggestions in this respect in time.

"Special instructions will be issued about the treatment to be given to political dignitaries.

"*Supplements to II*—Under all circumstances it will remain the duty of all superiors to prevent arbitrary excesses of *individual* members of the army and to prevent *in time the troops* becoming unmanageable. It must not come to it that the individual soldier commits or omits any act *he* thinks proper toward the indigenous population; he must rather feel that in every case he is *bound by the orders of his officers.* I consider it very important that this be clearly understood down to the lowest unit. *Timely action* by every officer, especially every company commander, etc., must *help* to maintain discipline, the basis of our successes.

"Occurrences with regard to 'I' and 'II', and which are of special importance, are to be reported by the troops to the OKH as special events.

[Signed] VON BRAUCHITSCH"

There are 340 copies of this order which, as noted, had attached a copy of the Fuehrer order. This apparently was given wide distribution, although the original Fuehrer order had a very limited distribution.

It is said the *maintenance of discipline* order was conceived by von Brauchitsch as a means of sabotaging the Hitler order, but it will be noted that in the quoted part of Halder's diary he has Hitler saying, "This need not mean that the troops get out of hand".

It seems to be conceded—if any concession is necessary—that this order was criminal. It has neither defender nor apologist. Instead of a straightforward and manly refusal to execute a criminal order, some of the defendants sought a surreptitious sabotaging and evasion of its enforcement. However, in spite of such rejection or opposition on the part of those in high command, the record contains a large number of reports showing the execution of commissars by units subordinate to various of the defendants, as will be shown in the discussion of the case pertaining to each. This would have been avoided had some of these commanders been sufficiently courageous to have forced the issue. This was not done. It was implemented throughout the army.

It is claimed that on some occasions at least, blown up, exaggerated, or even fictitious figures were given of the number of these functionaries who were murdered. But the cold, hard, inescapable fact remains that many were so executed in utter violation of the laws of war and of humanity.

Can these defendants escape liability because this criminal order originated from a higher level? They knew it was directed to units subordinate to them. Reports coming in from time to time from these subordinate units showed the execution of these political functionaries. It is true in many cases they said they had no knowledge of these reports. They should have had such knowledge. If they had expressed their opposition to and rejection of the Commissar Order, that the reports showing the carrying out of this order would have been shown to them by their subordinates is a conclusion that is inescapable. It was criminal to pass it down to subordinate units. When the subordinates obeyed the order, the superior cannot absolve himself by the plea that his character was so well known that his subordinates should have had the courage to disobey the order which he himself in

passing it down showed that he lacked. Such a plea is contemptible and constitutes no defense.

PRESIDING JUDGE YOUNG: I shall continue with the reading of the judgment.

BARBAROSSA JURISDICTION ORDER

The so-called Barbarossa Jurisdiction Order is in a different category from the Commissar and Commando Orders and its consideration is somewhat more complicated. This order was issued by Keitel on 13 May 1941 as "Decree on Exercising Military Jurisdiction in the Area of Barbarossa and Special Measures by the Troops", and reads as follows (*C–50, Pros. Ex. 594*):

"The Wehrmacht's application of its laws (Wehrmachtgerichtsbarkeit) place at *maintaining discipline.*

"The vast extent of the operational areas in the East, the fighting methods necessitated thereby and the peculiarity of the enemy give the Wehrmacht courts jobs which—in view of their limited personnel—they can only solve during war operations and until some degree of pacification has been obtained in the conquered area if they limit themselves at first to their main task.

"This is possible only if the troops themselves oppose ruthlessly any threat from the enemy population.

"For these reasons herewith the following is ordered for the area 'Barbarossa' (area of operations, army group rear area, and area of political administration).

I. "*Treatment of crimes committed by enemy civilians*

"1. Until further order the military courts and the courts martial will not be competent for *crimes committed by enemy civilians.*

"2. *Francs-tireurs* will be liquidated ruthlessly by the troops in combat or while fleeing.

"3. *Also all other attacks by enemy civilians against the armed forces,* its members, and auxiliaries will be suppressed on the spot by the troops with the most rigorous methods until the assailants are finished (niederkaempfen).

"4. Where such measures were not taken or at least were not possible, *persons suspected of the act will be brought before an officer at once. This officer will decide whether they are to be shot.*

"Against *localities* from which troops have been attacked in a deceitful or treacherous manner, *collective coercive measures* will be applied immediately upon the order of an officer of the

rank of at least battalion etc., commander, if the circumstances do not permit a quick identification of individual perpetrators.

"5. It is *strictly forbidden* to *keep* suspects in *custody* in order to put them at the disposal of the courts after the reinstatement of jurisdiction over indigenous inhabitants.

"6. The commanders in chief of the army groups can—by agreement with the competent commanders of the Luftwaffe and the navy—*reinstate jurisdiction of the Wehrmacht courts for civilians,* in areas sufficiently pacified.

"For the *area of the political administration* this order will be given by the Chief of the OKW.

II. *"Treatment of crimes committed against inhabitants by members of the Wehrmacht and its auxiliaries*

"1. *With regard to offenses committed against enemy civilians by members of the Wehrmacht* or by its auxiliaries *prosecution is not obligatory,* even where the deed is at the same time a military crime or misdemeanor.

"2. When *judging such offenses,* it will be taken into consideration in any type of procedure that the collapse of Germany in 1918, the subsequent sufferings of the German people and the fight against national socialism which cost the blood of innumerable followers of the movement were caused primarily by Bolshevist influence and that no German has forgotten this fact.

"3. Therefore the judiciary will decide in such case whether *disciplinary punishment* will be appropriate, or whether *prosecution in court* is necessary. In the case of offenses against indigenous inhabitants the judiciary will order a prosecution *before the military courts only if the maintenance* of discipline or the security of the forces call for such a measure. This applies for instance to serious deeds due to lack of self-control in sexual matters, which originate from a criminal disposition and which indicates that the discipline of the troops is threatening to deteriorate seriously. Crimes which have resulted in senseless destruction of billets or stores or any other kind of captured material, to the disadvantage of our forces will be judged, as a rule, not less severely.

"The *order to start investigation procedure* requires in every single case the signature of the judicial authority.

"4. *Extreme caution* is required in judging the credibility of statements made by enemy civilians.

III. *"Responsibility of the Troop Commanders*

"In as far as they are competent, it is the *personal* responsibility of the troop commanders to see to it—

"1. That all officers of the units under their command are instructed in time and in the most emphatic manner about the principles set out under I above.

"2. That their legal advisers are informed *in time of* these rules and *of the verbal communications in which the political intentions of the Supreme Command* (Fuehrung) *were explained to the commanders in chief.*

"3. That only those sentences will be confirmed which correspond to the political intentions of the Supreme Command (Fuehrung).

IV. *"Protection as secret matter*

"Once the camouflage is lifted this decree will merely have the classification of *Top Secret.*"

It is divided into two main parts: first, it dispensed with court martial jurisdiction over the civilian population and provided that civilians in the occupied areas would be subjected to arbitrary punishment upon the decision of an officer. The second part provided that there was no obligation to prosecute members of the Wehrmacht or its auxiliaries who committed crimes against enemy civilians except in cases involving discipline which were restricted to certain types of offenses.

As to the first phase, court martial jurisdiction of civilians is not considered under international law an inherent right of a civilian population and is not an inherent prerogative of a military commander. The obligation towards civilian populations concerns their fair treatment. Court martial jurisdiction of a military commander and its extent are determined by his superiors. It has been urged in this trial that there is no rule of international law that guerrillas be brought to trial before a court and that this order authorizing their disposition on the arbitrary decision of an officer is therefore not illegal. There may be some doubt that trial before a court is in fact required under international law.

But in considering this order it must be borne in mind that it was not solely applicable to guerrillas and that it is an obligation upon an occupying force to provide for the fair treatment of the civilians within the occupied area. Whatever may be said as to the summary proceedings against guerrillas, the allowing of such summary proceedings in the discretion of a junior officer, in the case of the wide variety of offenses that were left open to him, is considered criminal.

Furthermore, the fourth paragraph of section I above in its most favorable construction is at best ambiguous but the logical inference to be drawn from this section goes further in the

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opinion of the Tribunal and provides that suspected *francs-tireurs* may be shot, which is also considered illegal.

The fourth paragraph of section I also provides for collective coercive measures to be applied immediately upon the order of an officer of at "least battalion, etc., commander" and is considered illegal in that it places no limitations upon such collective actions whatsoever.

For these reasons the first part of this order is considered illegal and we so find.

With regard to the second aspect of this order, that is the obligation to prosecute soldiers who commit offenses against the indigenous population, this obligation as a matter of international law is considered doubtful. The duty imposed upon a military commander is the protection of the civilian population. Whether this protection be assured by the prosecution of soldiers charged with offenses against the civilian population, or whether it be assured by disciplinary measures or otherwise, is immaterial from an international standpoint. This order in this respect is subject to interpretation. It surely opened the door to serious infractions of discipline. The German Army was concerned with the discipline of its troops. That discipline could not be maintained without punishment. Unwarranted acts of a soldier against a civilian constituted a breach of discipline. As a matter of fact, practically any offense against civilians could be construed as a breach of discipline. The provisions of the act itself recognize in part this situation. Recognition of this fact in the order was further strengthened by the von Brauchitsch so-called disciplinary order. This order was issued on 21 May 1941, practically coincident with the Barbarossa Jurisdiction Order, and was quoted above in connection with the Commissar Order.

This order was apparently given wide distribution and it is considered not without merit that the military authorities in the issuance of this order had substantially limited section II of the Barbarossa Jurisdiction Order insofar as that order did away with the obligation to prosecute. At any rate, as far as the acts of a soldier against the civilian population were concerned, practically any act might be interpreted as an act against discipline.

This disciplinary order by von Brauchitsch, however, was virtually canceled by certain subsequent orders issued by Keitel which will be hereafter noted in this opinion.

As regards the first part of the Barbarossa Jurisdiction Order, commanders were merely deprived of jurisdiction. It was not a positive order to do some act. It was merely an order which took away part of their powers. It is difficult to see how courts martial could have been established to try civilians under such

circumstances and the actions of such courts would have been illegal and futile. As regards the second part of the order, as heretofore stated, it was subject to the interpretation that unwarranted acts against civilians constituted a breach of discipline. The illegal application of the order, therefore, rested to a marked extent with the commanders in the field.

Another provision of this order must be given consideration in this regard. Paragraph 6 of section I provides that the commander in chief of the army groups can by agreement with the competent commanders of the Luftwaffe and the navy "reinstate jurisdiction of the Wehrmacht courts for civilians, in areas sufficiently pacified." While the limitation is placed upon this provision that the areas must be sufficiently pacified before the jurisdiction of the Wehrmacht courts could be reinstated, this provision nevertheless left the door open for commanders in chief of army groups opposed to the arbitrary provisions of the order as to civilians, to take action to eliminate it from their areas. This the record shows none of them did.

This Tribunal does not hold field commanders guilty for a failure to properly appraise the fine distinctions of international law, nor for failure to execute courts martial jurisdiction which had been taken away from them, but it does consider them criminally responsible for the transmission of an order that could, and from its terms would, be illegally applied where they have transmitted such an order without proper safeguards as to its application. For that failure on their part they must accept criminal responsibility for its misapplication within subordinate units to which they transmitted it. And in view of the relation of this order to *francs-tireurs*, it takes the view that while commanding generals might not be able under the provisions of the Barbarossa Jurisdiction Order to establish courts martial to try them, that such commanders were nevertheless responsible, within the areas of their commands, for the summary execution of persons who were merely suspects or those who, from their acts, were not in fact *francs-tireurs* at all, such as the execution of the nineteen year old girl who wrote a song derogatory of the German invader of her country.

COMMANDO ORDER

Following the Dieppe raid, and after drafts and changes had been prepared largely by Warlimont and Lehmann, Hitler issued the following order on 18 October 1942 [*498–PS, Pros. Ex. 124*] :

"1. For some time our enemies have been using in their warfare methods which are outside the international Geneva Conventions. Especially brutal and treacherous is the behavior of the so-called commandos, who, as is established, are partially recruited even from freed criminals in enemy countries. From captured orders it is divulged, that they are directed not only to shackle prisoners, but also to kill defenseless prisoners on the spot at the moment in which they believe that the latter as prisoners represent a burden in the further pursuit of their purposes or could otherwise be a hindrance. Finally, orders have been found in which the killing of prisoners has been demanded in principle.

"2. For this reason it was already announced in an addendum to the armed forces report of 7 October 1942 that in the future, Germany, in the face of these sabotage troops of the British and their accomplices, will resort to the same procedure, i.e., that they will be ruthlessly mowed down by the German troops in combat, wherever they may appear.

"3. I therefore order—

From now on all enemies on so-called commando missions in Europe or Africa challenged by German troops, even if they are to all appearance soldiers in uniform or demolition troops, whether armed or unarmed, in battle or in flight, are to be slaughtered to the last man. It does not make any difference whether they are landed from ships and aeroplanes for their actions, or whether they are dropped by parachute. Even if these individuals, when found, should apparently be prepared to give themselves up, no pardon is to be granted them on principle. In each individual case full information is to be sent to the OKW for publication in the report of the military forces.

"4. If individual members of such commandos, such as agents, saboteurs, etc., fall into the hands of the military forces by some other means, through the police in occupied territories for instance, they are to be handed over immediately to the SD. Any imprisonment under military guard, in PW stockades for instance, etc., is strictly prohibited, even if this is only intended for a short time.

"5. This order does not apply to the treatment of any enemy soldiers who, in the course of normal hostilities (large scale offensive actions, landing operations and airborne operations), are captured in open battle or give themselves up. Nor does this order apply to enemy soldiers falling into our hands after

battles at sea, or enemy soldiers trying to save their lives by parachute after battles.

"6. I will hold responsible under military law, for failing to carry out this order, all commanders and officers who either have neglected their duty of instructing the troops about this order, or acted against this order where it was to be executed."

This order was criminal on its face. It simply directed the slaughter of these "sabotage" troops.

The connection of certain defendants with it is treated in the discussion of the individual cases.

NIGHT AND FOG DECREE

This was another criminal order from Hitler's brain. It was signed by Keitel on 7 December 1941, after prior negotiations with Lehmann and Warlimont, and is as follows [*1733–PS, Pros. Ex. 797*]:

"Since the opening of the Russian campaign, Communist elements and other anti-German circles have increased their assaults against the Reich and the occupation power in the occupied territories. The extent and the danger of these activities necessitate the most severe measures against the malefactors in order to intimidate them. To begin with one should proceed according to the following directives.

I

"In case of criminal acts committed by non-German civilians and which are directed against the Reich or the occupation power endangering their safety or striking power, the death penalty is applicable in principle.

II

"Criminal acts contained in paragraph I will, in principle, be tried in the occupied territories only when it appears probable that death sentences are going to be passed against the offenders, or at least the main offenders, and if the trial and the execution of the death sentence can be carried out without delay. In other cases the offenders, or at least the main offenders, are to be taken to Germany.

III

"Offenders who are being taken to Germany are subject to court martial procedure there only in case that particular military concerns should require this. German and foreign agencies will declare upon inquiries on such offenders that they were arrested and the state of the proceeding did not allow further information.

IV

"The commanders in chief in the occupied territories and the justiciars, within their jurisdiction, will be personally held responsible for the execution of this decree.

V

"The Chief of the OKW will decide in which of the occupied territories this decree shall be applied. He is authorized to furnish explanations, supplements, and to issue directives for its execution. The Reich Minister of Justice will issue directives for the execution within his jurisdiction."

We have heretofore quoted from the judgment of the International Military Tribunal relative to this order and it need not be repeated. The enforcement of this cruel and brutal order cost the lives of many innocent people and untold suffering and misery to their loved ones.

The connection of certain of the defendants with it will be treated in our handling of the cases against them.

There are criminal orders involved in this case, other than those we have specifically mentioned, which we discuss in connection with the case of the defendants to whom they were applicable.

HOSTAGES AND REPRISALS

In the Southeast Case [Hostage Case], United States *vs.* Wilhelm List, et al., (Case No. 7), the Tribunal had occasion to consider at considerable length the law relating to hostages and reprisals. It was therein held that under certain very restrictive conditions and subject to certain rather extensive safeguards, hostages may be taken, and after a judicial finding of strict compliance with all preconditions and as a last desperate remedy hostages may even be sentenced to death. It was held further that similar drastic safeguards, restrictions, and judicial preconditions apply to so-called "reprisal prisoners." If so inhumane a measure as the killing of innocent persons for offenses of others, even when drastically safeguarded and limited, is ever permissible under any theory of international law, killing without full compliance with all requirements would be murder. If killing is not permissible under any circumstances, then a killing with full compliance with all the mentioned prerequisites still would be murder.

In the case here presented, we find it unnecessary to approve or disapprove the conclusions of law announced in said judgment as to the permissibility of such killings. In the instance of so-called hostage taking and killing, and the so-called reprisal kill-

ings with which we have to deal in this case, the safeguards and preconditions required to be observed by the Southeast judgment were not even attempted to be met or even suggested as necessary. Killings without full compliance with such preconditions are merely terror murders. If the law is in fact that hostage and reprisal killings are never permissible at all, then also the so-called hostage and reprisal killings in this case are merely terror murders.

The responsibility of defendants for any such acts will be considered in our determination of the cases against the individual defendants.

PARTISAN WARFARE

The execution of partisans as *francs-tireurs* is connected with the Barbarossa Jurisdiction Decree in that it involves the treatment of civilians by the occupying and invading forces.

The record in this case contains much testimony and among the numerous exhibits are many documents dealing with so-called partisan warfare. We deem it desirable to make some comment on the law relating thereto before considering the cases of the individual defendants.

Articles 1 and 2 of the Annex to the Hague Convention are as follows:

"Article 1

"The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

"1. To be commanded by a person responsible for his subordinates.

"2. To have a fixed distinctive emblem recognizable at a distance.

"3. To carry arms openly: and

"4. To conduct their operations in accordance with the laws and customs of war.

"In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination 'army'.

"Article 2

"The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war."

A failure to meet these requirements deprives one so failing on capture of a prisoner of war status.

We have a strong suspicion from the record in this case that antipartisan warfare was used by the German Reich as a pretext for the extermination of many thousands of innocent persons. Hitler stated what it seems became the Wehrmacht policy when he said: "This partisan war again has some advantages for us; it enables us to eradicate everyone who opposes us."

The defendants without exception claim that they executed as partisans only those who were operating as *francs-tireurs* and bandits and who failed to comply with the requirements of the rules of war to constitute them lawful belligerents. They claim there is no evidence adduced by the prosecution that the defendants are guilty of executing any as so-called partisans who complied with the requirements to constitute them lawful belligerents, that is, any who were not in fact *francs-tireurs*. However, we need not on the record before us determine whether this is true or untrue for the evidence shows beyond any question that it was the policy of the Wehrmacht to create classes of partisans by definition in orders and directives and by construction and in this manner they brought within the list of these they prescribed as partisans and shot or hung not only the *franc-tireur*, in fact, but also many other classes that no conceivable reason can be found for so including except as Hitler stated it, "to eradicate all those who oppose us". In a conference called by General Mueller (General for Special Assignments) at Warsaw before the Russian campaign to instruct the judge advocate and intelligence officers of the armies on the meaning and scope of the Barbarossa Jurisdiction Decree, the following was the construction and instruction given:

> "One of the two enemies must die; do not spare the bearer of enemy ideology, but kill him.
>
> "Every civilian who impedes or incites others to impede the German Wehrmacht is also to be considered a guerrilla (for instance: instigators, persons who distribute leaflets, nonobservance of German orders, arsonists, destroying of road signs, supplies, etc.).
>
> "The population is denied the right to take up arms voluntarily. Neither are para-military associations (Komsomoel Osscaviachim) entitled to do so."

The classification certainly is elastic and capable of wide extension. *"Every civilian who impedes or incites others to impede the German Wehrmacht,"* taken as a criterion for determining who is a *franc-tireur*, clearly opens the way for arbitrary and bloody

implementation. Those falling into the various classifications were summarily executed as partisans and so classified in the reports. There is no warrant in the rules of war or in international law for dealing with such persons as *francs-tireurs,* guerrillas, or bandits. Red Army soldiers in uniform were in some instances shot as so-called partisans. There is, of course, no warrant in international law for such action.

The most vicious classification of the prescribed was that of "partisan suspect". The executions of such were a regular routine and their executions were reported along with those of the so-called partisans.

Suspicion is a state of mind of the accuser and not a state of mind or an act by the one accused. It is a monstrous proposition containing the very essence of license that the state of mind of the accuser shall be the determining factor, in the absence of evidence of guilt, whether the accused shall or shall not be summarily executed. But it is said that when these accused were captured they were interrogated and some were not executed but released or sent to prison camps. But this is no defense for it does not necessarily mean that those who were executed as suspects had been found guilty even by the informal interrogation by an officer, but only that the interrogator *had not had his suspicion that they were guilty removed,* so under the order, they, being still suspected, they were executed. This does not amount to even the minimum of judicial protection required before an execution.

The classification of the victims in the numerous reports in the records as partisan suspects is a natural and proper one to be made under the order for execution on mere suspicion of partisan activity. If, as defendants have contended, no suspects were executed until they were lawfully found and adjudged to be guilty, there was no need whatsoever for the distinction made in the classification. We find from the evidence that there were great numbers of persons executed in the areas of various of these defendants, who, under no stretch of the imagination, were *francs-tireurs* and great numbers of others executed solely on suspicion, without any proof or lawful determination that they were in fact guilty of the offenses of which they were suspected. The orders to execute such persons and mere suspects on suspicion only and without proof, were criminal on their face. Executions pursuant thereto were criminal. Those who gave or passed down such orders must bear criminal responsibility for passing them down and for their implementation by the units subordinate to them.

Notwithstanding our strong suspicion that the executions of persons described in the documents as partisans were in a vast number of cases not executions of those whom it was permissible

to execute under the rules of war, but a mere cloak under which innocent persons were eradicated, we accord to the defendants the benefit of any possible doubt and determine the question of their criminality on the basis of cases of the type mentioned concerning the criminality of which under both the law and the evidence there can be no doubt.

We shall determine on consideration of the evidence each defendant's guilt or innocence as to such matters charged against him.

THE HAGUE AND GENEVA CONVENTIONS

Another question of general interest in this case concerns the applicability of the Hague Convention and the Geneva Convention as between Germany and Russia. In determining the applicability of the Hague Convention it must be borne in mind, first, that Russia ratified this convention but Bulgaria and Italy did not. The binding effect of the Hague Convention upon Germany was considered by the IMT in the trial against Goering, et al. On page 253* of that judgment it is stated:

> "But it is argued that the Hague Convention does not apply in this case, because of the 'general participation' clause in Article 2 of the Hague Convention of 1907. That clause provided:
>
> " 'The provisions contained in the regulations (Rules of Land Warfare) referred to in Article I as well as in the present Convention do not apply except between contracting powers, and then only if all the belligerents are parties to the Convention.'
>
> "Several of the belligerents in the recent war were not parties to this Convention.
>
> "In the opinion of the Tribunal it is not necessary to decide this question. The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing international law at the time of their adoption. But the convention expressly stated that it was an attempt 'to revise the general laws and customs of war', which it thus recognized to be existing, but by 1939 these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war which are referred to in Article 6(*b*) of the Charter."

It is apparent from the above quotation that the view adopted by the IMT in that case as to the Hague Conventions was that they were declaratory of existing international law and therefore bind-

* Trial of the Major War Criminals, *op. cit. supra*, vol. I, pp. 253–254.

ing upon Germany. In this connection it is further pointed out that the defense in this case, particularly as regards partisan warfare, primarily is based upon the fact that partisans could be shot or hanged since under the Hague Convention they were not lawful belligerents. The defense can hardly contend that Germany was in a position to sort out as binding on her only those provisions of these Conventions which suited her own purposes. Like the IMT, we do not feel called upon in this case to determine whether or not the Hague Conventions were binding upon Germany as an international agreement. We adopt the principle outlined in that case to the effect that in substance these provisions were binding as declaratory of international law.

As regards to the Geneva Convention, it is to be borne in mind that Russia was not a signatory power to this convention. There is evidence in this case derived from a divisional order of a German division that Russia had signified her intention to be so bound. However, there is no authoritative document in this record upon which to base such a conclusion. In the case of Goering et al., above cited, the IMT * stated as follows:

> "The argument in defense of the charge with regard to the murder and ill-treatment of the Soviet prisoners of war, that the U.S.S.R., was not a party to the Geneva Convention, is quite without foundation. On 15 September, Admiral Canaris protested against the regulations for the treatment of Soviet prisoners of war, signed by General Reinecke on 8 September 1941. He then stated:
>
> " 'The Geneva Convention for the treatment of prisoners of war is not binding in the relationship between Germany and the U.S.S.R. Therefore, only the principles of general international law on the treatment of prisoners of war apply. Since the 18th century these have gradually been established along the lines that war captivity is neither revenge nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war. This principle was developed in accordance with the view held by all armies that it is contrary to military tradition to kill or injure helpless people * * *. The decrees for the treatment of Soviet prisoners of war enclosed are based on a fundamentally different viewpoint.'
>
> * * * * * * *
>
> "Article 6(*b*) of the Charter provides that 'ill-treatment * * * of civilian population of or in occupied territory * * * killing of hostages * * * wanton destruction of cities, towns, or villages'

* Ibid., p. 232.

shall be a war crime. In the main, these provisions are merely declaratory of the existing laws of war as expressed by the Hague Convention, Article 46, which stated: 'Family honor and rights, the lives of persons and private property, as well as religious convictions and practice must be respected.' "

It would appear from the above quotation that that Tribunal accepted as international law the statement of Admiral Canaris to the effect that the Geneva Convention was not binding as between Germany and Russia as a contractual agreement but that the general principles of international law as outlined in those conventions were applicable. In other words, it would appear that the IMT in the case above cited followed the same lines of thought with regard to the Geneva Convention as with respect to the Hague Convention to the effect that they were binding insofar as they were in substance an expression of international law as accepted by the civilized nations of the world, and this Tribunal adopts this viewpoint.

One serious question that confronts us arises as to the use of prisoners of war for the construction of fortifications. It is pointed out that the Hague Convention specifically prohibited the use of prisoners of war for any work in connection with the operations of war, whereas the later Geneva Conventions provided that there shall be no *direct* connection with the operations of war. This situation is further complicated by the fact that when the proposal was made to definitely specify the exclusion of the building of fortifications, objection was made before the conference to that limitation, and such definite exclusion of the use of prisoners was not adopted. There is also much evidence in this case to the effect that Russia used German prisoners of war for such purposes. It is no defense in the view of this Tribunal to assert that international crimes were committed by an adversary, but as evidence given to the interpretation of what constituted accepted use of prisoners of war under international law, such evidence is pertinent. At any rate, it appears that the illegality of such use was by no means clear. The use of prisoners of war in the construction of fortifications is a charge directed against the field commanders on trial here. This Tribunal is of the opinion that in view of the uncertainty of international law as to this matter, orders providing for such use from superior authorities, not involving the use of prisoners of war in dangerous areas, were not criminal upon their face, but a matter which a field commander had the right to assume was properly determined by the legal authorities upon higher levels.

Another charge against the field commanders in this case is

that of sending prisoners of war to the Reich for use in the armament industry. The term "for the armament industry" appears in numerous documents. While there is some question as to the interpretation of this term, it would appear that it was used to cover the manufacture of arms and munitions. It was nevertheless legal for field commanders to transfer prisoners of war to the Reich and thereafter their control of such prisoners terminated. Communications and orders specifying that their use was desired by the armament industry or that prisoners were transmitted for the armament industry are not in fact binding as to their ultimate use. Their use subsequent to transfer was a matter over which the field commander had no control. Russian prisoners of war were in fact used for many purposes outside the armament industry. Mere statements of this kind cannot be said to furnish proof against the defendants for the illegal use of prisoners of war whom they transferred. In any event, if a defendant is to be held accountable for transmitting prisoners of war to the armament industry, the evidence would have to establish that prisoners of war shipped from his area were in fact so used.

Therefore, as to the field commanders in this case, it is our opinion that, upon the evidence, responsibility cannot be fixed upon the field commanders on trial before us for the use of prisoners of war in the armament industry.

In stating that the Hague and Geneva Conventions express accepted usages and customs of war, it must be noted that certain detailed provisions pertaining to the care and treatment of prisoners of war can hardly be so designated. Such details it is believed could be binding only by international agreement. But since the violation of these provisions is not an issue in this case, we make no comment thereon, other than to state that this judgment is in no way based on the violation of such provisions as to Russian prisoners of war.

Most of the provisions of the Hague and Geneva Conventions, considered in substance, are clearly an expression of the accepted views of civilized nations and binding upon Germany and the defendants on trial before us in the conduct of the war against Russia. These concern (1) the treatment of prisoners of war; (2) the treatment of civilians within occupied territories and spoliation and devastation of property therein; and (3) the treatment of Red Army soldiers who, under the Hague Convention, were lawful belligerents.

We cite in this category the following rules from the Hague Rules of Land Warfare:

"Article 4

"Prisoners of war are in the power of the hostile government, but not of the individuals or corps who capture them.

"They must be humanely treated".

* * * * * * *

That part of Article 6 which provides—

"* * * The tasks shall not be excessive * * *"

That part of Article 8 which provides—

"Escaped prisoners who are retaken before being able to rejoin their own army or before leaving the territory occupied by the army which captured them are liable to disciplinary punishment.

"Prisoners who, after succeeding in escaping, are again taken prisoner, are not liable to any punishment on account of the previous flight."

From the Geneva Convention, that part of Article 2 which provides—

"They must at all times be humanely treated and protected, particularly against acts of violence, insults, and public curiosity."

That part of Article 3 which provides—

"Prisoners of war have the right to have their person and their honor respected. Women shall be treated with all the regard due to their sex."

Article 4 which provides—

"The power detaining prisoners of war is bound to provide for their maintenance.

"Difference in treatment among prisoners is lawful only when it is based on the military rank, state of physical or mental health, professional qualifications, or sex of those who profit thereby."

That part of Article 7 which provides—

"Prisoners of war shall be evacuated within the shortest possible period after their capture, to depots located in a region far enough from the zone of combat for them to be out of danger."

These parts of Article 9 which provide that—

"Prisoners captured in unhealthful regions or where the climate is injurious for persons coming from temperate regions, shall be transported, as soon as possible, to a more favorable climate";

and that—

"No prisoner may, at any time, be sent into a region where he might be exposed to the fire of the combat zone, nor used to give protection from bombardment to certain points or certain regions by his presence."

That part of Article 10 which provides—

"Prisoners of war shall be lodged in buildings or in barracks affording all possible guarantees of hygiene and healthfulness."

These parts of Article 11 which provide—

"The food ration of prisoners of war shall be equal in quantity and quality to that of troops at base camps."

and that—

"A sufficiency of potable water shall be furnished them."

That part of Article 12 which provides that—

"Clothing, linen, and footwear shall be furnished prisoners of war by the detaining power."

That part of Article 13 which provides—

"Belligerents shall be bound to take all sanitary measures necessary to assure the cleanliness and healthfulness of camps and to prevent epidemics."

Article 25—"Unless the conduct of military operations so requires, sick and wounded prisoners of war shall not be transferred as long as their recovery might be endangered by the trip."

Article 29—"No prisoner of war may be employed at labors for which he is physically unfit."

That part of Article 32 which provides—

"It is forbidden to use prisoners of war at unhealthful or dangerous work."

That part of Article 46 which provides—

"Any corporal punishment, any imprisonment in quarters without daylight and, in general, any form of cruelty, is forbidden."

Article 50 which provides—

"Escaped prisoners of war who are retaken before being able to rejoin their own army or to leave the territory occupied by the army which captured them shall be liable only to disciplinary punishment.

"Prisoners who, after having succeeded in rejoining their army or in leaving the territory occupied by the army which

captured them, may again be taken prisoners shall not be liable to any punishment on account of their previous flight."

That part of Article 56 which provided—

"In no case may prisoners of war be transferred to penitentiary establishments (prison, penitentiaries, convict prisons, etc.) there to undergo disciplinary punishment."

Under these provisions certain accepted principles of international law are clearly stated. Among these applicable in this case are noted those provisions concerning the proper care and maintenance of prisoners of war. Also the provisions prohibiting their use in dangerous localities and employment, and in this connection it should be pointed out that we consider their use by combat troops in combat areas for the construction of field fortifications and otherwise, to constitute dangerous employment under the conditions of modern war. Under those provisions it is also apparent that the execution of prisoners of war for attempts to escape was illegal and criminal.

Also, it is the opinion of this Tribunal that orders which provided for the turning over of prisoners of war to the SD, a civilian organization, wherein all accountability for them is shown by the evidence to have been lost, constituted a criminal act, particularly when from the surrounding circumstances and published orders, it must have been suspected or known that the ultimate fate of such prisoners of war was elimination by this murderous organization.

The contention of the defense as to the condition of many of the Russian prisoners when captured is considered a defense as far as it goes. No doubt many were in a deplorable condition due to lack of food, poor clothing, wounds, sickness, and exhaustion when captured. There is no question that for temporary periods these conditions would bring about much hardship and many deaths regardless of the efforts of their captors. However, the evidence in this case shows that hundreds of thousands of Russian prisoners of war died from hunger, cold, lack of medical care, and ill-treatment that were not a result of these conditions. It is true that later on in the war Germany realized that she had lost for herself a tremendous source of manpower which had become one of the major problems of the German nation. Thereafter to some extent her treatment of prisoners of war was based on the sounder economic principle that it was better to work them to death than to merely let them die. The great mass of Russian prisoners of war did not die because of their condition at the time of their capture. The argument that the winter of 1941–42 was the coldest winter in years in that area can hardly be alleged as an excuse

for the deaths of prisoners of war from cold. Cold winters have certainly not been unknown in those parts of Europe where these prisoners were kept in captivity. In fact, cold winters in those parts are the rule and not the exception. Nor can it be said that the German Army did not have food with which to maintain them. In their progress through Russia they had seized the food supplies of the people and there is no evidence in the record to show that German soldiers at that time were dying from starvation. There is evidence that in some cases there were epidemics of typhus in the German Army but nothing to parallel the various epidemics which broke out in the Russian camps. No doubt soldiers in the German Army died in isolated cases from lack of medical supplies and medical attention but the evidence in this case shows that thousands of Russian prisoners of war died from lack of attention while the German Army which held them was not materially suffering from lack of either.

As regards the humanity of their treatment, the evidence in this case discloses not only that humane treatment was not generally required of German soldiers in dealing with Russian prisoners of war, but that the directly opposite procedure was imposed upon them by superior orders. The treatment of Russian prisoners of war by the German Wehrmacht was a crime under international law, and it is so found by this Tribunal.

Concerning the compulsory use of the civilian population, spoliation, and devastation within occupied areas, the following provisions of the Hague Convention are likewise cited as applicable in this case:

> Article 43—"The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."
>
> Article 46—"Family honor and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected."
>
> Article 47—"Pillage is formally forbidden."
>
> Article 49—"If, in addition to the taxes mentioned in the above Article, the occupant levies other money contributions in the occupied territory, this shall only be for the needs of the army or of the administration of the territory in question."
>
> Article 50—"No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible."

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That part of Article 52 which reads as follows:

"Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country."

That part of Article 53 which reads as follows:

"An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the state, depots of arms, means of transport, stores and supplies, and generally, all movable property belonging to the state which may be used for military operations."

Under the Articles above quoted, it is apparent that the compulsory labor of the civilian population for the purpose of carrying out military operations against their own country was illegal.

Under the same Articles, the compulsory recruitment from the population of an occupied country for labor in the Reich was illegal.

It is conceded that this policy of recruitment of slave labor for the Reich did not originate with the army. The army apparently desired this source of labor for its own purposes.

The nature and the extent of this program of recruitment for slave labor is shown by [Document 310–PS] Prosecution Exhibit 490. This document concerns the recruitment of the age groups 1926 and 1927 for labor in the Reich and applied alike to men and women within these age groups. In other words, the Reich was drafting boys and girls in some instances as young as 17 years for slavery in a foreign country. The Sauckel plan for the mobilization of foreign labor was based on compulsory requisitioning from the populations of occupied territories. In fact, all the economy of the Reich became dependent for its labor to a large extent upon these sources. This stupendous undertaking could not have been effectively carried out without the cooperation of the military authorities in the occupied territories. Hundreds of thousands of the helpless population of the occupied territories were transferred to the Reich under this program of labor recruitment.

The same principles of international law apply to a large extent with regard to looting and spoliation. The difference is mainly that in one case Germany required human beings and in another, property for her own economy and the conduct of the war.

It is not contended that individuals of the German Army were guilty to a larger extent than is inevitable in cases of this kind in

any army. The German Army, as has been pointed out, was on the whole a disciplined army. The looting and spoliation shown by the record was not that of individuals but looting and spoliation by the German Government and the German Wehrmacht for the needs of both. It was done on a larger scale than was possible by individuals and the strictness of the prohibitions against individuals in the army, as shown by the evidence in this case, seems to have been sometimes based upon the idea that in looting, the individual was not depriving the victim of the property but was depriving the Reich and the Wehrmacht.

The doctrine of military necessity has been widely urged. In the various treatises on international law there has been much discussion on this question.

It has been the viewpoint of many German writers and to a certain extent has been contended in this case that military necessity includes the right to do anything that contributes to the winning of a war. We content ourselves on this subject with stating that such a view would eliminate all humanity and decency and all law from the conduct of war and it is a contention which this Tribunal repudiates as contrary to the accepted usages of civilized nations. Nor does military necessity justify the compulsory recruitment of labor from an occupied territory either for use in military operations or for transfer to the Reich, nor does it justify the seizure of property or goods beyond that which is necessary for the use of the army of occupation. Looting and spoliation are none the less criminal in that they were conducted, not by individuals, but by the army and the state.

The devastation prohibited by the Hague Rules and the usages of war is that not warranted by military necessity. This rule is clear enough but the factual determination as to what constitutes military necessity is difficult. Defendants in this case were in many instances in retreat under arduous conditions wherein their commands were in serious danger of being cut off. Under such circumstances, a commander must necessarily make quick decisions to meet the particular situation of his command. A great deal of latitude must be accorded to him under such circumstances. What constitutes devastation beyond military necessity in these situations requires detailed proof of an operational and tactical nature. We do not feel that in this case the proof is ample to establish the guilt of any defendant herein on this charge.

Concerning the treatment of Red Army soldiers, the [Annex to] Hague Conventions provide:

"Article 1

"The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

"1. To be commanded by a person responsible for his subordinates;

"2. To have a fixed distinctive emblem recognizable at a distance;

"3. To carry arms openly; and

"4. To conduct their operations in accordance with the laws and customs of war.

"In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination 'army'."

This Article defines what constitutes a lawful belligerent. Orders to the effect that Red Army soldiers who did not turn themselves over to the German authorities would suffer penalty of being treated as guerrillas, and similar orders, and the execution of Red Army soldiers thereunder, are in contravention of the rights of lawful belligerents and contrary to international law.

It has been stated in this case that American occupational commanders issued similar orders. This Tribunal is not here to try Allied occupational commanders but it should be pointed out that subsequent to the unconditional surrender of Germany, she has had no lawful belligerents in the field.

Judge Harding at this point will continue with the reading of the judgment.

RESPONSIBILITY OF COMMANDERS OF OCCUPIED TERRITORIES

JUDGE HARDING: The defense in this case as to the field commanders on trial has been partially based on the contention that while criminal acts may have occurred within the territories under their jurisdiction, that these criminal acts were committed by agencies of the state with which they were not connected and over whom they exercised no supervision or control. It is conceded that many of these defendants were endowed with executive power but it is asserted that the executive power of field commanders did not extend to the activities of certain economic and police agencies which operated within their areas; that the activities of these agencies constituted limitations upon their exercise of executive power.

In this connection it must be recognized that the responsibility of commanders of occupied territories is not unlimited. It is fixed according to the customs of war, international agreements, fundamental principles of humanity, and the authority of the commander which has been delegated to him by his own government. As pointed out heretofore, his criminal responsibility is personal. The act or neglect to act must be voluntary and criminal. The term "voluntary" does not exclude pressures or compulsions even to the extent of superior orders. That the choice was a difficult one does not alter either its voluntary nature or its criminality. From an international standpoint, criminality may arise by reason that the act is forbidden by international agreements or is inherently criminal and contrary to accepted principles of humanity as recognized and accepted by civilized nations. In the case of violations of international agreements, the criminality arises from violation of the agreement itself—in other cases, by the inherent nature of the act.

War is human violence at its utmost. Under its impact excesses of individuals are not unknown in any army. The measure of such individual excesses is the measure of the people who compose the army and the standard of discipline of the army to which they belong. The German Army was, in general, a disciplined army. The tragedy of the German Wehrmacht and these defendants is that the crimes charged against them stem primarily from its highest military leadership and the leadership of the Third Reich itself.

Military subordination is a comprenhensive but not conclusive factor in fixing criminal responsibility. The authority, both administrative and military, of a commander and his criminal responsibility are related but by no means coextensive. Modern war such as the last war entails a large measure of decentralization. A high commander cannot keep completely informed of the details of military operations of subordinates and most assuredly not of every administrative measure. He has the right to assume that details entrusted to responsible subordinates will be legally executed. The President of the United States is Commander in Chief of its military forces. Criminal acts committed by those forces cannot in themselves be charged to him on the theory of subordination. The same is true of other high commanders in the chain of command. Criminality does not attach to every individual in this chain of command from that fact alone. There must be a personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case it must be a personal neglect amounting

to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence. Any other interpretation of international law would go far beyond the basic principles of criminal law as known to civilized nations.

Concerning the responsibility of a field commander for crimes committed within the area of his command, particularly as against the civilian population, it is urged by the prosecution that under the Hague Convention, a military commander of an occupied territory is *per se* responsible within the area of his occupation, regardless of orders, regulations, and the laws of his superiors limiting his authority and regardless of the fact that the crimes committed therein were due to the action of the state or superior military authorities which he did not initiate or in which he did not participate. In this respect, however, it must be borne in mind that a military commander, whether it be of an occupied territory or otherwise, is subject both to the orders of his military superiors and the state itself as to his jurisdiction and functions. He is their agent and instrument for certain purposes in a position from which they can remove him at will.

In this connection the Yamashita case has been cited. While not a decision binding upon this Tribunal, it is entitled to great respect because of the high court which rendered it. It is not, however, entirely applicable to the facts in this case for the reason that the authority of Yamashita in the field of his operations did not appear to have been restricted by either his military superiors or the state, and the crimes committed were by troops under his command, whereas in the case of the occupational commanders in these proceedings, the crimes charged were mainly committed at the instance of higher military and Reich authorities.

It is the opinion of this Tribunal that a state can, as to certain matters, under international law limit the exercise of sovereign powers by a military commander in an occupied area, but we are also of the opinion that under international law and accepted usages of civilized nations that he has certain responsibilities which he cannot set aside or ignore by reason of activities of his own state within his area. He is the instrument by which the occupancy exists. It is his army which holds the area in subjection. It is his might which keeps an occupied territory from reoccupancy by the armies of the nation to which it inherently belongs. It cannot be said that he exercises the power by which a civilian population is subject to his invading army while at the same time the state which he represents may come into the area which he holds and subject the population to murder of its citizens and to other inhuman treatment. The situation is somewhat analogous to the accepted principle of international law that the

army which captures the soldiers of its adversary has certain fixed responsibilities as to their care and treatment.

We are of the opinion, however, as above pointed out in other aspects of this case, that the occupying commander must have knowledge of these offenses and acquiesce or participate or criminally neglect to interfere in their commission and that the offenses committed must be patently criminal. But regardless of whether or not under international law such responsibility is fixed upon him, under the particular facts in this case, responsibility of the commanders in question rests upon other factors. In this respect we quote certain provisions of the handbook for the general staff in wartime, pertinent to executive power [*NOKW–1878, Pros. Ex. 42*]:

"5. The exercising of executive power by military commanders is governed by No. 20–24 of Army Manual 90 (of the army in the field).

"6. If a zone of operation is determined, the Commander in Chief of the Army and the commanders in chief of the armies receive at the declaration of a state of defense or at the declaration of a state of war authority for exercising executive power in this territory, without further order (pars. 2 and 9 of the Reich Defense Law).

"In other cases, the Fuehrer and Supreme Commander of the Wehrmacht can transfer such authority for exercising executive power to the Commander in Chief of the Army and the commanders in chief of the armies.

"7. The executive power comprises the entire state power including the right of issuing laws without prejudice to the independence of jurisdiction. Those persons invested with executive power can decree local orders affecting the territory in which authority for exercising has been turned over to them or transferred to them, set up special courts, and issue instructions to the authorities and offices competent in the territory named, with the exception of the Supreme Reich Authorities, the Supreme Prussian Provincial Authorities, and the Reichsleitung of the NSDAP.

"8. The Supreme Reich Authorities, Supreme Prussian Provincial Authorities, and the Reichsleitung of the NSDAP can decree orders for the territory into which executive power has been transferred, only by agreement with the persons invested with executive power. Their right of issuing instructions to the authorities and offices subordinated to them remains intact. Nevertheless the right of issuing instruction by the person invested with executive authority takes precedence.

"9. Authority for exercising executive power is incumbent only on the persons invested. It can be transferred further only in as much as an authorization is ordered thereto actually or legally.

"Accordingly persons invested with executive power are authorized to entrust subordinated offices with the execution of individual missions.

"10. The laws, decrees, etc., which are valid at the transfer of the executive power retain their validity so long as the person invested with executive power encounters no contrary order.

"11. The Commander in Chief of the Army regulates the exercising of executive power through the commanders in chief of the armies.

"The revision of questions which occur in the exercising of executive power does not fall into the realm of work of the army judges. The civilian commissioner with the High Command of the Army is assigned for that purpose to the Commander in Chief of the Army; the chiefs of the civil administration, to the commanders in chief of the armies. Persons invested with executive power are authorized however, to call in the army judges assigned to them as counselors, especially in the decreeing of legal orders of penal law content."

It is therefore apparent that executive power under German law is the exercise of sovereign powers within an occupied area conferred upon a military commander by the state. The defense has undertaken to minimize to a large extent this wide authority but in view of the above document, it does not appear to be the mere shadow of authority contended. In fact, these provisions fix upon an occupying commander certain responsibilities as to the preservation of law and order within his area.

The contention of defendants that the economic agencies were excluded from their exercise of executive power is disproved by various documents which will hereafter be cited in considering the guilt or innocence of defendants on trial. And regardless of that fact, the proof in this case also establishes a voluntary cooperation of defendants on trial with these economic agencies in the furtherance of their illegal activities.

The defense contends that the activities of the Einsatzgruppen of the Security Police and SD were beyond their sphere of authority as occupational commanders because the state had authorized the illegal activities of these police units and so limited the executive power of the occupational commanders. However, the occupational commanders in this case were bearers of executive power and, one and all, have denied receipt of any orders showing, or

knowledge of, a state-authorized program providing for the illegal activities of the Einsatzgruppen.

One of the functions of an occupational commander endowed with executive power was to maintain order and protect the civilian population against illegal acts. In the absence of any official directives limiting his executive powers as to these illegal acts within his area, he had the right and duty to take action for their suppression. Certainly he is not in a position to contend that these activities were taken from his field of executive power by his superiors when he knew of no such action on their part.

The sole question then as to such defendants in this case is whether or not they knew of the criminal activities of the Einsatzgruppen of the Security Police and SD and neglected to suppress them.

It has been urged that all of the defendants in this case must have had knowledge of the illegal activities of the Einsatzgruppen. It has been argued that because of the extent of their murder program in the occupational areas and by reason of the communications available to the high commanders, and the fact that they were in command of these areas, they must necessarily have known of this program. The record in this case shows that some 90,000 so-called undesirable elements were liquidated by Einsatzgruppe D, largely within the area of the 11th Army. It also shows that some 40,000 Jewish women and children were liquidated in Riga which at that time was in the Commissariat Ostland, immediately to the rear of the Army Group North. The Einsatzgruppen and their subordinate units were organized to carry out this program within the operational areas of the army.

It is true that extermination of such a large number of people must necessarily have come to the attention of many individuals, and, also, it is established that soldiers in certain areas participated in some of these executions.

In many respects a high commander in the German Army was removed from information as to facts which may have been known to troops subordinate to him. In the first place, these troops were in many instances far removed from his headquarters. In addition the common soldiers and junior officers do not have extensive contacts with the high commanders and staff officers.

Another factor must also be taken into consideration in connection with the activities of the Einsatzgruppen. This is the dual nature of its functions. On the one hand, it was charged with the criminal liquidation of certain elements; on the other hand it exercised legitimate police activities in connection with

the security of the rear communications of the armies, in which capacity it operated largely against guerrillas.

Another factor was the effort made to keep the criminal activities of these police units from the Wehrmacht. In the early stages of the war many of their mass executions, as is shown by the record, occurred under the guise of pogroms instigated by the SIPO and SD but actually carried out by local inhabitants. Racial hatreds and pogroms have been known in Europe for centuries. Pogroms occurred at the time of the Crusades and have recurred in the history of Europe, even in our time. It is established that pogroms were used by Einsatzgruppe A which operated in the area of the Army Group North and in the Commissariat Ostland, as a vehicle for their criminal activities. At times it is shown such pogroms were participated in by local militia which necessarily owed its existence to the German Army.

Another source of information was reports submitted by Einsatzgruppen to army headquarters, but it is noted that such reports concerned mainly activities within their legal sphere of combating partisans and the maintenance of security. However, such reports showed the execution of Jews, gypsies, and others as specific classifications of those liquidated. Reports of the mass murders carried out by these police units, however, were submitted through their own channels to the RSHA in Berlin and were not submitted to army headquarters or through such headquarters.

An army commander has two reliable and extensive official sources of information (1) superior orders, (2) reports of subordinate units.

It is true that no superior orders transmitted to the defendant field commanders show the mass murder program of the Third Reich have been introduced in evidence with the exception of the Commissar Order in which the executing agency was not the SD but the army itself.

Official reports of subordinate units normally furnish a vast amount of information. Reports of individual instances of illegal acts may however not be submitted to higher headquarters if for no other reason than that the suppression of such acts is the province of the subordinate and their occurrence might be a subject for criticism. Also the staff of high operational commands engaged in extensive combat operations is much less likely to bring such matters to the attention of the commander than the staff of a lower command.

Other factors to be considered as to the knowledge of criminal acts of the SIPO and SD by defendants is the time, the localities,

the combat situation, the extent of the activities, and the nature of the command.

This, in brief, summarizes the main factors considered and the sources of knowledge appraised in determining the criminal responsibility of the defendants in this case in connection with activities of the Einsatzgruppen of the SIPO and SD. From this discussion it is apparent we can draw no general presumption as to their knowledge in this matter and must necessarily go to the evidence pertaining to the various defendants to make a determination of this question.

And it is further pointed out that to establish the guilt of a defendant from connection with acts of the SIPO and SD by acquiescence, not only must knowledge be established, but the time of such knowledge must be established.

When we discuss the evidence against the various defendants, we shall treat with greater detail the evidence relating to the activities of the Einsatzgruppen in the commands of the various defendants, and to what extent, if any, such activities were known to and acquiesced in or supported by them.

HITLER AND THE WEHRMACHT

The defense has asserted that there was considerable opposition to Hitler's plans and orders by the higher military leadership. General Franz Halder, who was chief of the German general staff from 1938 to 1942, testified that Hitler's plans to invade the Sudetenland caused the formation of a plot for a coup to overthrow Hitler, but that this plot was abandoned because of the Munich Pact. Be this as it may, the success of Hitler at Munich increased his prestige with all circles of the German people, including the higher military leadership.

In 1939, Hitler advised certain of the high military leaders of his decision to attack France by violating the neutrality of the Low Countries. On 11 October 1939, von Leeb wrote his Commander in Chief, von Brauchitsch, inclosing a memorandum prepared by him advising against this course of action. In it he argues that the invasion would develop into a long drawn-out trench warfare, and he continued [*von Leeb 39a, von Leeb Defense Ex. 39*]:

> "* * * Besides, we will not be in a position to rally allies to our cause. Even now, Italy is sitting on the fence, and Russia has accomplished everything it had aimed at by virtue of our victories, and by this has again become a predominant and directly decisive factor as far as Central Europe is concerned. Furthermore, Russia's attitude remains uncertain in view of

its continued diplomatic relations to the Western Powers. The more we tie ourselves down in the West the more freedom the Russians will have for their decisions. On the other hand, Belgium and, in the course of the years, the United States of America as well, will join our enemies, and the Dominions will exert all their strength to give effective assistance to the mother country."

Then, in discussing the political repercussions which would follow from this proposed action, he said:

"Any violation of Belgium's neutrality is bound to drive that country into the arms of France. France and Belgium will then have one common foe, Germany, which for the second time within 25 years assaults neutral Belgium! Germany, whose government solemnly vouched for and promised the preservation of and respect for this neutrality only a few weeks ago! I have already elaborated under paragraph 1 on the fact that in such a case it is highly probable that France will immediately rush strong forces to the aid of the Belgians, which means that there will be heavy fighting already on Belgian soil.

"If Germany, by forcing the issue, should violate the neutrality of Holland, Belgium, and Luxembourg a neutrality which has been solemnly recognized and vouched for by the German Government, this action will necessarily cause even those neutral states to reverse their declared policy towards the Reich, which up till now showed some measure of sympathy for the German cause. The Reich which cannot count on Italy's or Russia's military assistance, will become increasingly isolated also economically. Especially North America, whose population easily falls for such propaganda slogans, will become more inclined to submit to England's and France's influence."

Then on 31 October 1939, von Leeb wrote von Brauchitsch a letter in which he said:

"I consider the military annihilation of the English, French, and Belgians a goal which cannot be attained at present. For only if they are annihilated, if attacked, would they be ready for peace.

"To associate the successes in the East with the wishful thinking in regard to the West would be a fatal deviation from reality.

"In the political field, we have Poland as security in our hands, don't we? If that doesn't suit our opponents, then let *them* attack.

"The whole nation is filled with a deep longing for peace. It doesn't want the impending war and regards it with no feeling of sympathy whatsoever. If the Party offices are reporting anything else, they are withholding the truth. The people are now looking forward to having peace result from the policies of their Fuehrer, because they feel quite instinctively that it is impossible to destroy France and England, and that any more extensive plans must therefore be held in abeyance. As a soldier, one is forced to say the same.

"If the Fuehrer were now to make an end to the present situation, under conditions which were in some measure acceptable no one would interpret this as a sign of weakness or yielding but rather as recognizing the true status of power. The granting of an autonomy for Czechoslovakia and allowing the remainder of Poland to stand as a nation would probably meet with the complete understanding of the entire German people.

"The Fuehrer would then be honored as a prince of peace, not only by the entire German people, but assuredly also by large parts of the world as well.

"I am prepared to stand behind you personally to the fullest extent in the days to come and to bear the consequence desirable or necessary."

In spite of this, the plans went on for the invasion which, however, was delayed until the following May. Von Leeb testified this delay was brought about by the efforts of von Bock, Halder, and himself, in the hope that the additional time might allow a diplomatic settlement. The reasons given for the delay were purely military, viz, that the roads were impassable, the equipment defective, etc. The moral phase was not considered.

So it is clear there was some opposition among the military leadership to Hitler's plans, but the tragedy of it is that these men, in spite of their opposition, allowed themselves to be used by him. Von Leeb was asked by a member of the Tribunal why it was this leadership was impotent and helpless against Hitler, to which he replied (*Tr. pp. 2422–2423*) :

"Hitler was a demon, he was a devil. General Halder has testified here that you couldn't know what was going on in his mind. That, perhaps, is how it happened that those wills which were opposing this one will were too weak to be successful. Above all this will was represented in our top level leadership but we could not get at him. There was no way of convincing Hitler. He knew everything better than everybody else, and that is how disaster took its course.

"If now in retrospect you look back on the whole situation,

one might perhaps think that we, the high military leaders, should have formed a more united front in opposition to Hitler. Let's perhaps take the following case. Herr von Brauchitsch and the three of us, the three army group commanders, one day confronted Hitler and told him, 'So far and no further. Behind us is the whole of the German Army'. I don't believe that that would have made a strong impression on Hitler. He would have had the four of us arrested and put into a concentration camp."

The testimony of General Halder, referred to by von Leeb, was in response to a request that he give briefly his impression of Hitler, and is as follows (*Tr. p. 2003*):

"This is a very difficult task. A personality which was so unusual is difficult to sketch with very few words. The picture which I gained of Hitler is as follows: An unusual power of intellect; an amazingly quick comprehension, but not a trained person who could adapt himself to logical lines of thought; a person with very strong emotional tendencies; his decisions were conditioned by what he called intuition, that is, his emotions, but no clear logically thought-out considerations; his intellect also included an amazing power of imagination and phantasy which in an astonishing degree had its repercussion in his lines of thought or events; substantial parts of his character were a tremendous tenacity and energy of will power which also enabled him to surmount all obstacles, even in minor matters. The thing that most impressed me about Hitler was the complete absence of any ethical or moral obligations; a man for whom there was no limits which he could not transcend by his action or his will; he knew only his purpose and the advantage that he pursued; that for him was the imperative call. As far as it seemed to me, he was a very lonely man who lacked the capacity to enter into personal contact with other human beings and thus to relax and to release his personality. He was thus always torn by tension which made cooperation with him extremely difficult. I was not prepared for your question, Your Honor. This is a question about which many books will yet be written, and I shall be grateful to Your Honors if you would be satisfied with this brief sketch of mine."

In the final statement of General von Leeb* in behalf of all the defendants, he referred repeatedly to the difficulties confronting them, saying:

"However, in the Third Reich, under the dictatorship of

* Final statement is reproduced in Section X.

Hitler, we found ourselves faced with a development which was in contrast to our principles and nature. It is not true to say that we as officers changed—the demands made of us became different.

"We sought to oppose this evolution under the Third Reich, but we lacked the means which might have been effective under a dictatorship."

Again he said:

"In regard to Hitler's instructions, which went against our humane and soldierly feelings, we were never merely his tools without a will of our own. We did oppose his instructions as far as we deemed this to be possible or advisable, and we have toned their wording down and rendered them ineffective or mitigated them in practice."

To von Leeb, Hitler was a "demon * * * a devil," and to Halder he had "a complete absence of any ethical or moral obligation." The demands he made of the defendants may have been "in contrast to their principles and natures," and against their "humane and soldierly feelings," but the inescapable fact remains that in part, at least, if not to the whole, they permitted their consciences and opinions to become subordinate to his will, and it was this which has placed such great and ineradicable shame upon the German arms.

We realize the feelings of professional pride, of ambition to succeed in their profession of arms, of fear for their personal safety or of reprisals against their families, their love of country, their soldiers' concept of obedience, and indeed, the ingrained respect of the German for those in authority over him, were factors in their decisions. We are aware of the tendency towards degeneration of "civilized" warfare in the modern concept of "total" war, and of the war madness that engulfs all people of belligerent powers.

Those considerations cannot excuse, but it is proper to consider and judge in any case the offenses charged in the light of their historical and psychological background and in their connections with all surrounding circumstances.

WILHELM VON LEEB

Field Marshal Wilhelm von Leeb was born in 1876, entered service in 1895, and had various promotions until he became a field marshal in 1940. He was Commander in Chief of Army Group North in the campaign against Russia until 16 January 1942, when he resigned primarily because of interference in technical

matters by Hitler and was then placed in the Fuehrer reserve.

The German Army, prior to the establishment of army groups, was based on Heeres or ground forces which were composed of armies and subordinate units. The armies were both administrative and operational. When the army group was established, the staff provided was much smaller than the staff of the subordinate armies, according to the testimony of von Kuechler, one-third or one-half the size of the staff of an army. Judicial authority did not extend through the commander of the army group. He had no representative of the quartermaster general who directly controlled matters of supply. The quartermaster general did not operate directly through the army group but through the armies and army group rear areas where there were representatives of his department on the staff.

A commander of the army group in the early stages of its development had no staff of experts for supervision of prisoner of war affairs which was directly under the quartermaster general and his subordinates. Nor did the economic agencies of the Reich operate through the army group. The armies and commanders of army group rear areas had experts on their staffs to deal with these matters.

During the period of the defendant von Leeb's command of Army Group North the duties imposed upon him were almost exclusively operational and his headquarters and staff were strictly operational in their functions.

Executive power at the beginning of the Russian campaign was conferred directly upon the army commanders and the commanders of the army group rear areas. It was provided, however, that the commander in chief of an army group might issue orders to his subordinates in the field of executive power. In other words, his authority in this field was more in the nature of a right to intervene than a direct responsibility.

This power to intervene followed the general pattern of his command authority over subordinate units. Nevertheless, authority and responsibility as to many administrative matters were directly vested in von Leeb's subordinates. It was common for the OKH and staff officers of the OKH to issue orders directly to these subordinates without such orders always being submitted to army group headquarters for information. In other instances, orders addressed to subordinate units were sent through the army group. In such cases the army group headquarters acted as a forwarding agency, with implementation of orders resulting from their being put into command channels, and not from action on the part of the defendant.

The defendant's army group had moved from East Prussia to

Leningrad. He had under his command five to six hundred thousand soldiers. His operations were of great magnitude. They started with the opening of the Russian campaign on 22 June 1941, and his activities terminated officially on 16 January 1942. In this comparatively brief period of time he had moved a great army over a vast territory under the arduous conditions of combat. As stated, his function was operational. Many administrative duties had been left to his subordinate armies and his army group rear area. He and his staff alike would have the right to assume that the commanders entrusted with such administrative functions would see to their proper execution. Under such conditions it must be accepted that certain details of activities within the sphere of his subordinates would not be brought to his attention.

The evidence establishes that criminal orders were executed by units subordinate to the defendant and criminal acts were carried out by agencies within his command. But it is not considered under the situation outlined that criminal responsibility attaches to him merely on the theory of subordination and over-all command. He must be shown both to have had knowledge and to have been connected with such criminal acts, either by way of participation or criminal acquiescence.

Aside from the charge of crimes against peace heretofore disposed of in this opinion, the charges against him relate to the period he was Commander in Chief of Army Group North. We think these charges may be broken down into the following general headings: (1) The Commissar Order; (2) crimes against prisoners of war; (3) The Barbarossa Jurisdiction Order; (4) crimes against civilians; (5) pillage of public and private property; (6) criminal conduct pertaining to the siege of Leningrad. We shall discuss these *seriatim*.

1. The Commissar Order—We have discussed the criminality of the Commissar Order. Von Leeb was present at the meeting held by Hitler in March 1941 when the proposed extermination of the commissars was announced. He considered this to be in violation of international law and, as well, to be stupid in that it tended to defeat its own purpose. He discussed the matter with von Brauchitsch and lodged a protest with him. Von Brauchitsch assured him he would do all he could to prevent the issuance of the order but notwithstanding this, it was later issued by the OKH. Von Leeb as Commander of Army Group North, and von Bock of Army Group Center, and von Rundstedt of Army Group South were opposed to it. Von Leeb made further protest to von Brauchitsch on the occasion of the latter's visits in July and September 1941 and likewise protested to Keitel on two occasions.

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Keitel replied he would do his best to obtain a cancellation of the order. Later, pursuant to the objection made by the commanders of the army groups, General Mueller, General for Special Assignments under Commander in Chief of the Army, von Brauchitsch, wrote the OKW on 23 September 1941 as follows:

"It is requested to check on the necessity of the carrying out of the 'Commissar' Decree in its present form, considering the development of the situation. Commanders, commanding officers and the troops themselves report that the will to fight on the part of the Russians could be weakened if the commissars, who no doubt are the pillars of the embittered and stubborn resistance would find it easier to give up the fight, to surrender or to desert.

"At present the prevailing situation is such that every commissar faces his death in any case; that is why a large number of them is fighting to the last and also forces the Red Army soldiers to resist stubbornly by the most brutal means.

"The combat situation being what it is at present, when here and there the Russian side shows a slight weakening due to the large losses, the diminishing supply of personnel and material, the mixing of units and the indecisiveness of the leadership, a paralysis of the will to fight generally by breaking the resistance of the commissars might have a not inconsiderable success, and under circumstances may save much blood.

"The achievement of the goal should be attempted in proper form by all kinds of propaganda by varied means.

"The Commander in Chief of the Army also believes that the above views which have been reported to him personally by all army groups deserve consideration from a military point of view also, and a reconsideration of the treatment of the commissars accorded to them up to now seems expedient to him."

It will be noted this recommendation is based wholly upon military considerations without any discussion of the moral phase which of course would not have interested Hitler. This recommendation was submitted to Hitler and a notation thereupon was made in Jodl's writing, as follows: "The Fuehrer has refused any change in the decree concerning treatment of Russian commissars issued up to now."

It is apparent that Mueller's letter corroborates von Leeb's testimony regarding the opposition to this order by the commanders in chief of these army groups.

When this order was issued, it was directed by OKH to the armies in these three groups who, however, received copies for informational purposes. In other words, the army group had

nothing to do with the passing on of this order to subordinate units beyond the administrative functions of forwarding it to them.

However, in addition to his protests to his superiors, von Leeb discussed this order with subordinate commanders and let them know of his opposition to it. He also mentioned the maintenance of discipline order issued by von Brauchitsch in an effort to thwart as far as he could the enforcement of the Commissar Order.

As a practical purpose, what other action was open to him? He could not revoke this order coming as it did from his superiors, even from the head of the state. Had he undertaken to do so, this would have been a flagrant disobedience of orders. In discussing the resignation, he said:

> "* * * In addition, as a commander, I knew that all commanders I talked to were against this order and therefore I hoped that at least it would not be carried out in its full measure, and if I had resigned at that time then I would have saved myself in the cheapest manner possible, but at the same time I would have given up the struggle against Hitler, and for the rest such an application for resignation would probably not have made the slightest impression on Hitler. In addition it would probably have become known why I resigned because I couldn't suddenly say, 'I am ill, I can't go on any longer.' "

He was then asked as to his present impressions about this question, to which he replied:

> "I have had ample time and opportunity to think about this order and about what we did at that time under the pressure of responsibility, and here I must admit I don't know even today any better way. At that time as far as it was possible at all, we tacitly sabotaged the order and all depended on our doing it tacitly. I really don't know how we could do it differently today."

This order had been passed down to his subordinate units, the 18th Army under von Kuechler, the 16th Army under Busch, and the 4th Panzer Group under Hoepner. And in spite of von Leeb's attitude, the reports of units in these subordinate commands indicate the murder of many of these functionaries. It may be that in some instances the figures were fictitious or exaggerated, but in spite of this, we find there were many cases of these atrocities. But we cannot find von Leeb guilty in this particular. He did not disseminate the order. He protested against it and opposed it in every way short of open and defiant refusal to obey it. If

his subordinate commanders disseminated it and permitted its enforcement, that is their responsibility and not his.

2. Crimes against prisoners of war—During the period of von Leeb's command of Army Group North, prisoners of war in his area were under the general supervision of the quartermaster general. He in turn was subject to the supervision of the commander in chief of the OKH, at that time von Brauchitsch, who in turn was subject to the over-all command of Hitler through the OKW. The quartermaster general carried out his functions through subordinates in the armies and the army group rear areas. In both there were officers subordinated in part to him but primarily subordinated to the commander of the armies and the army group rear areas to whose staffs they belonged. Responsibility for prisoners of war affairs was therefore directly vested in the commanders of the armies and of the army group rear areas. Direct responsibility in these matters bypassed the commander in chief of the army group. While he had the right to issue orders to his subordinates concerning such matters, he also had the right to assume that the officers in command of those units would properly perform the functions which had been entrusted to them by higher authorities, both as to the proper care of prisoners of war or the uses to which they might be put. He also had the right as heretofore pointed out, to assume that certain uses to which they were put were legal under the conditions existing in the war with Russia. As we have stated, their use in dangerous occupations or in dangerous localities was obviously illegal under international law but there is no substantial evidence that such illegal uses of prisoners of war were ever brought to the attention of the defendant.

The only evidence that the use of Russian prisoners of war to clear away mines was ever called to the attention of the defendant is contained in [prosecution] Rebuttal Exhibit 3, NOKW–3337, book 1, page 4. This document states that:

> "This morning the CinC of Army Group North visited the Panzer group.
>
> "The essential content of the conference was about as follows:"

The pertinent entry reads:

> "* * * Because of the many mines laid in the houses they are not yet being entered (a number of accidents). Prisoners are used to clear away the mines."

This document was signed by Golling, Major, GSC, Liaison Officer OKH, with Panzer Group 4.

It is considered that this entry is too vague and subject to too many interpretations to establish that the defendant von Leeb was advised of this use of prisoners of war and consented thereto.

To prove von Leeb's knowledge of the neglect of prisoners of war it is urged that his chief of staff, Brennecke, attended a conference at Orsha on 13 November 1941, where the question of food supplies of prisoners of war was broached by the chief of staff of the Army Group Center. It is to be noted that the record of this conference is found in the files of the 18th Army, one of the units subordinate to von Leeb and directly responsible for prisoner of war affairs. The report in question on this meeting, however, merely states that Army Group Center "points out in particular that the prisoners of war actually constitute necessary additional labor, were, however, unable to work in their present condition, but fell to a large extent into a state of exhaustion."

Nothing appears in this document as to the condition of prisoners of war within the area of the Army Group North, nor does it appear that any report was made to the defendant von Leeb concerning the matter.

It is also urged that the defendant must have known of the neglect of prisoners of war from seeing them upon the roads. This is a broad assumption. The condition of these prisoners on the road as heretofore pointed out might well have been due to their condition when captured and not to any neglect of their captors at that time.

A careful examination of all the evidence on this subject does not establish either that the defendant von Leeb was guilty of neglect of prisoners of war or responsible for their improper use within the area of his command.

There is proof in the record that Red Army soldiers were illegally executed within the area of the defendant von Leeb and to show his connection therewith and responsibility therefor, our attention has been invited to certain exhibits.

The first of these is an order of 13 September 1941. An examination of this exhibit shows an order issued by the general for special assignments with the Commander in Chief of the Army to the 6th Army which was not under von Leeb's command. This order was sent to army groups for information. From these facts neither transmittal via the defendant von Leeb nor enforcement of this order can be inferred.

A further order of the OKH, signed von Brauchitsch, dated 25 October 1941, is also called to our attention, and it is stated that this was obviously distributed by the Army Group North in view of the divisional order of the 12th Infantry Division of the 16th Army which was part of the Army Group North, and a some-

what similar order of the 281st Security Division, which was under the command of the rear area of Army Group North. However, examination of these exhibits shows neither the actual order which was supposed to have been distributed by the defendant von Leeb nor that such an order was ever transmitted by him to the channels of command. The order itself does not in fact show the distribution made of the order, or that it was in fact ever distributed.

We are therefore unable to find from the evidence that the defendant von Leeb was criminally connected with, knew of, or participated in the illegal execution of Red Army soldiers within his area.

3. The Barbarossa Jurisdiction Order—This was a Fuehrer order received by the army group under Leeb's command. There is nothing to show that it was ever directed to subordinate units under him. It has been contended that this was an order pertaining to judicial authority and would not concern an army group and therefore would have been transmitted direct to those commanders who had judicial authority. Examination of the order itself however shows that only in part did it pertain particularly to judicial authority. Basically, it was an order pertaining to the conduct and discipline of troops and of such a nature to be of the highest significance to any officer in command of troops, including the army group commanders. The order itself charges troop officers with the responsibility of informing subordinate officers.

An entry in the war diary of the Army Group North shows that it was transmitted with the OKH order of 1 June 1941 to subordinate units. There is no evidence in the record to show that the defendant von Leeb expressed more than a disapproval of the order and that was on the basis that it threatened the discipline of the army. We must conclude from the evidence that this order was put into the chain of command by von Leeb's action.

It was a criminal order, at least in part. It was further an order that was at best ambiguous in respect to the authority conferred upon a junior officer to shoot individuals who were merely suspected of certain acts. There is nothing to show that in the transmittal of this order, it was in any way clarified or that instructions were given in any way to prevent its illegal application. The evidence establishes that von Leeb implemented this order by passing it into the chain of command. Coming directly through him in the chain of command, it carried the weight of his authority as well as that of his superiors. The record in this case shows that it was criminally applied by units subordinate to him. Having set this instrument in motion, he

must assume a measure of responsibility for its illegal application.

4. Crimes against civilians—This charge derives from the activities of Einsatzgruppe A which was assigned to and operated within the area of the Army Group North.

With regard to Field Marshal von Leeb's responsibility for crimes committed by the Einsatzgruppen within his area of command, as we have stated, it would be immaterial whether he knew that his government was carrying out a program of mass murder and cooperated with it, or whether he was unaware that there was such a program entrusted to the police by the authority of the state but still permitted acts of mass murder to be carried out.

It is urged that von Leeb knew of the extermination program of the German Government entrusted to the Einsatzgruppen. To prove this, three documents have been called to our attention. The first of these is an OKH order of 28 April 1941; the second is an OKH order of 9 August 1941. Both of these orders were shown to have been received by the Army Group North, and it can be presumed that communications from this source would be brought to the attention of the commander of an army group. However, neither of these documents shows that extermination program of the Third Reich. The third document, upon which his knowledge of such a program is alleged to have been based, is [NO–3422] Prosecution Exhibit 367. The significant part of the document is found on page 214 of document book 6–G. This was an enclosure to an operational order from the SIPO and SD concerning the use of the Einsatzkommandos. This inclosure, dated 7 October 1941, is referred to on page 209 where it is said that directives were completed in agreement with the High Command of the Army. However, there is nothing to show that the inclosure was ever transmitted to the Army Group North or that it was not in fact a draft of a contemplated order. It is a fixed rule of interpretation that an ambiguous document must be construed most favorably to the defendant. While this document definitely shows illegal activities of the Security Police, the proof does not establish that it was ever received by the defendant von Leeb.

The proof relied upon to show his knowledge of these criminal acts of the Einsatzgruppen against the civilian population within the area of his command is in part contained in reports of various officers of Einsatzgruppe A to their superiors in Berlin. These reports were not sent to von Leeb nor through his headquarters. They are evidence to establish that certain extermination activities were carried out by this organization. However, they are of a nature which must be viewed with careful scrutiny. In many respects as to time and place they are extremely vague. A report

asserts that 135,000 people had been liquidated by the Einsatzgruppe A but where these liquidations occurred is subject to considerable doubt. We know from other proof that some 40,000 Jews were liquidated in Riga, apparently by Einsatzgruppe A, but this liquidation occurred in the territory under the Reich Commissar Ostland, and outside the territory of the defendant.

Other than the mass liquidations which occurred at Kovno, the evidence does not establish any liquidations within his area which were brought to the attention of the defendant. This action, apparently inspired by the Einsatzgruppen, was, however, carried out as a pogrom, credited to a local self-defense organization of Latvians. Hearing of this action, von Leeb took action to prevent any recurrence of a similar nature within the area of the 16th Army where Kovno was located.

Reports containing incidents of illegal executions by the SIPO in connection with security operations were made from subordinate units in von Leeb's command to the army group rear area, armies, and corps headquarters. But it is not established that these reports were transmitted to the headquarters of the Army Group North or reported to von Leeb by his staff.

We are therefore unable to find from the evidence submitted that the defendant von Leeb had knowledge of the murder of civilians within his area by the Einsatzgruppen or acquiesced in such activities.

Nor is it established from the evidence that the defendant participated in the recruitment of slave labor for the Reich. The document relied on in this connection is a report to the effect that in a given period, a number of civilians were sent from the Army Group North to the Reich for labor. Leeb was in command for only a part of the period covered by the report. Furthermore, the document does not establish the involuntary nature of the recruitment.

5. Pillage of public and private property—The prosecution relies upon two orders to sustain this charge. The first of these orders is from the 12th Panzer Division on 11 November 1941, directing an operation against certain villages "used by the partisans as a base of operations," with instructions to seize the cattle, horses, and chickens and most of the food, but further directing a small amount of food be left for the population at the direction of the commander of the operations. We cannot say this order was illegal.

Likewise an order of XXXIX Corps issued on 7 December 1941, regarding a forced retreat, called for the destruction of food and fodder that could not be taken along in the retreat. The destruction of these foodstuffs would tend to hamper the advancing enemy

and we cannot find it was not justified under the exigency of the situation.

We do not find any criminality under this phase of the case.

6. Criminal conduct pertaining to the siege of Leningrad— Leningrad was encircled and besieged. Its defenders and the civilian population were in great straits and it was feared the population would undertake to flee through the German lines. Orders were issued to use artillery to "prevent any such attempt at the greatest possible distance from our own lines by opening fire as early as possible, so that the infantry, if possible, is spared shooting on civilians." We find this was known to and approved by von Leeb. Was it an unlawful order?

> "A belligerent commander may lawfully lay siege to a place controlled by the enemy and endeavor by a process of isolation to cause its surrender. The propriety of attempting to reduce it by starvation is not questioned. Hence, the cutting off of every source of sustenance from without is deemed legitimate. It is said that if the commander of a besieged place expels the noncombatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back so as to hasten the surrender."*

We might wish the law were otherwise but we must administer it as we find it. Consequently, we hold no criminality attached on this charge.

For the reasons above stated we find this defendant guilty under count three of the indictment for criminal responsibility in connection with the transmittal and application of the Barbarossa Jurisdiction Order. Under Control Council Law No. 10 it is provided that superior orders do not constitute a defense but may be considered in mitigation of an offense.

We believe that there is much to be said for the defendant von Leeb by way of mitigation. He was not a friend or follower of the Nazi Party or its ideology. He was a soldier and engaged in a stupendous campaign with responsibility for hundreds of thousands of soldiers, and a large indigenous population spread over a vast area. It is not without significance that no criminal order has been introduced in evidence which bears his signature or the stamp of his approval.

We find on the evidence in the record, and for the reasons above stated, the defendant is guilty under count three of the indictment, and not guilty under count two thereof.

PRESIDING JUDGE YOUNG: Judge Hale will continue the reading of the judgment.

* Hyde, *International Law* (Little, Brown and Co., Boston, 1945) 2d Revised Edition, vol. III, pp. 1802–1803.

JUDGE HALE: He was born 7 February 1885, and entered military service in 1903. After Hitler's rise to power he was transferred to the air forces where he became a leading figure. In 1936–1937 he was Commanding General of the "Condor Legion" sent by Hitler to participate in the Spanish Civil War which was used as a testing ground for the OKL.

He attained the rank of field marshal in 1940. In 1941 he was made commander of Air Fleet 3. In 1942 he lost his command authority in the war against England. In 1943 and 1944 he served at different periods for several weeks as "Deputy Commander in Chief West" during temporary absences of Field Marshal von Rundstedt. During these times he also had to continue his activities as commander in chief of Air Fleet 3, and restricted his activities as "Deputy Commander in Chief West" to the signing of letters or orders presented to him by Blumentritt, chief of the general staff under von Rundstedt, and specialists from that staff.

Aside from his alleged participation in crimes against peace, heretofore disposed of in this opinion, he is charged with (1) enforcing the "Sauckel action" while serving as deputy in Rundstedt's absence; and (2) using Russian prisoners of war in air force construction battalions in France.

The prosecution relies upon these two charges for a conviction. The first is based upon an order of 6 June 1943, of which 380 copies were issued, in which he says:

"13. Recruiting of Workers in the Area of the Commander in Chief West

"According to report from the military commander in Belgium and Northern France it has again occurred, in spite of orders to the contrary, that German agencies without being entitled hereto recruit workers within the area of the military commander of Belgium and northern France for other areas without using the mediation of the agencies of the military commander of Belgium and northern France and of indigenous agencies as prescribed. Through such procedure these workers for the most part were lost to recruitment for Germany through the 'Sauckel Action'. I shall examine to what extent military authorities are involved in this prohibited recruiting."

On 1 March 1944, at a meeting between Milch and Sauckel, the latter said: "* * * Field Marshal Rundstedt and Field Marshal Sperrle gave me the utmost support in these matters", i.e., the

support of the Wehrmacht in compulsory recruitment of French labor.

Blumentritt testified in substance that during this period Sperrle had little to do with such matters and that this order was merely to clarify the jurisdiction of the different agencies. The record indicates that Sperrle was on principle opposed to the Sauckel drive and sought to make it ineffective. Consequently there is generated in our minds a reasonable doubt as to his guilt on this charge.

The second charge is founded upon entries in War Diary No. 1 of Luftwaffe Construction Brigade 12, Air Fleet 3, under Sperrle, and consequent orders of subordinate units showing it was contemplated that the Russian prisoners of war be used as construction units. But there is no evidence they were so used, but to the contrary, the record establishes none were ever so used.

We find the defendant not guilty under counts two and three of the indictment and he will be discharged by the Marshal when the Tribunal adjourns.

GEORG KARL FRIEDRICH-WILHELM VON KUECHLER

Field Marshal von Kuechler was born in 1881, entered service in 1900, and rose by various promotions to field marshal in January 1942, succeeding, von Leeb as Commander of Army Group North. He continued in this command until January 1944, when he was placed in the Fuehrer Reserve.

He participated in the entire Polish campaign as Commander in Chief of the 3d Army. From 30 September 1939 until 5 November 1939 he was commander of the border section of East Prussia. On 5 November 1939 he became Commander in Chief of the 18th Army in the West. The 18th Army invaded Holland in 1940, marched through Belgium, advanced to Dunkirk, captured Paris, and he remained commander in chief of it until the troops reached the Spanish border.

At the beginning of July 1940, he was sent to the East, and then became, so to speak, the Commander in Chief of the eastern front, but that was only a short time, until the arrival of Field Marshal List. But he retained the 18th Army. At first only the staff of the 18th Army was transferred to the East, while the troops remained in the West. But little by little, most of the troops of the 18th Army he had commanded in the West returned to the East, so that in the spring of 1941, the 18th Army was completely assembled in the East.

Then came the Russian campaign in 1941. At that time he was Commander of the 18th Army on the northern flank, at first in the

Baltic, then as far as Leningrad. He retained this command until January 1942, when he was made a field marshal and took over the command of Army Group North, as successor to Field Marshal von Leeb, a position which he held until he was relieved of it in 1944.

The record indicates that Field Marshal von Leeb appraised him as "personally without fear, cold-blooded, respected, exemplary soldier suitable as commander in chief of an army group." The record shows him to have been cold-blooded and ruthless.

He was charged under all four counts of the indictment. Numbers one and four have been eliminated by the action of this Tribunal. The remaining charges, under counts two and three, may be broken down into the following headings: (1) The Commissar Order; (2) the Commando Order; (3) neglect of prisoners of war and their use in prohibited labor; (4) illegal execution of Red Army soldiers and murder and ill-treatment of prisoners of war; (5) deportation and enslavement of the civilian population; (6) plunder of public and private property; (7) murder, ill-treatment, and persecution of civilian population; and (8) the Barbarossa Jurisdiction Order.

We shall discuss these charges in order.

1. The Commissar Order—As commander of the 18th Army, he received this order directly from the OKH, together with the von Brauchitsch Disciplinary Order. He passed the Commissar Order on to subordinate commanders. He testified that he couldn't embezzle it, push it aside, or ignore it. He had attended the Hitler conference in Berlin in March and knew of the impending war of ideology and extermination. He was opposed to the order because it was repugnant to him and not consistent with his views of warfare, and "between the devil and the deep blue sea I had to find a way through. On the one hand I did not want to be in danger of being regarded as a disobedient commander, because it was quite obvious that it would become known and that it would be said the commander in chief did not carry out an order. On the other hand, however, I did want to express my own opinion in regard to this order that it wasn't to be followed. That was my position." He further testified that he protested to von Leeb. However, he gave an affidavit for use in the IMT on behalf of the High Command in which he stated: "I never held this order in my hands; whether it ever reached my agency, I do not know; whether and in what manner troop commanders were informed of it, I cannot state * * *. My then commander in chief, Field Marshal von Leeb, I met several times on the battle field. We never discussed an order concerning special measures against political commissars." These two statements are utterly irrec-

oncilable. His explanation is that when he made the affidavit he did not know this as the "Commissar Order", and that the documents had refreshed his memory. We think it clear that he knew exactly what he had reference to when he made the affidavit. This of course affects his credibility.

But even though we were disposed to accept his statement of his opposition to the order, the cold, hard, inescapable fact remains that he distributed it, and that it was enforced by units subordinate to him in the 18th Army. Many reports were made by these subordinate units, which should have been known to him, that commissars were being executed by them. He says he did not know of it. It was his business to know, and we cannot believe that the members of his staff would not have called these reports to his attention had he announced his opposition to the order. It was a criminal order upon its face and the fact that he was caught "between the devil and the deep blue sea," or that it would have endangered him as a disobedient commander if he had not carried out the order, is not a defense to, but may go in mitigation of, the crime charged.

2. The Commando Order—This order was transmitted by the OKH directly to the armies as well as to the Army Group North of which the defendant was then in command. The evidence in this case does not show it was put by the defendant into the channels of command for subordinate units. The order was not particularly applicable to the eastern area and there is no evidence to show that it was carried out within his command. Under these circumstances we fail to find the evidence sustains a criminal act by the defendant in connection with this order.

3. Neglect of prisoners of war and their use in prohibited labor—The defendant has been charged with the use of prisoners of war in dangerous occupations, including the use of prisoners for the removal of mines. The evidence in this case shows orders providing for such use issued by units subordinate to him. It also shows that an order of the OKH was distributed by the L Corps of the 18th Army to the 269th Division, which directed that "mines other than in the combat or dangerous area are to be removed by Russian prisoners in order to spare German blood." The defendant in his testimony admits that this order must have passed through the headquarters of the 18th Army. This order was dated 3 November 1941. An order of the XXX Corps providing for the use of prisoners of war in clearing mines is dated 1 September 1942. An order of the 281st Security Division in the rear area of the Army Group North, distributed on 16 July 1943, provided for the use of civilians for the removal of mines. Von Kuechler denies that XXX Corps was subordinate to

him at this time but the Order of Battle shows that it was subordinate to him. Whatever the fact, the other documents spread over a wide period of time and from the testimony in this case, particularly the defendant's, we conclude that the defendant had knowledge of and approved the practice of using both prisoners of war and civilians for improper and dangerous work.

4. Illegal execution of Red Army soldiers and murder and ill-treatment of prisoners of war—As to the responsibility of the defendant von Kuechler for the criminal execution of Red army soldiers and prisoners of war, a number of documents have been called to our attention. These comprise generally orders of the OKH under which these illegal executions were carried out. An examination of these orders, however, fails to adequately establish the defendant's transmittal of them. However, it is not considered that this fact relieves him from criminal responsibility in connection with these acts.

Subsequent to the time that the defendant assumed command of the Army Group North, the record discloses that numerous reports showing such illegal executions were made to his headquarters, covering a wide period of time. These reports must be presumed in substance to have been brought to his attention. In fact, his own testimony indicates he was aware of these reports. There is no evidence tending to show any corrective action on his part. It appears from the evidence therefore that he not only tolerated but approved the execution of these orders.

He must, therefore, be held criminally responsible for the acts committed by his subordinates in their illegal execution of Red Army soldiers and escaped prisoners of war.

Concerning the criminal neglect of prisoners of war, the defendant is charged in two capacities—the first as Commander in Chief of the 18th Army; the second as Commander in Chief of the Army Group North after he assumed command in January 1942.

As Commander of the 18th Army, he was charged directly with responsibility for prisoners of war. This is shown from various sources of evidence in this case and particularly from the testimony of Halder wherein he stated that the Commander in Chief of the AOK was responsible for prisoners of war in the occupational zone of AOK and that the OQ [O.Qu.] of the AOK was in charge of these matters. In fact, von Kuechler himself stated that he visited every prisoner of war camp in his area.

That prisoners of war died from neglect and ill-treatment within his area is shown by various documents. Among these is the war diary of the AOK 18 Ic wherein it is stated as of 4 November 1941, that "ten prisoners were dying every night from exhaustion." On 9 November the OQ [O.Qu.] announced at a

conference with the Chief of Staff of the 18th Army that "at present 100 men are dying daily." At another conference held at the headquarters of the AOK 18 on 28 November 1941, it was disclosed that all the inmates of the Camp East were expected to die within six months at the latest because the prisoners were treated badly when at work and could not survive on the rations, and it was stated that "in the Camp West where the prisoners were not put to work, the number of dead is insignificant and has other reasons." This exhibit shows that in the camp at Pleskau [Pskov], out of 20,000 prisoners, about one thousand perished immediately from exhaustion. The entry as of 28 November 1941 states that the "guards believe that they must be tough", and also states that "as the number of prisoners available is very restricted, the weak ones must also be put to work."

Under these circumstances and upon the entire evidence in this case, the Tribunal finds that as Commander in Chief of the 18th Army, the defendant von Kuechler was guilty of criminal neglect of prisoners of war within his jurisdiction.

Concerning the defendant's responsibility as Commander in Chief of the Army Group North, the evidence shows that on 22 June 1942, certain regulations pertaining to prisoners of war were distributed by the commander of the rear area of the Army Group North. This order contained a copy of regulations for the commander of prisoners of war in the operational area. Under heading (1) of the regulations, it is stated: "The commander of prisoners of war is subordinated to the High Command of the Army Group." Further regulations as to his duties are outlined.

Further, it is shown by the evidence in this case that after the reorganization of the army group staffs in 1942, there were two agencies on the staff of an army group responsible for prisoner of war affairs. One of these was Department Q2 [Qu.2] and the other was the Commander of Prisoner of War Affairs. It therefore becomes apparent that after 22 June 1942, he became directly responsible for prisoners of war within the area of his army group. However, the evidence in this case does not show neglect of prisoners of war in the army group area subsequent to his assumption of command.

We are therefore unable to find von Kuechler guilty of neglect of prisoners of war as the Commander in Chief of Army Group North.

5. Deportation and enslavement of the civilian population— The responsibility of the defendant von Kuechler for the economic agencies of the Third Reich operating in his command, pertains both to the question of slave labor for the Reich and economic

spoliation. One of these economic agencies was the Economic Staff East under Goering. Its activities and responsibilities are set forth in the so-called Green Portfolio. On page six of the document, paragraph I, it is provided:

"The subordinate economic agencies of the Economic Staff East are, as far as they are active in the zone of operation assigned to the command agencies of the army and militarily under their jurisdiction * * *."

Subsection A provides for the economic organization for the army group rear area. Subsection B provides for the economic organization within the army areas.

An order of the OKW to the OKH, OKL, and OKM of 19 May 1941, transmitted instructions pertaining to this matter. Pursuant to these orders, economic officers were attached to army headquarters, to the army group rear areas, and to subordinate units. At a later time, economic inspectors were attached to the army group and control of economic matters was taken over by the army group. This is shown by [NOKW–2460, Pros.] Exhibit 436, the heading of which is as follows:

"Commander in Chief, Army Area North
Enclosures to War Diary Qu.
Monthly reports
Economy Inspectorate North
from 1 March 1942 to 31 August 1942
Economy Inspectorate North
Group Leader M I/Ia
Registry No. 637/42 secret
461/42
14/6/Le.
Back to Chief of Staff, to be submitted again.
Pleskau [Pskov], 6 June 1942."

On 23 April 1942, an order was issued, signed by von Kuechler, pertinent parts of which are as follows:

"1. The economy offices are not civilian institutions but offices of the OKW.

The activity of the economy offices is guided by the directives concerning 'Economy in the Occupied Eastern Territories' (Green File).

"2. The economy works *for* the troops. Disregard of economic reconstruction or interference will harm the troops themselves.

"3. Within the educational program, ample opportunity is

given to the economy offices to enlighten the troops on the purpose, structure, and success of their activities.

"4. Promise for maximum efficiency of land and inhabitants in the occupied territories is the *uniform* direction and orientation of the German offices.

It is of the utmost importance to me that the commanders in chief of the occupied territories and the chiefs of the economic missions cooperate very closely and faithfully.

"5. The economy offices are *solely* responsible for the execution of the economic orders of the Economy FSt East.

"6. Economic coercive measures of the economy offices may be imposed only if they are countersigned by the bearer of the executive power, i.e., the local commander.

"7. Coercive measures in the interest of the troops, such as conscription of laborers, means of transportation, and delivery of products, can be carried out by the military authorities only in cooperation with the local economy offices. If agreement cannot be reached, decision is to be requested from the superior military and economy authorities."

The relationship between the army and economic authorities is further established by an order of the commander of the rear area of Army Group North, issued on 3 June 1943 to security divisions under his command, which reads as follows [*NOKW–1501, Pros. Ex. 48*]:

"To delineate the authority of the military command authorities and the economy offices, the High Command Army Group North, has informed Economy Intendantur North as follows:

* * * * * * *

"a. Legislative

"The issuing of law decrees is reserved exclusively to the bearers of the executive power. Decrees in the economic sphere will be issued by agreement with the economy offices, with the reservation only of compulsory military reasons. The economy offices are responsible for the departmental content of legal decrees, issued at the suggestion of or in collaboration with economy offices.

"The carrying out of law decrees issued by military command authorities in the economic sphere is a duty of the economy offices.

* * * * * * *

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"c. Administrative

"The occupied territories will be administered by the bearers of the executive power unless special regulations are issued for individual departmental spheres. The special administrations include the economic administration of the occupational zone. This is a task of the Economy Organization East. Economic directives to military command authorities, to the troops, to the indigenous administration, or to the civilian population which do not require legislative decrees according to *a* are to be submitted (vertreten) to the military command authorities by the economy office. Their implementation is ordered by the military command authorities through military channels of command.

"The other departmental-economic directives will be carried out by the economy offices through their departmental channels. The military command authorities are to be kept informed currently by them of all directives of particular importance received or issued.

"There is no immediate correspondence between the economy offices and the indigenous administration unless the bearers of the executive power issued different instructions in individual cases.

"You are requested to inform the subordinate offices of the economy administration accordingly.

"The security divisions are receiving this information with the request to inform the subordinate offices and units down to Ortskommandantur and battalion level correspondingly."

The above quoted directives clearly establish the relationship between the defendant as Commander of Army Group North and the economic authorities within his area.

On 8 June 1942 the 285th Security Division reported to the Commander of the Rear Area of the Army Group North as follows:

"The morale of the population has been lowered a good deal by the labor allocation to Germany since the recruiting had to be carried on in most cases by imposing a forced quota on the various communities."

A situation report dated 15 March 1942 to the Commander of the Rear Area of the Army Group North, stated as follows:

"Of particular interest is the seizure of refugees to cover the needs of labor for the Reich and for the fighting troops as well as for the war plants in the Army Rear Area and Estonia.

"During the period 28 January–19 February all in all 16 transport trains containing 9,786 persons went to the transit

camp in East Prussia. From the area around Sebesh and Idriza on 15 February 1942, altogether 3 transport trains with 1,357 persons were sent off. At the present time an additional 1,500 persons, who are gathered in Krasnogvardeisk, are ready for transport."

A report from Korueck 584 to AOK 16, dated 27 June 1943, states as follows:

"The enemy propaganda exploits the situation and is working hard at it. The population is told over and over again that they will be employed in the front line by the Germans and that they are bound to starve due to the small rations. In consequence only a few people appear on the date of their draft and the draftees must be brought in by use of soldiers. The then unavoidable harshness contributes greatly to the deterioration of the morale."

On 14 February 1943, von Kuechler distributed over his signature a Fuehrer order relative to evacuations which provided—

"3. In case of evacuation, all men between the age of 16 and 65 are to be taken along by the troops. Thus, the troops will always have manpower for building of entrenchments and prisoners of war will be released for new employment (handing over to Luftwaffe in exchange for men they have released). Then the enemy will be unable, as he is doing now on a large scale, to draft the entire male population as combatants.

"4. In case of planned evacuations of considerable extent the mass of the civilian population is to be taken along, whenever possible, to be used later as manpower. The villages are then to be destroyed."

On 19 September 1943, the High Command of the Army Group North/OQu. transmitted an order to the Corps Headquarters Tiemann which provided in pertinent part as follows:

"*Ad Section I*

"*The procurement of the manpower and its allocation to the agencies requiring same* will be affected by *Army Group North/OQu in cooperation with Economy Intendant North* * * *."

"*Ad Section II, 2c*

"The labor offices have orders to retain the male individuals of the age classes 1925–26 and 1927 upon their arrival in the reception camps for transport to the Reich * * *."

This order also inclosed a special ordinance for the procurment of

manpower for the execution of Fuehrer Order 10, signed by Wagner, and a directive of 30 September 1943, from the High Command of the Army Group North to the Corps Headquarters Tiemann, pertinent parts of which reads as follows from Article I:

"Any possible military aid is to be provided for the economic agencies charged with the procurement of the civilian manpower."

Section II contains other provisions as to labor to be kept available for the construction of a Panther line exclusively. Subsection 5 of Section II provides—

"All troops and authorities in the army group area and army area must examine by means of the economy agencies, how far the allocation of female labor forces is necessary. In this respect the strictest standards must be applied. All labor forces which are not absolutely required, are to be released and are available for *allocation to the construction of the Panther line."* Section IV of the order provides:

"The Higher Engineer Commander No. 3 is responsible for the housing of the laborers. The Commander of Army Group North Rear Area has in this respect to support him extensively. In the billeting space the troops and military installations must move together more closely, the population must be housed in the very narrowest space, *and the part of the population unfit for labor allocation, must be ruthlessly deported.* The prohibition of troops and population being billeted together may in special cases be relaxed on the responsibility of the commanders."

On 21 September 1943, the Commanding General of the Security Troops and Commander of the Rear Area of the Army Group North issued an order, pertinent parts of which are quoted as follows:

"Subject: Evacuation of the civilian population from the area between the present advanced front line and the Panther position.

"Reference: Commander in Chief Army Group North, Ia No. 101/43, top secret military, dated 17 September 1943 (not distributed).

"I. Task

"The Commander in Chief of Army Group North has ordered, by reference order, the evacuation of the civilian population from the area between the present advanced front line and the Panther position. This evacuation is to be carried out extensively and without delay by all means and possibilities available.

"II. Supervision

"Pursuant to special order the responsibility and supervision of the evacuation of the population rests with the commander in the Army Group North. For this purpose he is entitled to issue instructions to the armies.

III. Principles to be applied in the evacuation

"1. No usable manpower must be left to the enemy.

"2. The evacuation will take place mainly in marching convoys of about 1,000 persons each, covering an average of 12–15 km. per day * * *.

"4. The families will set out in village communities under the direction of the Starost and be escorted by indigenous police.

"5. During the march, the families are to feed themselves. Only bread is to be distributed on the way * * *.

"12. Before the setting out of the convoys, the inhabitants will be screened in the starting places, and/or transfer camps, for later labor assignment. See Number IV, A 3. For this purpose Gauleiter Sauckel will send a number of representatives to Economy Intendantur North. In order to avoid undesirable effects upon the readiness of the population to be evacuated the able-bodied are to be turned over to the representatives of Gauleiter Sauckel together with their families. As far as they cannot take charge of complete families, the separation of the able-bodied is to take place at the earliest in the receiving camps, but if possible only in the final areas.

"The labor assignment of those evacuated will be partly for operation 'Panther', partly in the occupied territory, partly in the Reich. It is estimated that 50 percent of each convoy are able-bodied. Children over 10 are considered as laborers."

On 7 October 1943, the AOK 18 OQu Ic Counterintelligence Officer transmitted to the High Command of the Army Group North Ic Counterintelligence Officer, a communication regarding evacuation by foot march which refers to this contemplated evacuation, pertinent parts of which read as follows [*NOKW–3379, Pros. Reb. Ex. 24*]:

"Numerous remarks from the population have been heard in the sense of 'We prefer to be clubbed to death right here than to being evacuated.' Even the population which is basically pro-German suspects rightly that the evacuation by foot march will mean inconceivable misery and will cost innumerable people their health or their lives * * *.

"3. One must keep clearly in mind that these treks will be trains of misery of the worst kind in spite of the fact that within the army area, on account of the comparatively dense deploy-

ment of German troops, it was possible to prepare to some extent the taking care and sheltering of the treks. The horses and vehicles of the population on hand will not be sufficient by far to take care of the people who are unable to march or become unable to march, and to take along the most necessary amounts of foodstuffs, clothing, and household implements. Already up to the collecting camps Luga and Jamburg the treks will have to cover up to 150 km, therefore they will be on their way up to 2 weeks. Considering the state of the clothing, especially the shoes, of the population and the expected weather, the participants of these marches will soon be in an indescribable state especially the women and children. As far as the availability of any horses and vehicles of their own is concerned, reference is made to the enclosed report of the Ortskommandant of Lampoo, and it is expressly pointed out that the community of Lampoo is one of the richest and so far best maintained communities in the whole army area."

Notwithstanding this communication to his headquarters, on 30 November 1943, the defendant signed the following order to the 16th Army:

"1. The population of the occupied Russian zone east of the Panther has to be *speedily evacuated,* unless they are labor forces required by the Wehrmacht. The able-bodied population in particular has to be seized, eventually even without consideration as to preserving the unity of families, and with horses and cattle to be deported to the territories west of the Panther. As to undesirable elements, suspected of assisting the bands, the organization of special camps in the East is to be waited for * * *.

* * * * * * *

"7. The execution of above measures and their continuous supervision is the duty of all commanders and offices. They have to be aware of the fact that an omission represents a grave offense, injures the conduct of the war, and costs the blood of German men."

Many documents in evidence aside from these which we have specifically mentioned outlined the ruthless policy of the Third Reich for labor recruitment and many documents in the record show the hardships resulting therefrom. The documents which we have above mentioned, several of which bear the signature of the defendant von Kuechler, establish beyond question the ruthless manner in which he contributed to this program and also the ruthless manner in which he evacuated hundreds of thousands of helpless people, contrary to the dictates of humanity and the

laws of war. He is also guilty of the use of the civilian population for work directly connected with the waging of war contrary to the rules of international law. The various defenses he has offered to these acts provide no justifiable excuse and are most unconvincing.

6. Plunder of public and private property—The evidence does not convince us beyond a reasonable doubt that the defendant is guilty of the charge of the plunder of public or private property.

7. Murder, ill-treatment, and persecution of civilian population; and

8. Enforcement of the Barbarossa Jurisdiction Order—We shall unite these matters in this discussion.

The criminal purposes of the Barbarossa Jurisdiction Order have been discussed by us. This order was received and disseminated by the defendant without any action by him to prevent its criminal application, and carried out illegally by units under the defendant's command.

Units subordinate to him summarily executed civilians because they were Communists, gypsies, had an anti-German attitude, "on suspicion" of aiding partisans, for anti-German propaganda, for listening to Radio Moscow and spreading rumors of atrocities, for refusing to work, and so on.

At a meeting, held in July 1942, of Hitler, Keitel, Goering, and others, Hitler stated, "The Russians have now ordered partisan warfare behind our front. This partisan warfare has some advantage to us; it enables us to eradicate whoever opposes us."

The Barbarossa Jurisdiction Order was an implement for the execution of this purpose. Summary executions were held after an on the spot investigation by an officer, even down to a second lieutenant. Headquarters I AK [Army Corps] in Army Group North issued on 5 March 1942 an order reciting that "strong suspicion will be sufficient in numerous cases under the special conditions of this war" to authorize the execution of the suspect. Brutality was substituted for judicial process, suspicion took the place of proof.

In Halder's diary, there is an entry of 26 September 1941—

> "Mental institutions in Army Group North. Russians look at the feeble-minded as sacred beings. Killing them is necessary nevertheless."

There was in the area of the 18th Army under the defendant an asylum containing some 230 insane and diseased women. After some discussion to the effect that these unfortunates were "no longer objects with lives worth living according to German conception," it was proposed that they be executed. An entry in the

diary of XXVIII AK [Army Corps], dated 25–26 December 1941, shows "The commander in chief assented" to this solution, and directed its enforcement by the SD. Von Kuechler's denial to the contrary, we find this action was taken with his knowledge, approval, and consent. We cannot find that this ghastly entry was made by some young and over-worked officer, as contended by the defendant. It is evidence of the deliberate enforcement of a state policy known to the defendant and the world as well.

As to the criminal responsibility of von Kuechler in connection with the extermination activities of Einsatzgruppe A, other than as above set forth, within the area of his command, we do not find the evidence adequate to establish his guilt for substantially the same reasons as these given in the judgment concerning von Leeb.

The prevailing pattern of persecution of the Jews, however, is to be found in the units subordinate to the defendant, and we find was known to and approved by him. As early as July 1940, he issued an order stating—

> "2. I am also stressing the necessity of ensuring that every soldier of the army, particularly every officer, refrain from criticizing the ethnical struggle being carried out in the Government General, for instance, the treatment of the Polish minorities, of the Jews, and of church matters. The final ethnical solution of the ethnical struggle which has been raging on the eastern border for centuries calls for one-time harsh measures.
>
> "Certain units and departments of the Party and the State have been charged with the carrying out of this ethnical struggle in the East.
>
> "The soldiers must, therefore, keep aloof from these concerns of other units and departments. This implies that they must not interfere with these concerns by criticism either.
>
> "It is particularly urgent to initiate immediately the instructions concerning these problems of those soldiers who have been recently transferred from the West to the East; otherwise, they might become acquainted with rumors and false information concerning the meaning and the purpose of that struggle."

This clearly showed his attitude towards the Jewish question. On 10 October 1941, the 18th Army distributed the infamous Reichenau Order. Because of its inhumanity, we set it out in full [*NOKW-3411, Pros. Rebuttal Ex. 14*]:

> "Subject: Conduct of troops in eastern territories
>
> "Regarding the conduct of troops towards the Bolshevistic system, vague ideas are still prevalent in many cases. The most essential aim of war against the Jewish-Bolshevistic system is a

complete destruction of their means of power and the elimination of Asiatic influence from the European culture. In this connection the troops are facing tasks which exceed the one-sided routine of soldiering. The soldier in the eastern territories is not merely a fighter according to the rules of the art of war but also a bearer of ruthless national ideology and the avenger of bestialities which have been inflicted upon Germany and racially related nations.

"Therefore the soldier must have full understanding for the necessity of a severe but just revenge on subhuman Jewry. The army has to aim at another purpose, i.e., the annihilation of revolts, in the hinterland, which, as experience proves, has always been caused by Jews.

"The combating of the enemy behind the front line is still not being taken seriously enough. Treacherous, cruel partisans and unnatural women are still being made prisoners of war; and guerrilla fighters dressed partly in uniforms or plain clothes and vagabonds are still being treated as proper soldiers, and sent to prisoner-of-war camps. In fact, captured Russian officers talk even mockingly about Soviet agents moving openly about the roads and very often eating at German field kitchens. Such an attitude of the troops can only be explained by complete thoughtlessness, so it is now high time for the commanders to clarify the meaning of the pressing struggle.

"The feeding of the natives and of prisoners of war who are not working for the armed forces from army kitchens is an equally misunderstood humanitarian act as is the giving of cigarettes and bread. Things which the people at home can spare under great sacrifices and things which are being brought by the Command to the front under great difficulties, should not be given to the enemy by the soldiers not even if they originate from booty. It is an important part of our supply.

"When retreating the Soviets have often set buildings on fire. The troops should be interested in extinguishing fires only as far as it is necessary to secure sufficient numbers of billets. Otherwise the disappearance of symbols of the former Bolshevistic rule even in the form of buildings is part of the struggle of destruction. Neither historic nor artistic considerations are of any importance in the eastern territories. The command issues the necessary directives, for the securing of raw materials and plants, essential for war economy. The complete disarming of the civilian population in the rear of the fighting troops is imperative considering the long and vulnerable lines of communications. Where possible, captured weapons and ammunition should be stored and guarded. Should this be impossible be-

cause of the situation of the battle, the weapons and ammunition will be rendered useless. If isolated partisans are found using firearms in the rear of the army, drastic measures are to be taken. These measures will be extended to that part of the male population who were in a position to hinder or report the attacks. The indifference of numerous apparently anti-Soviet elements which originates from a 'wait and see' attitude must give way to a clear decision for active collaboration. If not, no one can complain about being judged and treated as a member of the Soviet system.

"The fear of the German counter measures must be stronger than the threats of the wandering Bolshevistic remnants. Being far from all political considerations of the future the soldier has to fulfill two tasks—

"1. Complete annihilation of the false Bolshevistic doctrine of the Soviet State and its armed forces.

"2. The pitiless extermination of foreign treachery and cruelty and thus the protection of the lives of military personnel in Russia.

"This is the only way to fulfill our historic task to liberate the German people once and forever from the Asiatic-Jewish danger."

Is it any wonder that persecutions followed when heads of armies were issuing such inflammatory and inciting orders?

Various other orders of like import were issued by the 18th Army and subordinate units. Orders were issued requiring Jews to wear distinguishing brassards, and placing them in ghettos. We find this was known to and approved by the defendant.

For the reasons above stated, we find the defendant guilty under counts two and three of the indictment.

HERMANN HOTH

Hermann Hoth was born 12 April 1885 at Neuruppin. He served in World War I in various positions and after the war remained with the Reichswehr. In 1938, as a major general, he commanded the 18th Division which entered the Sudetenland. Shortly thereafter, in November 1938, he was promoted to lieutenant general and was appointed commander of the newly activated XV Motorized Corps, consisting of three motorized divisions. As commander of this corps he marched into Poland in September 1939. Following the Polish campaign he led a Panzer group in the attack on France and captured Brest and Bordeaux. In July 1940, he was promoted to full general and the XV Panzer Corps was transformed into Panzer Group 3. For the war against Rus-

sia, Panzer Group 3 was assigned to Army Group Center, being first subordinate to AOK 9 and later to AOK 4. Hoth remained as Commander of Panzer Group 3 until 9 October 1941, and on 10 October 1941, he was appointed Commander in Chief of the 17th Army attached to Army Group South. On 15 May 1942, he was appointed Commander in Chief of the 4th Panzer Army, in which position he remained until 12 October 1943, when he was transferred to the Fuehrer reserve.

Hoth is charged on all four Counts of the Indictment. We have disposed elsewhere in this opinion of counts one and four.

COUNT TWO OF THE INDICTMENT

This count charges Hoth with war crimes and crimes against humanity involving crimes against enemy belligerents and prisoners of war.

THE COMMISSAR ORDER

At the conference at the Reich Chancellory on 31 March 1941, which Hoth attended, Hitler made the announcement regarding the nature of the war against Russia and the extermination of commissars. Hoth thus had advance notice of Hitler's criminal intentions.

Prior to the beginning of the Russian campaign, the Commissar Order was sent to Hoth's headquarters. With respect to this order he testified as follows:

> "Much as I would like to, I can no longer recall the occasion and the place, that is, when and where I passed on the order to the commanding generals of the two Panzer corps. I have thought much about it, but I no longer know. The fact that it was passed on by me is beyond any doubt."

He testified further that he expected the commissars to violate international law but did not wish them to be shot merely because they were commissars. There has been no contention during this trial that the commissars, sometimes referred to as Politruks, who were attached to the army, were not soldiers and that they did not comply with all the requirements of the Hague Convention and international law to constitute them lawful belligerents. In its essence, the Commissar Order was a clear and definite directive to shoot captured enemy soldiers with a known lawful prisoner of war status and being such it constituted an order to commit murder. It was a criminal order on its face. It was a criminal act under international law for Hoth to pass it down to his subordinate units. When these units committed the crimes enjoined by it, the superior commander must bear a criminal responsibility

for such acts because he ordered their commission.

As a defense Hoth says that he received the order from his superior Brauchitsch and that he simply passed it down without emphasizing it or attempting to mitigate it. He states also that he did not think Hitler would ask his commanders to do anything wrong and further that Hitler was the head of the state and that when he received a directive from him it superseded section 47 of the German Military Penal Code which provides that an officer need not carry out an order that is clearly criminal on its face and commits a criminal act if he does so. He further states, in effect, that he was certain that his subordinates were sufficiently radar-minded to pick up the rejection impulses that radiated from his well known high character and that he believed that they would have the courage that he lacked to disobey the order. As we have set forth in another section of the opinion, superior orders are not a defense but may be considered under some circumstances in mitigation of the punishment, but the mere unexpressed hope that a criminal order given to a subordinate will not be carried out is neither a defense nor a ground for the mitigation of punishment. That the character impulses were too weak or the minds of the subordinates were too insensitive to pick them up is shown by the documents.

On 22 June 1941, the 20th Infantry Division reported one commissar killed, this being on the first day of the Russian campaign. The next day another commissar was reported killed by this same division. It would be most unusual to find such in the reports if the commissars were killed in battle unless the reports referred to some preexisting order. With the Commissar Order in effect it is perfectly natural and logical to find such reports. Nothing in the Commissar Order required such a report of commissar battle casualties.

On 30 June 1941, a commissar with the rank of colonel was captured by the 12th Panzer Division which was subordinate to Hoth and shot as ordered.

On 6 July 1941, the 20th Panzer Division, subordinate to Hoth in its activity, report shows the interrogation and shooting of another commissar. On 18 July 1941, upon inquiry from the XXXIX Army Corps, subordinate to Hoth, it was reported that the division, since 5 July 1941, had shot approximately twenty commissars. On 26 July 1941, one political commissar was shot.

On 17 July 1941, Panzer Group 3 reported two commissars shot and in the same report for 18 July 1941, the following appears:

> "A report on the number of *liquidated commissars* is not yet at hand. Up to now the number of captured and liquidated commissars seems to be very small (approximately 50)."

This report was made by the chief of the general staff of the Panzer Group.

An intelligence report of Panzer Group 3 covering the period from January until July 1941 contains the following statement:

> "During the first weeks of the fighting only a small number of political commissars and officers were captured. Up to the beginning of August in the whole area of the group about 170 political commissars (within the armed forces) were captured and reported as removed by the army headquarters. This operation was no problem for the troops."

This activity report was seen by Hoth. Other portions of this report show that Hoth saw and signed it on 25 September 1941. Another paragraph contained in the report is significant as indicating what happened to the 170 commissars who "were captured and reported as removed by the army headquarters":

> "The special treatment of the political commissars by the armed forces resulted in its becoming soon known on the Russian side and in the strengthening of the will to resistance. To prevent its being known, the special treatment should have been performed only in camps located far back in the rear. Most of the captured Red Army soldiers and officers are aware of such a special treatment, of which they said they learned from routine orders and from political commissars who had escaped."

The above paragraph is significant as indicating the actual carrying out of the Commissar Order. There would have been no need to say that the special treatment should have been carried out far to the rear to prevent its becoming known if there had not, in fact, been special treatment to become known to the Russians.

On 8 August 1941, in a directive from the chief of the general staff of Hoth's Panzer Group 3 the following appears:

> "In accordance with the new Soviet regulations, all regiments and divisions, as well as higher staffs, have now *war commissars* (formerly political commissars), while companies, batteries, and troops have *political* leaders (Politruk), who also fall under the classification of war commissars. Individual inquiries on the part of the troops make it necessary to point out again that *there will be no change* in the treatment of these persons."

This document indicates that Hoth's psychological rejection of the Commissar Order had not gone as far down as his chief of staff. From the information contained in this directive from the chief of staff it would appear extremely doubtful that Hoth's

rejection of the order would be suspected at subordinate levels since the information is stated to be in response to inquiries by the troops.

On 25 November 1941, Hoth then being the Commander in Chief of the 17th Army, through his chief of staff, ordered the establishment of a concentration camp. Directions for the treatment of the inmates of the camp are attached to the order providing for the establishment of the camp. In these directions appears the following: "Commissars will be subject to special treatment".

The Commissar Order was passed down by Hoth and with his knowledge and approval was ruthlessly carried out by units subordinate to **him.**

TREATMENT OF PRISONERS OF WAR IN HOTH'S AREA

As regards the general condition of prisoners of war in Hoth's 17th Army Area the report of the Oberquartiermeister of his army under date of 25 November 1941 is enlightening. Hoth took command of the 17th Army on 10 October 1941. As the report covers the period from the beginning of the war to the date of the report, all of the delinquencies therein shown cannot be charged against him. It does not show whether the shooting of the four hundred prisoners therein noted occurred before or after he assumed command. The portions of this report significant as showing the general condition are as follows:

> "The PW's who are still in the army area at present cannot be evacuated, since they are being required for the activiation of PW companies to be used for railway maintenance and of PW construction battalions.
>
> * * * * * * *
>
> "Since the beginning of operations altogether 236,636 PW's were taken by the elements of the army up to 15 November 1941. Moreover, 129,904 PW's have passed through the installations of the army who were taken by units not tactically under the command of the army, so that since the beginning of operations a total of 366,540 PW's were made and evacuated. Approximately 400 were shot. As for those who died of natural causes and those escaped, no records are available.
>
> * * * * * * *
>
> "The rations ordered by decree OKH GenStdH/Gen. Qu., IVa (III,2) No. I/23728/41 sec., dated 21 October 1941, could not, of course, be issued to the PW's even in a single case. Fat, cheese, soya-bean flour, jam, and tea could not always be issued even to our own troops.

"These foodstuffs were replaced by millet, corn, sunflower kernels, buckwheat, in part by lentils and peas, partly also by bread.

"Distribution of the ordered rations, either in full or in part, was not possible simply because rations could not be supplied. The feeding of PW's has been possible only from stores found in the country. The cooking of the food causes additional difficulties since only in rare instances field kitchens were brought along by the PW's. Even our own troops, as a result of the supply difficulties, had to live from the country. The rations due to them had to be cut down by half for a longer period.

* * * * * * *

"Clothing is insufficient; above all footwear. Underwear, in part, is completely lacking. The insufficient clothing is particularly felt during labor employment in the winter.

"Conditions of the clothing situation can only be improved if all dispensable clothing items are being taken away from the PW's who are to be released in the rear area of the army group, and placed at the disposal of the armies upon request.

"Repair shops have been installed in the transit camps which are under the jurisdiction of the army. There is a shortage of material and tools. Deceased and *shot* persons will be buried without their clothes and the clothes used again. [Emphasis supplied.]

* * * * * * *

"In view of the present number of PW's, their housing is absolutely impossible. Brick stoves will be built by the PW's themselves.

* * * * * * *

"After being assigned for labor their health improves since these PW's receive supplementary rations. With the existing shortage of fat and albumen, mortality will increase during the winter months. Many cases of pneumonia and severe intestinal diseases have occurred. At the evacuation of the huge numbers of PW's taken in the battle east of Kiev, where under the worst weather conditions only part of the PW's could be sheltered in sheds, 1 percent died each day."

While not all of these conditions are shown beyond a reasonable doubt to be the responsibility of Hoth since some reports cover matters before he assumed command, certain of them are shown to be his responsibility. The first paragraph shows the prisoners

were not to be evacuated because the army needed them for labor purposes. Conceding that they were to be used for labor not improper under the rules of war, still it was not lawful to hold them even under Hoth's own evaluation of his responsibility that he must feed them because he exploited them for labor purposes. The report shows that the rations prescribed for prisoners of war by an OKH order of 21 October 1941, issued 11 days after Hoth assumed command of the 17th Army, "could not of course be issued to the PW's even in a single case". True, it shows also a shortage of food for the army. Both the army and the prisoners of war were living off the country. The prisoners of war were held for labor purposes with no food to properly sustain them. It was 25 November and the Russian winter, whose severity has here been so emphasized, was upon them. The prisoners had insufficient clothing. There is recorded the obvious conclusion—that the lack of clothing was particularly felt during labor employment in the winter. Clothing was so scarce that the shot and deceased persons were to be stripped before burial.

"In view of the present number of PW's their housing is absolutely impossible," is the further statement in the report. "The cooking of the food causes additional difficulties since only in rare instances field kitchens were brought along by the PW's." It was not permissible under international law to hold the prisoners of war for labor purposes under these inhumane conditions. It was his duty to evacuate them to a place where they could be cared for properly. While some of the conditions were inherited by Hoth from his predecessor, there is evidence of neglect that was continuing after he assumed responsibility in that he held them for labor under such conditions.

Hoth commented in his testimony that the bad condition of the prisoners when taken was due to their stubbornness and bad judgment in not surrendering when there was no hope for them. In the light of the treatment they received after surrender, there was little choice between fighting on hopelessly and starving or surrendering and dying in the 17th Army camp at the rate of one percent per day. Hoth admitted his obligation to care for the prisoners in his testimony, to which we have referred, wherein he said:

> "* * * because I exploited these prisoners of war for labor purposes, and I had to feed them."

The documents in this case show that units subordinate to Hoth's 17th Army and later units subordinate to his 4th Panzer Army used prisoners of war for labor, consisting of road and railroad maintenance, work in construction battalions, and digging

antitank ditches. They show also that 2,071 prisoners of war were being used on 1 August 1943 for labor in troop supply. And, on 4 October 1943, 24 prisoners of war were turned over for loading ammunition. On 3 August 1943, the 11th Panzer Division reported the construction of 696 meters of antitank ditches and the proposed construction of 600 meters more for which 586 prisoners of war were being used.

The use of prisoners of war to load ammunition was contrary to international law. We have elswhere in the opinion discussed what work is or is not permissible for prisoners of war. We cannot say that the evidence shows as to Hoth, except for the matter of loading ammunition, a use of prisoners of war that was unlawful, for it does not appear that any of it was done at the front or in a dangerous location.

The fact that the enemy was using prisoners of war for unlawful work as the defendant testified does not make their use by the defendant lawful but may be considered in mitigation of punishment.

On 15 July 1941, a report to the 20th Panzer Division contains the following:

> "2 GPU soldiers were captured on 15 July 1941, during a systematic search of the city.
>
> * * * * * * *
>
> "On 15 July, early in the morning a wood factory in the north of the city started to burn again, after the fire in the city had been completely extinguished. It is probable that this was caused again by arson through members of the GPU. The two captured soldiers were shot, as a deterring example."

That members of the GPU were soldiers and were to be considered as such is shown by an intelligence bulletin of Hoth's 3d Panzer Group bearing date of 8 August 1941 which specifically so states.

On 9 September 1941, "Four extremely suspected Red Army men were shot who were apprehended in Djedkovo—nearest the place of attack." The attack referred to was the firing by ten or twenty partisans, none of whom were apprehended, on two motor vehicles of Panzer Group Signal Regiment 3. It is difficult to see anything in this but murder of prisoners of war as a pure terror measure.

These reports, to which we have referred, show that the killing of prisoners of war for the reasons therein stated were not mere excesses but were in accordance with an approved policy. If such had not been the case, it is not credible that the subordinate

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commanders from whose areas the reports came would have reported the shootings or recorded them without reporting some action against the perpetrators.

Under date of 29 October 1941, in the war diary of the Oberquartiermeister of Hoth's 17th Army, appears the following:

> "The billeting of PW's captured in the city and some of the inhabitants of the country in the building used by our own troops has proved to be a useful countermeasure against the time bombs put there by the enemy. It has been our experience, that, as a result of this measure, the time bombs were found and rendered harmless in a very short time by the prisoners and/or the inhabitants of the country."

To use prisoners of war as a shield for the troops is contrary to international law.

Hoth said he gave no orders that this be done and he did not think it was done in his army. However, he admits knowing that prisoners of war were used as a shield for German troops in another army and states that he thought his Oberquartiermeister was reporting on that.

WAR CRIMES AND CRIMES AGAINST HUMANITY CONSISTING OF CRIMES AGAINST CIVILIANS

Frequent reference has been made throughout the trial to the notorious Reichenau Order. This order was sent for information by von Rundstedt of the High Command of Army Group South to Hoth's 17th Army in a letter, dated 12 October 1941, which Hoth in his testimony states that in due course he received.

On 17 November 1941, Hoth issued a similar order over his signature which speaks the language of Hitler and shows a sympathy with his ruthless policy of exploiting the country and its population.

The documents clearly indicate Hoth's general attitude as being one of ruthlessness and brutality in dealing with the population. The Barbarossa Jurisdiction Order, which we have referred to elsewhere as being an illegal order, was passed down by Hoth. It was clearly susceptible without the strongest of safeguards of being made criminal in the implementation. Hoth said, "I received the order and passed it on to the troops subordinate to me." There is no testimony that any safeguards were attached when it was transmitted. On 25 September 1941, an activity report of Panzer Group 3 was made up covering the period from January to July 1941. This recites that on 11 June 1941 the intelligence officer and the army judge of Hoth's Panzer Group 3 were ordered to Warsaw for a conference with Major General Mueller, the General for Special Assignments, concerning the

Barbarossa Jurisdiction Order. This report bears the handwritten notation, "Seen 25 September 1941" and is signed "Hoth." In that report under the heading "Legal Question" the following appears:

"On 11 June, the intelligence officers and the army judge were ordered to Warsaw to a meeting with the General for Special Assignments with the Commander in Chief of the Army. The General for Special Assignments, Major General Mueller, after having read the Fuehrer decree, explained that in future operations the necessity of war might possibly have to come before a feeling of law.

* * * * * * *

"One of the two enemies must die; do not spare the bearer of enemy ideology, but kill him.

"Every civilian who impedes or incites others to impede the German Wehrmacht is also to be considered a guerrilla (for instance: instigators, persons who distribute leaflets, nonobservance of German orders, arsonists, destroying of road signs, supplies, etc.).

* * * * * * *

"*Punishments,* principles: no delay but immediate proceedings. In lighter cases individual persons can, under certain circumstances, be punished by flogging. The hardships of the war require severe punishments (remember World War I: the Russians in Gumbinnen. If the railroad Tilsit-Insterburg were damaged, all village inhabitants who lived along that line were to be shot). In cases of doubt as to the guilt, suspicion will often have to suffice. Clear evidence often cannot be established."

Hoth testified that his judge advocate who attended the Warsaw Conference probably reported to him on his return, as it would have been his duty to do so. He denied any knowledge of the matters contained in the last-mentioned report and said he did not remember having read it. When Hoth saw, as we believe he did, this authoritative construction of the order, if not before, he must have known that criminal objectives were intended in its implementation, and this notwithstanding the so-called Brauchitsch Disciplinary Order that is claimed to have been designed to mitigate it. That the order was understood to be criminally implemented is apparent from an activity report and directive of the intelligence officer of Hoth's Panzer Group 3, dated 3 July 1941, in which it is said:

"Insofar as there is proof or well founded suspicion, that civilians actually are soldiers, assigned for duty as spies or saboteurs, or who have supported or carried out attacks against the German Wehrmacht, while wearing civilian clothing, they are to be segregated from the others and are to be shot upon orders by an officer."

and—

"Insofar as concerning civilians proof or *the well founded suspicion is given,* that they are soldiers employed for purposes of espionage or sabotage, or that it concerns those who in civilian clothing have supported or carried out measures against the German Wehrmacht, they are to be segregated from the others and to be shot by order of an officer." [Emphasis supplied.]

In the cover letter sent out by the 257th Infantry Division in Hoth's 17th Army, under date of 7 December 1941, the following appears:

"You receive enclosed an excerpt on the way and kind of conducting interrogations of partisans. *This excerpt was compiled by the army.* It must not be brought along when the deployment takes place * * *." [Emphasis supplied.]

Hoth in his testimony when asked if the army referred to in the letter was the 17th Army answered that, "It seems as though that were the case." The character of the instructions and the license they direct is apparent from the following contained therein:

"B. Directives for the interrogation

"It never occurred yet that an interrogated person incriminated even one other person without being put under heavy pressure. The following must, therefore, be observed:

All interrogated persons must be warned in a most severe way to say the truth. They expect anyhow nothing else but that the methods of the NKWD are applied in the interrogation, that means they count on being beaten up from the beginning. *The following categories of persons must first be questioned by third degree (eindringlich zu vernehmen) (25 on the buttocks), if women are concerned with rubber tubings, if men are concerned with cowhide or rubber truncheons)*: [The material preceding in italics was crossed out in the original document, and the following handwritten remark was inserted: Destroyed in conformity with later order! to prevent that such things fall into enemy hands.]

"1. Platoon and unit leaders of the destruction battalion.

"2. Returned Colchos—and village leaders.

"3. Veteran partisans.

"4. Individuals who were named by tortured people.

"5. Drivers of high party functionaries.

"One or the other will make depositions on partisans now. As it is a common experience that the person concerned did not know anything before and makes depositions now, he is subjected to a more searching interrogation: 25 more with solid rubber or cowhide, while the question asked is repeated during the jam session (translator's note: Actually string orchestra is literal translation of the German word, 'Streichorchester'. The expression, 'Streich', has a double meaning in this connection, as it means as well playing a string instrument as also the strokes administered to the victim of such treatment as described here) and the word, 'Hovere' (talk) is added to the question. This way, e.g.

"Where is the leader of the partisan group?—Hovere!

"What tasks were assigned to you?—Hovere! etc.

"The person concerned will continue to talk, and 25 more are administered to him, after he was ordered to tell all he still knows, this way.

"1. Where are other partisans?

"2. Who is with the partisans?

"3. Who cooks for the partisans?

"4. Where are ammunition and food depots hidden?

"5. Who keeps in touch with the partisans?

"The following kind of people have to be interrogated most severely and searchingly in any case from the very beginning:

"1. Every party functionary, particularly commissars and Politruks.

"2. Every returned village and Colchos elder.

"3. Individuals named by the tortured people.

"The persons who were questioned most severely, as well as convicted persons (confront the people concerned!) must be liquidated at the end of the most severe detailed interrogation."

PRESIDING JUDGE YOUNG: That the instructions bore fruit is apparent from the fact that the 257th Infantry Division immediately passed this directive down in the form of an order following almost verbatim the wording of the directive.

A situation and activity report for the period 15–30 March 1942 to the XLIV Corps, then under Hoth's 17th Army contains the following:

"Of the 281 persons who had been turned over to the Partisan Jaeger Group, 12 were shot for illegally wandering around without proper identification; 59 as partisans, 78 as Communists and Komsomols, 82 as spies, 13 for sabotage and refusal to work, 31 for anti-German propaganda, 1 for stealing army property, and 5 Jews."

The foregoing shows that the Partisan Jaeger Group, a unit of the Wehrmacht, was *shooting civilians* for not having proper identification, for being Communists, for being anti-German, for being Jews, and for refusal to work.

The 257th Infantry Division under date of 3 December 1941, then subordinate to Hoth's 17th Army, gave the following instruction for supervision of the civilian population:

"*c.* During the combating and the interrogation the severest measures have to be applied, because, as experience shows, only the application of the most rigorous methods cause suspicious elements to make statements. In general, the examinations can be concluded only by the following:

"(1) Release.

"(2) Transfer to a prisoner or concentration camp.

"(3) Liquidation to be carried out if additional statements are no longer to be expected. Partisans of special importance are to be transferred to division section Ic. Liquidations, if they do not take place during combat or in case of resistance, are to be ordered by the counterintelligence officer."

On 7 December 1941, the 257th Infantry Division sent a directive for combating partisans which we have hereinbefore mentioned directing that third degree methods be used, and after no further information could be secured the person should be liquidated. That these brutal instructions were for the troops is indicated by the statement in the letter enclosing the directives in which it is said:

"* * * Further instruction of the Partisan Jaeger troops (partisan hunting units) will take place shortly."

Hoth left the 17th Army, according to his testimony, about the middle of April. The same document shows a continuation of similar practices up to the middle of May, a month after Hoth relinquished command of the 17th Army.

A similar report contained in the last-mentioned document through 15 April shows the shooting of 114 for the various reasons stated.

On 9 September 1941, an order by Hoth's chief of staff relating to partisans containing the following:

"In order to capture the harmless followers as soon as possible it would seem *expedient* to treat them extremely well in the presence of the civilian population (food and cigarettes) so that this will become generally known and fear of giving themselves up voluntarily will vanish. *Executions are, therefore, to be carried out far away and unobtrusively insofar as there are causes for suspicion of partisan activities;* otherwise they will be sent away as PW's [Emphasis supplied].

* * * * * * *

"If weapons are found in the possession of partisans or if public acts of violence are committed against the Wehrmacht, the partisans are to be shot or hanged by order of an officer and the reason for it is to be made known to the local population in a suitable manner. (For instance, a sign could be hung around the neck of the partisans, stating: 'This will happen to everybody who saws down a telegraph pole'). The same action is to be taken with regard to local inhabitants who support partisans."

The foregoing show the implementation of the Barbarossa Jurisdiction Order as extending the classification of *francs-tireurs* in accordance with Mueller's construction of the Barbarossa Jurisdiction Order.

The following shootings on suspicion and for reprisal are shown by units subordinate to Hoth in his commands:

"Two very suspicious looking men, probably partisans were seized on 19 September in the region of Pashkovo. They were shot."

and—

"Around Bratzkaya Zemla the civilian population took part in the battle against our forces. Shooting of all male civilians over 15 years of age was ordered and carried out."

Hoth in his testimony estimated that about fifty were shot in this operation.

The intelligence officer's morning report for IV Corps subordinate to Hoth's 17th Army under date of 7 March 1942, notes that "* * * 10 civilians were shot in public in Novo Alexandrovka because two civilians attacked an officer (who was lightly wounded)."

The intelligence officer's morning report for XLIV Corps subordinate to the 17th Army between 13 December 1941 and 10 March 1942 contains the following:

"Five hostages were shot as a reprisal measure for a German sentry being fired on by civilians at Shabelkovka."

On 17 July 1941, the XIII Army Corps reported to Hoth's 17th Army, "8 Jews and 2 Poles shot as a retaliatory measure for sabotage of telephone lines."

A report of the Panzer Group 3, commanded by Hoth, to the 9th Army contains the following:

"A motorcyclist of the 3d Panzergrenadier Signal Regiment was killed in a hand-to-hand fight by a suspected man, whom he had relieved of his pistol, in the village of Rostrovski Latuishki (10 km N of Ripshevo), on 24 August. Five suspected civilians who had been apprehended shortly before were hanged in the village—which, by the way, is inhabited by Latvians who are absolutely pro-German and anti-Soviets—and the corpses were left hanging for 8 days."

In as much as Hoth was temporarily relieved of his command on 28 November 1943, it well may be that he did not see the report to which we next turn, which is from Security Sector II to Panzer Army 4 [which is from Army Rear Area 585 to Security Sector II and 4th Panzer Army] by teletype dated 27 November. Hoth says he would have opposed the hostage measure as it would have been very inexpedient in the Ukraine. The report states:

"Since mines have been placed in an increasing number in the area Tshudnov-Miropol, severest measures are to be taken (against this activity). First, 15 men are to be arrested as hostages in each of the villages Tshudnov and Miropol. Notices in the German and Ukrainian language are to point out to the population, that in case of future placing of mines, 3 hostages will be shot for each German who is killed and 1 hostage for each German who is wounded. This will not take place if the culprits are handed over to the military authorities within 12 hours.

"I order, that numbers of hostages shall be shot at the above ratio if mines are placed again.

"The population of the districts of Tshudnov and Miropol will supply mine-searching details, which will search the streets constantly for mines.

"Reports concerning the seizure of hostages, executions by shooting, and mines removed by the population are to be forwarded daily in the daily reports to Korueck 585.

"Confidential agents committed in the area there, are to do everything in their power to find the mine-placing band, so that

a larger operation can be carried out, which will lead to the total extermination of the gang."

This may not be held as incriminating Hoth beyond a reasonable doubt, since it is probable he did not receive it and therefore could not have countermanded it. It is consistent with the general policy that prevailed during his period of command.

A directive of the XLIV Corps, subordinate to Hoth's Panzer Group 3, at this time, dated 9 September 1941, for the control of the civilian population contained the following:

> *"In case of sabotage* of telephone lines, railway lines, etc., sentries will be posted selected from the civilian population. In the case of repetition, the sentry on whose beat the sabotage was committed will be shot. Suitable as sentries are only people who have a family who can be apprehended in case the sentry escapes.
>
> "I. Thorough action in accordance with the issued instructions will be taken with ruthless strictness in all *cases where attempts against the Wehrmacht, its supply institutions or those of the country have been found out.*"

Hoth says this was a corps order; that he didn't know about it but "that on the whole it is consistent with the situation of the time and of the necessities of that time." He says he would not have approved of shooting the sentries.

COOPERATION WITH THE SD

The record discloses that the SD perpetrated a mass killing of 1,224 Jews, 63 political agitators, and 30 saboteurs and partisans on 14 December 1941 at Artemovsk. This was, at the time, in the area of Hoth's command and immediately after the occurrence, it came to his knowledge. He testified that he then criticized his chief of staff for not advising him that the SD were in his area and he, the chief of staff, said he would settle the matter. The chief of staff issued an order that "the drives on Jews in Artemovsk are postponed until the situation at the front is straightened out."

The record shows a large scale mopping-up action in Kramatorskaya by the SD about 6 weeks later. Kramatorskaya at this time was Hoth's headquarters. The record fails to show any executions as a result thereof. There can be no doubt that Hoth knew after the Artemovsk incident that the SD, along with its police functions, operated as a murder organization also. The record shows after he acquired this knowledge that within his area his own army police, over whom he had command authority,

turned over prisoners and Jews to the SD as a regular practice. When Hoth's concentration camp, which he says was merely a collection camp, known as Dulag 180, was dissolved there were turned over to the SD, 35 prisoners and 25 from the camp hospital. There is no evidence in the record that the SD were a medical unit or had any hospital facilities.

These cases of turning civilian prisoners over to the SD occurred continuously from the time of the Artemovsk incident till Hoth relinquished his command of the 17th Army in the middle of the following April.

The SD during this time maintained liaison with the Ic officer on Hoth's staff and when Hoth moved his headquarters the SD moved its headquarters to Hoth's new location. Neither in the documents nor in the testimony is there any evidence that Hoth gave any more attention to the SD after he turned the matter over to his chief of staff who entered the aforesaid postponement order. Hoth had executive power and it was his duty to protect the civilian population including prisoners in his area. Notwithstanding his knowledge of the character and functions of the SD, his possession of the power to curb them and his duty to do so, he washed his hands of his responsibility and let the SD take its unrestrained course in his area of command.

On the matters above set forth, and on the record, we find the defendant Hoth guilty on counts two and three of the indictment.

HANS REINHARDT

The defendant Reinhardt was born 1 March 1887 at Bautzen in Saxony. He served as a junior officer in World War I and after the war remained with the Reichswehr. As a major general he participated in the invasion of Poland as Commander of the 4th Panzer Division and of Belgium and the Netherlands as Commanding General of the XLI Panzer Corps. With this corps he took part in the invasion of Yugoslavia. Still commanding the XLI Panzer Corps, he entered the campaign against Russia, the corps being subordinated to Army Group North. On 5 October 1941, he was appointed Commander of Panzer Group 3. In March 1942, he was appointed Commander in Chief of the 3d Panzer Army which position he retained until appointed Commander in Chief of Army Group Center on 16 August 1944. Due to differences with Hitler concerning his conduct of operations, he was relieved of this command on 26 January 1945. In 1940, he was promoted to lieutenant general of Panzer Troops and in 1942, to full general. The defendant Reinhardt is charged under all four counts of the indictment. Counts one and four having been disposed of, there remains to be considered the question of his guilt under

counts two and three which charge respectively: war crimes and crimes against humanity; crimes against enemy belligerents and prisoners of war, and war crimes and crimes against humanity; crimes against civilians.

THE COMMISSAR ORDER

The Commissar Order was transmitted to Reinhardt by General Hoepner, the commander of Panzer Group 4, and Reinhardt thereafter communicated it orally to his divisional commanders. He testified that when he transmitted it to his divisions, he directed orally that it was not to be carried out. He testified further that General Hoepner was opposed to the order and that he, Reinhardt, protested it to General Hoepner; that General Hoepner protested to the army group under von Leeb and presumably, the protest was carried back from the army group to the Commander in Chief of the [German] Army. Notwithstanding this alleged resistance and repudiation of the order, it appears from the documents that reports of executed commissars shortly began to be sent in from subordinate divisions and that they were sent on by the corps.

The Russian campaign began 22 June 1941. The 269th Infantry Division reported on 9 July to the XLI Corps that 34 Politruks were liquidated. On the same day the XLI Corps reported to Panzer Group 4 a total of 97 Politruks had been executed in the corps area up to 8 July. The balance of 63 liquidated commissars doubtless are chargeable to the three remaining divisions of the corps, the 1st and 6th Panzer Divisions, and the 36th Motorized Division. On 10 July 1941, Panzer Group 4 reported to Army Group North that up to 8 July 1941, 101 commissars had been liquidated. Out of a total of 101 executed Politruks, 97 were liquidated by Reinhardt's XLI Corps, and the balance of 4 by the LVI AK of Panzer Group 4. At the time of the report, Panzer Group 4 consisted only of the XLI AK and the LVI AK. Thereafter, 71 commissars were executed by the 19th of July by Panzer Group 4. We have mentioned that Reinhardt testified that he orally directed that this order not be carried out. A second defense, which is supported by the testimony of two witnesses, Bruns, the intelligence officer of Hoepner's Panzer Group 4 and Mueller, an ADC of Bruns, is to the effect that all of these reports were fictitious. The testimony might be more credible if they had not drawn such fantastic conclusions as that Hoepner clearly expressed his repudiation of the Commissar Order by having Bruns read it to the corps commanders and later that he expressed it by gesticulation. Mueller was more definite as to Hoepner's rejection of the order but it is not possible for the Tribunal to believe in the face of these reports that commissars were not shot

pursuant to this order within the area of Reinhardt's command. The order was a criminal order on its face, and one which under the German military regulations and certainly under international law should not have been passed down by either Hoepner or Reinhardt. If international law is to have any effectiveness, high commanding officers, when they are directed to violate it by committing murder, must have the courage to act, in definite and unmistakable terms, so as to indicate their repudiation of such an order. The proper report to have been made from division to army group level when a request was made from the top level to report the number of commissars killed would have been that this unit does not murder enemy prisoners of war.

Counsel for the defendant, in his brief, makes the following statement:

> "War has its own laws, even more than peacetime. One of the most incomprehensible laws of war is that certain news spreads through mysterious channels and with unbelievable rapidity over entire fronts, entire armies and whole countries; that it even spreads from one's own frontline to that of the enemy, and it can never be found out how this was possible. Of course, this also happened with such an extraordinary order as the Commissar Order. Several witnesses testified that it was known among the Russians even at an earlier date than among our soldiers in the front line."

Unless the order had been communicated rather extensively, and as a policy down to low levels and even to the troops, it is difficult to understand how it would sweep the entire Russian front. The obvious explanation for this is that it became known because of its implementation.

That the defense of fictitious reports may itself be fictitious is suggested by the activity report of one of Reinhardt's divisions. The 36th Motorized Division on 3 July 1941 before the need for any fictitious reports was created by a top level inquiry, notes the capture of Latvian and Russian soldiers and that two political commissars were eliminated during the advance. On 4 July, a political commissar who pretended to be a sergeant was eliminated. On 6 July, three commissars were eliminated and on 16 September, a captured Politruk of a Russian rifle regiment was eliminated. It is not quite comprehensible why the shooting of these five commissars on three different days is reported unless the executions actually occurred.

In January 1942, an activity report of the 35th Infantry Division, subordinate to Reinhardt, contains the following:

"* * * The reason for the will to fight may be found primarily in the fact that well in advance the enemy learns how the commissars and political leaders are treated when captured by the Germans. The mistake of drawing attention to this has been made even in German propaganda leaflets. It would have been better to keep the treatment of the commissars a secret. It would have sufficed to transport them separately to the rear, to a camp specially established for this purpose by the corps, and to take them to task only then and there."

The Tribunal finds that Reinhardt passed on this criminal order and bears the responsibility for its execution in his area.

THE COMMANDO ORDER

We have discussed this criminal order generally in a preceding part of this opinion. A copy of this order was sent to the 3d Panzer Army. The war diary of this army for 27 October 1942 shows it was received. Reinhardt, at this time, was in command of the 3d Panzer Army. On 28 October, the IX Corps, subordinate to the 3d Panzer Army, notes the order received in its war diary. We take no stock in the defense that this order was not to be effective in the East. That the 3d Panzer Army was of the opinion that it was applicable in the East, appears from the war diary of this army for 18 November 1942, which is several weeks after the receipt of the order. In that war diary it is stated [*NOKW-3482, Pros. Rebuttal Ex. 46*]:

"Various difficulties have arisen concerning the execution of the Fuehrer order of 21 October, relative to the shooting of terrorists and groups of bandits. The Pz. Army asks the army group to clarify, above all, whether this order Vol. IIb, 30a, merely concerns British terror groups or whether it also applies to the bands in the occupied area. *In this connection, the army group takes the attitude that, until a new OKW decree is published which is in prospect, all bandits are to be shot to death even if they wear uniforms.* Bandits who voluntarily surrender without being forced to do so by their situation will be treated as PW's. An order will be issued to the troops on this subject." [Emphasis supplied.]

That the army considered the Commando Order of general application is shown by the emphasized portion of the above quotation, that until otherwise advised, the order was to be carried out against men in uniform. Another entry in the war diary of the 3d Panzer Army referring to this same situation reads as follows:

"Until new regulations of OKW are published, bandits who surrender voluntarily without being forced by circumstances,

will be treated as PW's. All other bandits, also the uniformed ones, will be shot.

"This order will be destroyed after reading, this order will not be passed on in writing."

It was a criminal order, Reinhardt passed it down in the chain of command.

It may be stated as a matter somewhat in mitigation and as showing the personal attitude of the defendant Reinhardt, that in November 1943, he issued an order that parachutists are lawful combatants and are to be treated as prisoners of war. That was at a time when the German Army was not so flushed with success and when it was a little more inclined to soften the treatment meted out to the Russians. The Tribunal has noted it as being a matter proper, at least for consideration, on the question of mitigation. It should further be noted in this connection that it does not appear that Reinhardt, though he received it, ever passed on literally or in substance the notorious Reichenau Order.

PROHIBITED LABOR OF PRISONERS OF WAR

An order from the commander in chief of the [German] army, providing that mines were to be detected and cleared by Russian prisoners of war in order to spare German blood, was issued on 29 October 1941. This order was transmitted in the area of Army Group North and was implemented in Reinhardt's area. His LIX Corps issued an order [on 2 March 1942] providing [*NOKW-2139, Pros. Ex. 201*]—

"If it is suspected that roads or places are mined, prisoners of war or the local population are to walk in front or clear the mines."

The activity report of the 3d Panzer Army, dated 15 December 1943, notes that there were five prisoners in Dulag 230 who were requested for mine clearing and that Dulag 230 was informed accordingly. A report sent by the LIX Corps to the 3d Panzer Army covering the months of January, February, March, and May 1943 relative to the use of prisoners of war for these months, respectively, shows the following: 246 in supply units, 104 for billet and field fortification construction; 193 in supply units; 25 for billet and field fortifications; 196 in troop supply units, and 183 for billet and field fortifications; 175 in troop supply services; and 11 for billet and field fortifications. On 6 January 1944, the 3d Panzer Army furnished 40 prisoners of war to an SS unit for field fortification work at the front. A report of the 83d Infantry Division in the 3d Panzer Army shows 25 prisoners of war put to work by the 2d Rifle Battalion were killed while working. An

activity report of the 3d Panzer Army states that on 4 October 1943, 200 prisoners of war were used on field fortifications. Numerous other documents show the use of prisoners of war on field fortifications and at the front, their use being so general that we conclude it was the policy of the 3d Panzer Army under Reinhardt to use prisoners of war for that purpose.

An order signed by Reinhardt as Commander in Chief of the 3d Panzer Army, dated 18 October 1942, confirms this conclusion in every respect. Under the heading "Labor Allocation of Prisoners of War and Civilians," he states:

> "The urgent need for prisoners of war in the zone of operations and for the economy and armament industry at home requires a thorough and planned organization of the labor allocation of prisoners of war."

We do not find all of the above uses of prisoners of war criminal. To use them for field fortifications, loading ammunition, mine clearing, and any other work that is dangerous was clearly prohibited by international law and constitutes a war crime.

MURDER AND ILL-TREATMENT OF PRISONERS OF WAR

Reports of subordinate units show the hanging of two former Russian soldiers for being friendly to partisans; and the shooting of four Russian prisoners for planning to escape, and six prisoners of war who had stolen arms and ammunition and tried to escape. On 15 December 1942, a report shows the shooting of a Russian prisoner of war since he could not be removed under the eye of the enemy and within the range of enemy machine guns. Four days later the same unit reported that two other prisoners of war had to be shot.

TURNING OVER OF PRISONERS OF WAR TO THE SD

On 24 July 1941, [*NOKW-2423, Pros. Ex. 244*] the High Command of the Wehrmacht issued an order for the screening and separation of Russian prisoners of war in the camps in the zone of operation by which politically untenable and suspicious elements, commissars, and agitators were to be segregated. An activity report shows that the commander of the Army Rear Area 590, subordinate to Reinhardt, issued an order of 29 December 1942 containing the following [*NOKW-2389, Pros. Ex. 708*]:

> "6. The fetching of prisoners from the prisoner collecting point for the purpose of interrogation, transfer to a transient camp, 'special treatment', or discharge can take place only through the Feldgendarmerie Battalion (motorized) 695 and the Security Police and SD Dorogobush in mutual agreement. In

the event that no officer of the Feldgendarmerie Battalion (motorized) 695 known to the camp commandant of the prisoner collecting point, nor the chief of the SD unit Dorogobush, should be supervising the taking away of the prisoners, a written authorization issued by these offices must be handed to the camp commandant. The turning-over of a prisoner may in any event take place only against a written receipt."

This Wehrmacht report should be noted for the reason that the term "special treatment", enclosed with quotation marks, is used with apparent understanding. The next paragraph to that above quoted is of interest as relating to labor allocation. It is stated therein that—

"An allocation may take place only in keeping with the stock available of able-bodied prisoners. Only those prisoners may be allocated for labor in whose case no special treatment is to be expected, and whose interrogation has been concluded."

Since the whole report concerns prisoner of war matters, it is to be expected that the prisoners who may not be allocated as "special treatment" are prisoners of war. As an example of the carrying out of the general policy to eliminate those opposed to the Wehrmacht, the following appears in a report received by the 3d Panzer Army:

"On 28 December 1941, the prisoner of war Alesander Wassiljew, who worked in a snow-shoveling detail and thereby came into touch with the Russian civilian population, was arrested and shot in Shachovaskaya; he continuously had caused unrest among the population by talking to the people about the overwhelming defeat of the Germans and prophesied that the Russians would soon appear in Shachovaskaya."

In comments emanating from one of Reinhardt's staff officers relative to the suggestion for the formation of a Russian Red Cross, it is indicated that he was opposed to authorizing the Red Cross to make any search for prisoners missing in action and the reason which he gives is set forth with great frankness. It is as follows:

"Overwhelmingly large number of POW's deceased without documentary deposition, and of civilians who disappeared due to brutal actions."

At this point we refer to the following finding of Tribunal V in Case No. 7, and adopt it as a correct statement of the law. It is as follows*:

* United States *vs.* Wilhelm List, et al., p. 1271, this volume.

"Want of the knowledge of the contents of reports made to him (i.e., to the commanding general) is not a defense. Reports to commanding generals are made for their special benefit. Any failure to acquaint themselves with the contents of such reports, or a failure to require additional reports where inadequacy appears on their face, constitutes a dereliction of duty which he cannot use in his own behalf."

DEPORTATION AND ENSLAVEMENT OF CIVILIANS

Deportation and enslavement of civilians was carried on within the area of Reinhardt's army commands on a scale of great extent. At the outset of our consideration of this subject, it should be said that there is no international law that permits the deportation or the use of civilians against their will for other than on reasonable requisitions for the needs of the army, either within the area of the army or after deportation to rear areas or to the homeland of the occupying power. This is the holding of the IMT judgment and this consistently has been the holding of all of the Nuernberg Tribunals. It is necessary then only to determine factually whether with the knowledge, consent, or approval of the defendant the deportation and enslavement occurred. There is no military necessity to justify the use of civilians in such manner by an occupying force. If they were forced to labor against their will, it matters not whether they were given extra rations or extra privileges, for such matters could be considered, if at all, only in mitigation of punishment and not as a defense to the crime. While we do not, in referring first to a report to the 3d Panzer Army, dated 6 March 1944, follow the chronological order, we set it forth first because it deals with the manner of conscription and the attitude of the army long after the beginning of the war. In this report the following appears [*NOKW–2531, Pros. Ex. 527*]:

"Partly the workers are being seized in the streets and under the pretext that they are to work for 2–3 days; they are being brought to work without any winter clothing, shoes, mess kit, and blankets * * *. The indigenous auxiliary police fetched the Russians out of their houses at night, but partially these people could buy themselves out of it by giving *some alcohol to the indigenous auxiliary policemen.*

"This manner of conscription did not increase the Russians' willingness to work."

Apparently due to an error, some terribly diseased and afflicted persons were sent out on a work assignment. The explanation contained in the document which is offered in Reinhardt's defense shows, probably, a mistake but does not otherwise greatly improve

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his situation. It shows how labor recruiting was carried on and that the army was cooperating. Among other things, it states:

"Army Q.M. [O.Qu.] order to the general [corps] commands that in case of drives for the recruitment of labor forces a labor allocation official has to participate right from the start. The Army Economy Official—Group Labor could supply officials from his own ranks; but whether this employment could be achieved speedily enough in each case is a matter still open to doubt.

"2. The criticized conditions in the recruitment of labor forces (kidnapping on the street, corruptness of the O.D. men—(indigenous auxiliary police—etc.) can never be entirely eliminated, especially in cases of sudden demand. It is possible that the criticized events concern the Kaminski drive, in which once 750 workers were supplied. But such abuses are also not entirely avoidable within the area of the divisions. In the case of the '78 year olds, the blind, and the cripples, etc.' it is, according to a statement by the Fortification Engineer Staff 7, a case in which a group of 15–20 people once happened to get mixed up with a transport in the beginning of February. Responsibility cannot be fixed any more, as nothing is known about this in Vitebsk." [*Reinhardt 208, Reinhardt Ex. 17.*]

The Commander of Army Rear Area 590 in a report to the 3d Panzer Army reported the following assignments: women for the Reich, 100; field fortification construction, men, 956, women, 2199. His report also contains the following [*NOKW–2341, Pros. Ex. 444*]:

"Five hundred male and 500 female workers were conscripted at the time, as ordered in paragraph 18 of the procurement order. This conscription, however, was superseded by the subsequent orders concerning the formation of transports of labor detachments. The following must be said about the organizing of these transports:

"Nowhere was there any desire or inclination for this labor assignment; indeed, sometimes it even occurred that men wept when they were being shipped away. Almost all of the workers had literally to be dragged away. This caused very grave difficulties for the local military administrative offices, because all of the transports had to be assembled at very short notice and almost simultaneously. There were not always sufficient forces (military police, military police service) to bring the workers from remote villages. Those who were brought, however, sometimes proved to be unfit for work. There was no suitable

place to accommodate those who were fit to be sent away, a place which would have made guarding easy until they could be shipped away. The workers, however, had to be closely guarded at all times for otherwise they would have run away."

The foregoing shows clearly that these people who were used for work were not volunteers but were rounded up and impressed into service as slaves.

The [Ober-] Quartiermeister for the 3d Panzer Army on 3 December [1942] made a report to Army Group Center in which was contained the following [*NOKW-2347, Pros. Ex. 1560*]:

"The application of force, unavoidable in putting the population to work and mentioned already in one of the regular reports as causing a great strain, is beginning to show effects. In addition, matters are rendered more difficult by inadequate food rations which—according to consistent reports from all districts—are not sufficient to satisfy the hunger of the population.

* * * * * * *

"Noteworthy is the generally established fact that the number of persons staying away from work or of those who must forcefully be driven to work is on the increase.

* * * * * * *

"The extent of difficulties to be surmounted can be realized when bearing in mind that *nearly all workers have to be pressed into service and must often individually be driven to work by soldiers, cossacks, and members of the auxiliary police.*" [Emphasis supplied]

A letter signed by Reinhardt under date of 28 March 1943 to the Commanding General of the XLIII Corps shows conclusively his knowledge and attitude toward the labor program. Among other things in the letter he said [*NOKW-524, Pros. Ex. 455*]:

"Time and again, I have, when touring the area, noticed squads of civilian workers practically idling. Furthermore, the number of inhabitants assigned to a job does not correspond to the task which could, *with proper planning, be achieved by half the number.* The supervisory personnel (furnished by the troops, by Organization Todt, etc.) is just standing by and does not show any military bearing; foremen and supervisors do not take any steps to urge more working speed. This intolerable state of affairs will immediately cease once and for all. We must keep in mind that in the homeland even German women and girls are working hard, readily fulfilling what they

consider their elementary duty. This being the case, we ought to be ashamed of ourselves if we did not request the civilian inhabitants of the occupied territory, called upon to work on our behalf, to utilize the working day fully. In this respect, I rather prefer a daily minimum of 8 working hours, of which the fullest use is made and which include breaks, *to longer hours, half of which is spent in dawdling.* The population—which is being subjected to a much greater strain on the Russian side—must be compelled to fulfill my requirements, if necessary through retention of wages, deprivation of food, and restraint of personal liberty; just as I shall call to account any supervisory personnel of any description and rank, if my demands are not enforced. Supervision of workers is a military duty like any other and requires the full efforts of the personnel assigned.

"It is requested that all military superiors and all organs in charge of traffic control and of the maintenance of discipline cooperate with me in the full exploitation of labor of any kind."

The Commander of the XLIII Corps, to whom this letter was addressed, on 2 June 1943, issued a directive to draft by force male and female labor power from the rural communities of the communication zones. He then specified five rural communities in which coercive measures were to be carried out. He directed that the policy be announced as permanent so the population will come forth from its hideouts and be seized. The effect on the people is indicated by his statement that the drafted forces will attempt to dodge the labor allocation with every means at their disposal. The ruthlessness intended is shown by the direction that all men and women are to be instructed that they will be shot at when attempting to flee and the reason given, "* * * only partisan adherents flee; they undergo corresponding treatment."

How many so fleeing were shot and denominated as partisans in the reports, the record does not show. The report states that for several weeks the population of the rural communities "does not cooperate in fighting against them (the bandits) in a measure which is to be expected for the final liberation of Russia." To remedy this lack of cooperation with their German conquerors, all male inhabitants of these rural communities, as well as females, between the ages of 14 and 45, unless the women had one child under eight, were drafted for tasks in another region.

A division under the XLIII Corps on 30 June 1943 reported:

"Already it happened that civilians assigned to fortification work, who up to now did not receive supplementary rations for heavy work, collapsed due to exhaustion, especially since Rus-

sian civilians are being assigned for labor regardless of their physical fitness." [Emphasis supplied.]

On 5 January 1944, the 3d Panzer Army issued a directive for its corps headquarters and rear area which stated [*NOKW-2367, Pros. Ex. 523*]:

"All persons capable of carrying arms and able to work must be seized for the allocation of labor. That is to say, in general, all men and women, age 14 to 55."

It appears beyond question that men and women and even children were drafted for work and that they were used in the main front line. One order says they are to be sheltered and fed and another that they shall be used ruthlessly and, if the situation permits, in the front lines also. Another report shows that "the allocation of entire families for fortification construction near the front line met with difficulties."

We are convinced by the documents and the testimony in the case that in the area of Reinhardt's army, enforced labor by the civilians was carried out as a policy and that it was implemented ruthlessly with Reinhardt's knowledge and consent, and even pursuant to his orders.

DEPORTATION AND ENSLAVEMENT FOR LABOR IN THE REICH

Reinhardt's policy with respect to this matter is shown by an order signed by him as Commander in Chief of the 3d Panzer Army to the effect that [*NOKW-3539, Pros. Rebuttal Ex. 39*]—

"The Fuehrer has charged Gauleiter Sauckel with the direction of the entire labor allocation program reaching *into the zone of operations.* An intelligent cooperation of the military agencies with the departments of the labor allocation administration must make it possible to mobilize the work capacity of the entire able-bodied population. If success cannot be achieved in any other way, coercive measures must now be applied to recruit the required labor for allocation in the Reich." [Emphasis supplied.]

This order had wide distribution throughout his command. Having given such an order he must assume responsibility for what was done by his subordinate units in response thereto.

We find in the records a report from the Secret Field Police that a father making his way to the partisans, over the objection of his children, was shot while so doing. The three children were sent to Germany to work.

When the order came down from the OKH to draft the age groups 1925 and 1926, Reinhardt's chief of staff of the 3d Panzer Army gave an order in which it was specified [*NOKW-2340, Pros. Ex. 484*]—

> "Beginning 3 August 1943, a transport train with eastern workers will be dispatched each Tuesday and Friday from the army area to the Reich."

The proclamation sent out with these orders stated that "whoever tries to evade his service obligation will be severely punished."

A report of 23 July 1943 reveals that a conference was held at the headquarters of the 3d Panzer Army. This document is rather significant. A notation of one of the matters discussed is as follows [*NOKW-2473, Pros. Ex. 487*]:

> "Severe sanctions against resistance and transgression.
>
> "Transferring guilty persons to the SD? (Lublin?)
>
> "Family members of persons liable to service who have escaped to be apprehended without consideration for personal situation for labor allocation Reich; however these are to be cared for and treated like those willing to work."

Three days after this conference, the 3d Panzer Army reported to the Army Group Center. A trenchant statement contained in that report is [*NOKW-2454, Pros. Ex. 489*]—

> "Persons apprehended by force after attempts to evade this draft at first will be sent to penal camps which must be run along strict lines."

An activity report of 4 August 1943 of the 3d Panzer Army with reference to the labor commitment of the civilian population and particularly the 1925 and 1926 classes states [*NOKW-2336, Pros. Ex. 491*]—

> "The first batches of eastern workers for the Reich have been assigned to the collection camps without use of unpleasant measures. In some areas about 50 percent of the persons subject to the labor draft have fled, possibly by way of joining the bands."

A notation under date of 30 October 1943 appears in the war diary of the Third Panzer Army as follows:

> "MVR [Militaerverwaltungsrat] Behnisch, Chief of the Labor Group of Economy Headquarters 206 in Vitebsk, reports to O 5 on the allocation of his forces during the 'Heinrich' operation, and on the intended transport of the civilians emanating (gemachten) from this enterprise. All personnel fit for military service and for work, who are seized are to be sent to the

concentration camps of Lublin and Auschwitz via the SD camps and Dulag 125. In any case they may not be turned over for free labor allocation in the Reich. MVR Behnisch further reports that in the rear area of the II Luftwaffe Field Corps there are about 8,000 newly arrived civilians, and in the area of the O.K. Shumilino about 3,000. He asks for a decision whether any recruits may be drawn from these resettled persons for labor allocation in the Reich. After being submitted to O. Qu. this is authorized, but intensive recruiting in Vitebsk, which according to MVR Behnisch's opinion would produce 2–3,000 persons, is delayed for the time being."

This clearly disposes of any contention that the recruitment of those classes for labor in the Reich was on any voluntary basis. A situation report of the 3d Panzer Army, dated 21 February 1944, notes—

"Utmost seizure of all unemployed and able-bodied civilians still loitering about. Recently ordered by Panzer AOK 3/O.Qu./Qu. 2 dated 10 January 1944, No. 579/44 secret."

Following this on 4 April, a report of the 3d Panzer Army shows that 11,000 from the Vitebsk area were found fit for labor assignment to the Reich and deported. The report further notes that there was a continuation of labor assignment according to the most recent draft of the order concerning age groups, 1925–1926.

The foregoing and other evidence in the record convince us that the forcible conscription and illegal use of civilians within the area of Reinhardt's command was a fixed policy. While he and his witnesses deny that such a policy was in effect, we find their testimony not credible. Not only were civilian workers conscripted for use in the army areas but the orders and reports cited, and others to which we have not referred, show clearly that the deportation of civilian workers to the Reich was of such long continued and general practice, that even were there no orders signed by the defendant authorizing it, he must be held to have had knowledge of the practice and of its extent. The record shows that he did nothing to hinder or prohibit the practice, that on the contrary he encouraged and carried it out in the area of his command.

PLUNDER AND SPOLIATION

The evidence on the matter of plunder and spoliation shows great ruthlessness, but we are not satisfied that it shows, beyond a reasonable doubt, acts that were not justified by military necessity.

Reinhardt passed on the Barbarossa Jurisdiction Order. On 25 February 1942, he gave the following directions to his troops [*NOKW–1921, Pros. Ex. 171*]:

> "6. If weapons are found in the possession of partisans or their partisan activity seems quite obvious, the partisans are to be shot or hung by order of an officer, and the reasons made public to the population by some suitable manner (for instance, a sign attached to the partisan with the inscription: 'This is what happens to everyone who fells a telegraph pole'). Similar treatment should be given to inhabitants who support partisans."

This shows clearly that in his area they extended the term *franc-tireur* in accordance with the Mueller directions at the Warsaw Conference. The LIX Army Corps and Panzer Group 3, among other things, ordered—

> "The holding of hostages may be deemed necessary. If it is suspected that roads or places are mined, prisoners of war or the local population are to walk in front or clear the mines."

On 31 July 1942, Reinhardt signed an order which, among other things, stated, "The death sentence may be imposed on every tenth man if the ringleader or the especially guilty persons cannot be apprehended." He states further in the order that every officer or field police official (not auxiliary police official) is competent to make the decision and, after careful examination, that such officer shall order the executions (shooting or hanging).

An order signed by Keitel on 16 December 1942 provided [*NOKW–2961, Pros. Ex. 1306*]:

> "The troops are therefore entitled and even obliged to employ whatever means in this fight without any restraint, also against women and children, as long as it leads to success."

This order was sent down to subordinate units by the 3d Panzer Army on 6 January 1943 and was carried out with ruthlessness. Reinhardt says his chief of staff transmitted this during his absence, but throughout the trial it has been the contention of the defense that the chief of staff took no authority in matters of policy and did not sign orders unless he knew that they were in conformity with the will of the commander. We think that is what occurred in this case. If the order was not in conformity with his policy, he should have repudiated it. Reinhardt says he did not return to this sector but there can be no question that he returned to his command and we have no doubt he learned what his chief of staff had done in his absence.

The 3d Panzer Army on 30 March 1943 passed on an OKH order in which it is provided that band supporters and band *suspects* are to be handed over to the Senior SS and Police Leader for transfer to a concentration camp "providing they have not been shot immediately, or hung, or in special cases assigned to the combating of bands according to section 11 of the circular." The XLIII Army Corps, under date of 29 March 1943, suggested to the 3d Panzer Army the following [*NOKW–457, Pros. Ex. 715*]:

> "When in band-infested areas, where the bulk of the bands consists of forcibly recruited persons, bandits are publicly hanged or shot, it must be considered that these forcibly recruited people, if only for fear of a similar fate, will be induced to offer the most active resistance to the troops mopping up. If, therefore, it is not succeeded in eliminating the bandits immediately on the battle field, they should rather at first be taken along as prisoners and *inconspicuously eliminated only during the transport.* Thus, only the fact of the capture will be passed on from mouth to mouth, and the number of deserters will grow in spite of the active counterpropaganda of the commissars. It may be advisable, for propaganda reasons, to dress up some bandit as a member of an East unit or of indigenous auxiliary police (OD), under inconspicuous but strict guard, and to show him very conspicuously to the population in the area of his former commitment. This ruse of war again and again induces bandits to desert, as experience shows." [Emphasis supplied.]

A directive of the IX Corps dated 26 September 1942 sent to the Jagdkommando (partisan hunters) describes how they shall set traps and wait with patience to catch possible partisans or mine layers. One paragraph in this directive is as follows:

> "If the element of surprise is no longer present, e.g., if by chance local people turn up, the spot selected for activities is to be abandoned at once unless the inconvenient witnesses can be done away with quietly." [*NOKW–2113, Pros. Ex. 648.*]

This shows the utter disregard for the life of the civilian population by elements subordinate to Reinhardt.

SD detachments were assigned by the 9th Army to Reinhardt's Panzer Group 3 with directions that the group make further assignments. An order from the chief of staff of Panzer Group 3 to the LVI Army Corps also discloses such assignments. It must therefore be said that Reinhardt knew of the SD being in his area as early as September 1941. That this association with the SD continued when Panzer Group 3 became the 3d Panzer Army

is indicated by the war diary of the 3d Panzer Army, wherein is set forth, under date of 30 March 1943, an order by the Chief of Staff of the 3d Panzer Army in which the following appears [*NOKW–1976, Pros. Ex. 656*]:

"1. Band supporters and band suspects are to be handed over to the competent senior SS and Police Leaders for transfer to a concentration camp, providing they have not been shot immediately, or hung, or in special cases assigned to the combating of bands according to section 11 of the 'circular.'

"2. The population is to be clearly informed of the difference between 'forced labor' which is carried out under extremely hard conditions, and the 'labor allocation to the Reich' on the basis of recruitment of labor by the Plenipotentiary General for Labor.

"In this connection it is ordered:

"I. The band supporters and band suspects apprehended in the army area are to be handed over to the Einsatzkommando of the Security Police and the SD for transfer to a concentration camp. Units of the SD are located at Vitebsk, Demidov, Surazh, Gorodok, Nevel, Sebezh, Polotsk."

Not only did Reinhardt's Army know about the SD, but over a long period of time, it actively cooperated with it in sending suspects of all kinds, including civilian men, women, and children for forced labor in the concentration camps "under extremely hard conditions." Thousands of such unfortunates were deported to the Reich and sent to Lublin and Auschwitz through the instrumentality of Reinhardt's commands.

Among reports indicating Reinhardt's knowledge of the activities of the SD, we find such notations as the following:

"Military administrative councillor, Matthes, reports that 700 of the evacuees in PW Transient Camp (Dulag) 230 have been screened by the SD and that all of them are intended for evacuation to Lublin."

Dulag 230 was under Reinhardt's control.

Under date of 2 September, this notation appears:

"SD Vitebsk reports that the evacuation of supporters of bands to Auschwitz could not be effected as yet because the railroads did not allocate cars."

Under date of 18 September, it is noted:

"Qu 2 arranges with SD that in case the evacuation to the Reich fails to materialize, the people will be deported by the SD to Auschwitz or Lublin as soon as shipment is possible. SD is directed to send the 700 prisoners from Granki to PW Transient Camp 230."

On 6 October 1943, the commander of Dulag 230 reported:

"* * * that a convoy of 31 men, 172 women, and 240 children had arrived. It consists of the band population rounded up by the troops. There are now about 1,000 civilians in Dulag who can be transported".

and also—

"Where old people and small children are concerned, SD cannot (as discussed with Obersturmfuehrer Meder) transport the people to Lublin or Auschwitz."

On 19 October 1943, the following was reported:

"Visit of the Secret Field Police Group 717 concerning the question as to which camp civilian prisoners can be sent to, who are old and infirm and who have small children, and whose kin have been executed as bandits or bandit supporters, or have been handed over to the SD to be transported to Lublin. It seems intolerable to settle these persons anywhere in the army area because they spread an extremely poisoned atmosphere against the Germans."

An order of 12 August 1943, by the 3d Panzer Army contained the following [*NOKW–2354, Pros. Ex. 727*]:

"According to Pz. AOK 3, Ia No. 6262/43 secret, it is ordered to evacuate the area designated in the above reference since it was established beyond doubt that the population helped the bands during the operations of the 2d and 7th Jaeger Battalions. SD Vitebsk has declared itself ready to arrange that the population which is to be evacuated will be sent to an SD camp (Lublin)."

The distribution list shows that the army sent a copy of the order to "SD Vitebsk" for information.

Seven days later, on 19 August 1943, another order was issued relating to the same evacuation and by the same authority. Among other things, the order stated:

"* * *. This concerns approximately 2,500 persons from the district of Vitebsk, to whom about 500 civilians from the district of Surazh will be added. The latter are to be brought to Transient Camp 230 by the II Luftwaffe Field Corps. Sufficient equipment for the trip, including additional food, is to be allowed to the persons to be evacuated. All cattle, agricultural equipment, and agricultural products remaining will be taken over by economic detachment, group agriculture. Report on the goods taken over is to be made to O. Qu. 2/IVa by *31 August 1943*.

"The request to SD Vitebsk, to separate unmistakable band elements in Transient Camp 230 and to take them over for the purpose of accommodating them in Lublin, continues to be upheld.

"Besides properly looking after them and feeding them which has already been ordered, Transient Camp 230 will also see to indoctrinating them with the necessary propaganda (especially also informing them of the reason for the evacuation—large sections of the population aiding the bands; the innocent ones must suffer with the guilty ones)."

Reinhardt held the executive power for his area and it was his duty to exercise it for the protection of the population. He was obligated not to deport them, not to despoil them of their property, nor to send both those innocent and those guilty of aiding the so-called bands to concentration camps, as well as sending the 1925 and 1926 groups to forced labor in the Reich. The orders to do those things were criminal orders and they were fully implemented by him. He is criminally responsible for issuing the orders and for the acts done in implementation of them.

Whether or not Reinhardt knew that Lublin and Auschwitz were murder institutions is not material. There is no direct evidence that he did. One of his orders shows he knew that the forced labor was hard. He knew they were penal camps. He sent old men, women, and children to them. His own testimony convicts him of knowledge that the SD killed cripples. He had known this for 2 years. He knew they operated under their own authority, conveyed by orders of whose origin and nature he professed ignorance, and yet he turned over to them large numbers of the civilian population over whom he had power and whom he was under a duty to protect. He turned civilians over to this organization, over which he also says he had no control. Slave hunting in his area was so general and long continued that without the direct evidence pointed out, knowledge would be imputed to him.

The Tribunal, on all the evidence, finds Reinhardt guilty on counts two and three of the indictment.

Judge Harding will continue with reading the judgment.

HANS VON SALMUTH

JUDGE HARDING: Hans von Salmuth was born in Metz on 21 November 1888. He became an officer aspirant in September 1907 and served in the First World War, first as battalion and

executive officer and then as general staff officer. After the end of the war he remained in the Reichswehr where he held various assignments. He was promoted to brigadier general in 1937 and became Chief of the General Staff of Army Group Berlin. In September 1939, he became Chief of General Staff of Army Group North and took part in the Polish campaign. At about this same time he was promoted to major general. From October 1939 to May 1941, he was Chief of General Staff of Army Group B, during which time he was promoted to lieutenant general of the infantry. From May to December 1941, he was Commanding General of the XXX Corps and participated in the Russian campaign. From 21 March to 6 June 1942, he was Deputy Commander of the 17th Army, and from 6 June to 13 July 1942 he was Deputy Commander of the 4th Army. On 13 July 1942, he was appointed Commander in Chief of the 2d Army and promoted to general in January 1943. In October 1943, he was appointed Deputy Commander of the 15th Army and subsequently became its Commander in Chief, a command which he retained until August 1944.

He was not a member of the Nazi Party or any of its formations.

The defendant is charged under counts two and three of the indictment and the charges urged against him in respect to these counts come under the following headings which we will consider in serial order: (1) The Commissar Order; (2) The Commando Order; (3) prohibited labor of prisoners of war; (4) murder and ill-treatment of prisoners of war; (5) deportation and enslavement of civilians; (6) plunder of public and private property and wanton destruction; (7) murder, ill-treatment, and persecution of civilian population; (8) discrimination, persecution, and execution of Jews, including cooperation with the Einsatzgruppen in this program.

1. The Commissar Order—The Commissar Order was received by the defendant while he was Commanding General of the XXX Army Corps. The evidence shows that it was distributed to subordinate units by him. He states that he rejected the order and acquainted his divisional commanders with his objections. The evidence does not establish that the order was ever carried out within the XXX Army Corps while it was under the command of the defendant. Two instances are cited which, it is urged, show it was carried out; in one instance within the 17th Army over which he subsequently became the commander in chief. This instance occurred approximately one month before his arrival. The second instance relied on occurred in the 4th Army approximately one month after he assumed command. This instance is considered ambiguous as to whether or not the commissars were in

fact executed after they had been taken prisoner. In neither instance, however, is it considered that the defendant can be charged because from the time element, it cannot be said that they occurred with his acquiescence or approval or due to any order which he had distributed.

2. The Commando Order—The evidence shows that this order and also Hitler's supplement to it were received by the defendant while Commander in Chief of the 2d Army. On 28 October he transmitted this order for compliance with a cover letter to units within his command and requested that all copies were to be returned to AOK 2 by 10 November. This cover letter was signed by his chief of staff and shows the initials O.B., commander in chief. The defendant states that his chief of staff should not have signed the letter and was not authorized to do so, but he did nothing to repudiate this action of his chief of staff, nor is it shown that he reprimanded him in any way therefor.

It is shown further that an order for the 580th Rear Army Area, signed by the quartermaster, was issued, providing:

> "Members of terror and sabotage troops, agents, who fall into the hands of the Wehrmacht are to be turned over to the SD without delay."

and that—

> "Any military detention in prisoner of war camps, etc., is most strictly forbidden, even if considered only as a temporary measure."

On 8 October 1942,* the AOK 2 requested clarification from Army Group B of dubious points arising from application of the Commando Order.

It is obvious that he transmitted this order for execution wherever it was considered applicable, whether to British, Americans, or Russians.

3. Prohibited labor of prisoners of war—Under the conditions confronting the defendant, it is considered as a matter of fact that the use in the combat areas of prisoners of war constituted a use in a dangerous area. Numerous documents and the testimony of witnesses including the defendant in this case establish this. Furthermore, Exhibit 226 and Rebuttal Exhibits 58, 59, and 60 show the illegal use of captured soldiers of the Western Powers. The Western Powers were signatories to the Geneva Convention as was Germany, and the uses to which they were put were illegal under the provisions of that Convention. This fact is shown by

* Evidently this date is a recording error in as much as the Commando Order was not issued until 18 October 1942.

the documents themselves and the defendant must accept criminal responsibility for his use of prisoners of war both on the eastern and western fronts.

Exhibits 524 and 526, among others, are cited to show this illegal use.

4. Murder and ill-treatment of prisoners of war and Red Army soldiers—On 25 July 1941, the OKH issued an order which was transmitted in the chain of command by Salmuth's XXX Corps. This was obviously an illegal order in that it provided that Red Army soldiers "are to be considered guerrillas as from a certain date, to be fixed in each area, and are to be treated as such." This Tribunal finds also that the defendant was criminally responsible for its transmittal.

On 21 November 1941, von Salmuth transmitted an order concerning partisans to subordinate units which provided that "every civilian and also every dispersed soldier who is found in the possession of arms in the region of the XXX AK is to be shot immediately." Von Salmuth signed this order and it is found to be an illegal order. This order was executed within the command of the defendant.

Concerning the treatment of prisoners of war in the areas under the defendant, numerous reports from these areas show what must be considered as an excessive number of deaths by shooting and otherwise among the prisoners of war. They imply a degree of negligence on the part of the defendant but we need not discuss this question. These reports show that prisoners of war were handed over to the SD, a police organization, and that thereafter the army exercised no supervision over them and apparently had no control or record as to what became of them.

Whether or not they were liquidated, as many of them undoubtedly were, is not the question. The illegality consists in handing them over to an organization which certainly by this time the defendant knew was criminal in nature.

The defendant undertakes to state that he had no supervision over these prisoner of war camps. From the evidence we are of the opinion that the defendant was responsible for prisoners of war within his area and also had control over them and that he must accept criminal responsibility for the illegal transfer of these prisoners to the SD.

5. Deportation and enslavement of civilians—Concerning the question of the use of the civilian population in the army area of the defendant and the illegal recruitment and transportation of civilian slave laborers to the Reich, the evidence establishes the defendant's responsibility. Numerous documents in evidence might be cited and, furthermore, documents introduced in rebuttal

show that the extension of this program, both in the West and the East, was one which the defendant strongly urged.

A defense witness, Harteneck, who acted as the chief of staff of the defendant, shows that this labor was compulsory. The documents speak for themselves. But if further evidence is needed, the defendant's own testimony on the stand shows that this labor was compulsory. The record shows the defendant was guilty, both of using prohibited labor of civilians in operations directly concerned with the conduct of the war and of transporting slave laborers to the Reich.

6. Plunder of public and private property—The evidence in this case is not considered sufficient to establish criminal connection for plunder of public and private property.

7. Murder, ill-treatment, and persecution of civilian populations—The evidence does not establish beyond a reasonable doubt the transmittal of the Barbarossa Jurisdiction Order by the defendant. The evidence does, however, establish many instances of the illegal executions of civilians by units subordinate to the defendant. From this evidence the following exhibits are cited:

From 15 to 30 April 1942, a report of the Feldkommandantur to the XLIV Army Corps of the 17th Army under von Salmuth shows the shooting of persons as partisan suspects, Communists, for stealing army property, as Jews, and the turning over of Jewish women to the SD.

A report dated 2 September 1942, from the Korueck 580 to AOK 2 under von Salmuth shows the hanging of persons "strongly suspected" of sabotage.

Reports from the same Korueck addressed to AOK 2, covering a period from 7 October to 12 November 1942, show that on 16 October "a large number of suspects" were shot; that in the localities near Veretenino "several hundreds of suspects were liquidated" and the town itself burned; that a patrol reports "three suspicious looking men" were shot.

A report of 2 September 1942, states:

> "If the prerequisites for surprise no longer exist, for instance, because inhabitants appear by chance, the chosen site must be immediately abandoned if the troublesome witnesses cannot be eliminated silently."

A report shows 6,000 persons executed as partisans and agents by all participating agencies (excluding the SD).

The war diary of the 17th Army under von Salmuth, 24 July 1942, reports that concentration camp Gorlovka was dissolved on 22 July, and that of 655 civilians who passed through, 158 were liquidated and 23 handed over to the SD.

Whether or not these and other executions, shown by the evidence, by his subordinates were pursuant to the Barbarossa Jurisdiction Order is immaterial. These illegal executions were carried out over a wide period of time and by numerous units subordinate to the defendant.

The evidence also establishes in many cases issuance of orders which would naturally result in such criminal acts by his subordinates. Among these is cited an OKW order of 16 December 1942 which the defendant distributed for information and further action, which provided that the order should not fall into enemy hands. This order dispensed with the von Brauchitsch disciplinary order as far as partisan warfare was concerned by providing that no punishment should be imposed upon troops because of their conduct and that no sentence should be confirmed which contradicted this order. It also provided [*NOKW-2961, Pros. Ex. 1306*]—

> "If this war against the bands in the East and the Balkans is not waged with the most brutal methods, the available forces will in the near future no longer be sufficient to overcome this plague.
>
> "For this reason the troops are justified and obliged to resort in this combat to all measures—even against women and children—without leniency, as long as they are successful."

AOK 2, under the defendant, even recommended a supplement to this order, submitted on 2 April 1943, to the Army Group Center which provided [*NOKW-473, Pros. Ex. 1523*]:

> "During interrogation of bandits, also that of women, all means have to be employed in order to get the necessary statements. Interpreters are to be specially trained for the interrogation of bandits. It is frequently necessary to interrogate an individual bandit several times in order to get a result."

On 7 August 1941, Salmuth's XXX Corps received from the AOK 11 an OKH order of 25 July 1941 concerning the treatment of enemy civilians and prisoners of war. This order he distributed down to the battalions of his corps. It provided in pertinent part as follows [*NOKW-1906, Pros. Ex. 247*]:

> "Attacks and all kinds of acts of violence against persons and objects, as well as all attempts, are to be beaten down ruthlessly by use of arms until the enemy is destroyed.
>
> "In cases of passive resistance or road obstructions, shootings, raids, or other acts of sabotage where the culprits cannot be determined at once and taken care of in the already ordered manner, collective forcible measures are to be carried out

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without delay by order of an officer not below the rank of a battalion commander, etc. It is specifically pointed out that it is not necessary previously to take hostages to hold liable for future offenses. The population is held responsible for order in their areas even without special previous announcement and arrest.

"Attacks and assaults on natives assigned by us to work (for instance, road construction, agriculture, trades, factories) and on supervising personnel, constitute attacks on the occupation forces and are to be punished as such."

This and other evidence in this case prescribed the employment of ruthless collective measures and terror activities against the civilian population. On 26 November 1941, the XXX Corps distributed to subordinate units an order, in pertinent part as follows [*NOKW–2538, Pros. Ex. 630*]:

"The incidents which happened during the last days, during which several German and Rumanian soldiers lost their lives during attacks of partisans, require severest countermeasures.

"2. Therefore immediately the following persons are to be taken hostages in all places where troops are stationed:

"*a.* Persons whose relatives are partisans.

"*b.* Persons who are under suspicion to be in contact with partisans.

"*c.* Party members, Komsomols, party applicants.

"*d.* Persons who formerly were members of the party.

"*e.* Persons, who, prior to the moving in of the German and Rumanian troops had any official functions, i.e., village magistrates and deputies, members of the local Soviet, party officials of any kind, directors of state institutions of any kind, sanatoriums, etc.

"*f.* Persons who are found outside the closed villages without a special permit.

"3. These hostages are to be accommodated in concentration camps. Their food must be supplied by the inhabitants of the village.

"4. From these hostages 10 are to be shot for each German and Rumanian soldier who is killed by partisans, and 1 of the hostages is to be shot for every German or Rumanian soldier wounded by partisans; if possible they are to be shot near the place where the German or Rumanian soldier was killed and then they are to be left hanging at that place for 3 days."

The record shows such collective actions to have been carried out by subordinate units under the defendant's various commands.

The Tribunal finds from the evidence above cited and other evidence in this case that the defendant sponsored, acquiesced in, and approved such illegal executions within the areas of his command.

8. *Discrimination, persecution, and execution of Jews, including cooperation with the Einsatzgruppen in this program*—On 1 August 1941, a Ukrainian woman reported a secret meeting of some fifty local Jews and Bolshevists who she said planned to collect and destroy leaflets dropped by German planes requesting the Ukrainian population to resume work in the fields, and to attack the German military offices after the Jews had become strong enough by calling in other persons.

On 2 August, the XXX Corps reported to the 11th Army, a pertinent part of which is as follows [*NOKW-650, Pros. Ex. 738*]:

> "On the basis of this report the SS Einsatzkommando 10a, stationed in Olshanka was informed immediately. The Einsatzkommando was requested to dispatch a detachment to Kodyma immediately in order to prevent the execution of the intentions of the Jews and Bolsheviks on the same afternoon by an extensive action in the Jewish quarters. The action was executed under the command of SS Hauptsturmfuehrer Prast, and 300 members of various troop units were also employed to block off the city quarter involved. The action started on 1515 hours and was finished at 1900 hours.
>
> "III. *Results.*
>
> "A total of 400 male persons were arrested, mostly Jews. These were subjected to an interrogation in the market place of Kodyma. It was remarkable that many of these Jews were from Balti, Soroki, Yampol, and other localities formerly occupied by German troops, in particular former leading Communists. 98 of these 400 persons were proved active members of the Communist Party (functionaries and the like) and/or urgently suspect of participation in the intended plots.
>
> "The rest of the persons consisted to a great part of asocial elements of the Jewish race. The first mentioned 98 persons were shot to death outside of the village pursuant to the directive of SS Hauptsturmfuehrer Prast, after they were briefly screened and interrogated once more."

On 2 August 1941, the 11th Army made the following entry in its war diary [*NOKW-1465, Pros. Ex. 739*]:

> "Preparation of a plot by Jews and Komsomols in Kodyma. Gang leaders and suspects were shot. In addition 170 hostages arrested."

On 3 August 1941, Sonderkommando 10a reported to Einsatzgruppe D as follows [*NOKW–586, Pros. Ex. 741*]:

"* * * In agreement with the commanding general, 99 of the persons arrested were shot, among them 97 Jews, approximately 175 were taken as hostages, the rest released. Executions were carried out by 24 men of the Wehrmacht and 12 of the Security Police * * *".

On 2 August 1941, Sonderkommando 10a filed a report concerning this instance, pertinent parts of which read as follows:

"By interrogation of and confrontation with Ukrainian inhabitants of the town, 98 persons were identified who had taken part in the meetings or who had behaved in an insubordinate manner to the German military, or who had belonged to the Jewish intelligentsia." [*NOKW–579, Pros. Ex. 740.*]

The headquarters of the XXX Corps on 1 August was located in Kodyma and the defendant was in command of the area, including that city which consisted of about 10,000 people. The defendant on the stand denies his participation in or knowledge of this incident until after it had taken place and he is supported in his position by the testimony of his then chief of staff, Harteneck and his Ic, Eismann. The stories of these three witnesses, however, are not consistent. Nor is the defendant's own testimony consistent with itself.

The record further shows that subsequent to the execution herein described, that on the evening of 1 August and prior to 8:30 p.m., the defendant issued a proclamation to the population of Kodyma as follows [*NOKW–586, Pros. Ex. 741*]:

"1. A number of persons were shot today, because it had become known to the German Command that preparations were being made for secret attacks against the troops of the German Wehrmacht in the town.

"2. Besides, a further number of persons were taken hostages and brought to the prison camp. They will not be harmed if the population of the town shows a quiet and loyal attitude towards the troop detachments in the town and towards the German soldiers.

"3. However, should any troop detachments or individual German members of the Wehrmacht or any installations of the German Wehrmacht in the town or in the vicinity of Kodyma be attacked, the German Command shall be obliged to have more executions ordered. Only a quiet and loyal attitude of the entire population secures the lives of those hostages.

"4. It is herewith being ordered that until further notice the population of Kodyma has to provide for the provisioning of these hostages. The town mayor is arranging for details with the local commander and the commander of the prison camp.

"5. Starting immediately the civilian population is forbidden to leave their homes between 2030 and 0400 in the morning. Anyone being in the streets during this time will be shot.

"Kodyma, 1 August 1941

The German Command"

On 2 August, he signed an order to his troops which reads as follows [*NOKW–2963, Pros. Ex. 1303*]:

"2. *Participation of soldiers in actions against Jews and Communists*

"The fanatical intent of the members of the Communist party and of the Jews to stop the German Wehrmacht at all costs must be broken under all circumstances. In the interest of the security of the army rear area it is therefore necessary to proceed with all vigor. Sonderkommandos have been charged with this mission. At one place, however, members of the armed forces participated in such an action in an unpleasant manner.

"For the future I order:

"Only those soldiers may participate in such actions who are expressly ordered to do so. I also forbid all members of the troops subordinate to me any participation as spectators.

"In as much as members of the armed forces are ordered to participate in such actions, they must be under the command of officers. These officers are responsible that every unpleasant excess on the part of the troops be avoided."

It also appears in none of the documents or the testimony herein that the defendant in any way protested against or criticized the action of the SD or requested their removal or punishment. The only punishment inflicted, according to the testimony, upon any one was apparently a 20–day confinement sentence against a member of his own staff for unauthorized participation in this action.

If we are to accept the rather flimsy pretext that some Jews in Kodyma were planning action against the Wehrmacht, the evidence established that the executions recorded were far beyond the punishment of those involved in any such conspiracy and constituted a murder action, and the Tribunal finds from these documents and other evidence that the defendant acquiesced in and approved this criminal action.

Certainly from then on the defendant knew of the murder activities of the SIPO and SD. When he turned over prisoners of war and civilians to them, he knew what could be expected as to their fate. When these units operated in his area he knew the murderous functions they performed. Notwithstanding, on 7 August, he transmitted the OKH order of 25 July 1941, which provided [*NOKW–1906, Pros. Ex. 247*]:

> "*Suspected elements* who, although they can not be proved guilty of a serious crime, seem dangerous because of their *attitude* and behavior are to be handed over to the Einsatzgruppen or the Kommandos of the SIPO (SD). The moving about of civilians without travel authorization must be stopped."

On 24 July 1942, Korueck 580, which was the rear area of the AOK 2 under von Salmuth, directed:

> "A Sonderkommando of the Security Police and of SD 4a has been attached to AOK 2 for the carrying out of special security police tasks outside of the jurisdiction of the troops. The Sonderkommando carries out its mission on its own responsibility. The AOK will coordinate the tasks of this Sonderkommando with those of the military counterintelligence, the activity of the Secret Field Police, and with operational requirements."

And on 4 July 1943, while Commander in Chief of the 4th Army, the defendant signed a report as follows:

> "III. *Collaboration with the GFP (Secret Field Police), Senior SS and Police Leaders, Plenipotentiaries of the Chief of Security Police, the SD and the Einsatzstab Rosenberg.*
>
> "Collaboration with all German offices was very good. Especially in the corps areas, the cooperation of the GFP (Secret Field Police) with the commands proved very advantageous."

On 26 December 1944, he issued a directive, signed by his chief of staff, as follows:

> "7. *The Sonderkommando 4a of the Security Police and the SD.*
>
> * * * is subordinate to the army with regard to routing, supplies, and accommodations.
>
> "The Kommando receives its operational orders from the Chief of the Security Police and the SD.
>
> "The army has the right to issue orders when they are required in order to avoid interference with operations. Besides, it is the responsibility of the Ic/AO to coordinate the tasks of the Kommando with the interests of the military counterintelli-

gence, the activities of the GFP and the requirements of the operations.

"The head of the Kommando must effect a close collaboration with the Ic/AO of the army. Since the operational area of the Kommando is as a matter of principle restricted to the army rear area (with the exception of individual cases) a close collaboration with the O.Qu./Qu.2 and the Commander of the Army Rear Area is also indicated.

"Counterintelligence tasks within the troops and their counterintelligence protection are the sole tasks of the GFP. (Initial) KI."

The record does not establish the extent or location of the liquidations pursuant to this program carried out within those areas, but it does establish his cooperation with the Einsatzgruppen, knowing their murderous functions.

On 24 May, while in command of the 17th Army, the defendant distributed an order to subordinate units, requiring the registration of all citizens except Jews, foreigners, Red Army soldiers, and certain other categories, and provided that:

"Persons supplying shelter to new arrivals (also to members of the family) without the certificate or with a forged certificate are shot to death just as those persons who take quarters in a place (hide overnight), without having obtained the written permission of the mayor."

In other words the order provided for the registration of certain civilians and excluded others, including Jews, who apparently were to be shot for not having the certificate with which they were not provided.

For the reasons above stated concerning this defendant, we find him guilty under counts two and three of the indictment.

KARL HOLLIDT

Karl Hollidt was born in Speyer on the Rhine on 28 April 1891. After a normal education, he became an officer aspirant in July 1909, and in November 1910 became a second lieutenant of infantry. In the First World War he was a combat soldier and was wounded. Subsequent to the First World War he served with the Free Corps and later was accepted into the Reichswehr or One Hundred Thousand Man Army as a captain. He stated in his affidavit that he was promoted to brigadier general in the summer of 1938.

He did not participate in the Polish campaign but, at the onset of the war, took over command of the 52d Infantry Division and

was committed for the defense of Saarbruecken in the West Wall. In April 1940, he was promoted to major general. In November 1940, he was given command of the 50th Infantry Division. He participated in the invasion of Greece and later, from Rumania, participated in the invasion of Russia. In February 1942, he was made general of the infantry (lt. general) and given command of the XVII Corps of the 6th Army. In January 1943, he was appointed Commander of Army (Armeeabteilung) Hollidt, which was later reorganized as the 6th Army under his command.

In February 1943, he was promoted to Generaloberst (general). In April 1944, he was relieved of his command and retired to inactive duty. In March 1945, he became liaison officer of the chief of civilian administration in the Ruhr district where he remained until April 1945.

Aside from the charge of crimes against peace, heretofore disposed of in this opinion, charges under counts two and three of the indictment will be dealt with under the following headings: (1) The Commissar Order; (2) The Commando Order; (3) prohibited labor of prisoners of war; (4) murder and ill-treatment of prisoners of war; (5) deportation and enslavement of civilians; (6) plunder of public and private property and wanton destruction; (7) murder, ill-treatment and persecution of civilian population.

1. The Commissar Order—The evidence shows that the defendant Hollidt received in writing this order or a similar order providing for the shooting of political commissars. The defendant testified that he instructed his regimental commanders not to comply with this order. The only report in evidence as to such executions is from the 50th Division; it is the ambiguous statement found in [NOKW–2945, Pros.] Exhibit 1265. A later report submitted by the XVII Army Corps of the 6th Army on 15 February 1942, discloses the execution of two commissars. From this report it is not clear that the commissars were executed after capture. We can only construe such documents favorably to the defendant.

Furthermore, the defendant denies that he, on this date, had assumed command of the XVII Army Corps and alleges that he did not see this document. It is true that his service record discloses that he was assigned to this corps in January 1942. However, an assignment and the assumption of command are different; and assuming that he had taken command in January, it can hardly be said that the execution, if such is assumed, grew out of any action or neglect on his part in view of the length of time he had been with the command.

We therefore find from the evidence that the defendant was not criminally connected with this order.

2. The Commando Order—The XVII Army Corps received this order and, on his return from leave in early November 1942, the defendant Hollidt read it. He stated that he saw no reason to pass on the order and the evidence does not establish that he did so, and there is no evidence to show that it was ever carried out by units under the defendant.

We are therefore unable to find the defendant criminally connected with this order.

3. Prohibited labor of prisoners of war—Documents pertaining to this matter upon which the prosecution relies pertain to the time when the defendant was in command of the Armeeabteilung Hollidt [later] the 6th Army. At that time he was in the course of retreat which covered some 1,500 kilometers, and his army was in a difficult and deplorable condition at various periods during this retreat, and he defended his use of prisoners of war to some extent upon the exigencies of the situation which confronted him. This constitutes no legal defense but is only in mitigation. From the factual point of view that the defendant was in retreat and subject to heavy, unexpected attacks it is evident that the employment of prisoners of war in constructing field fortifications and for labor with combat units necessarily put them in a position of greater danger than the same use would have subjected them to on a more stable front.

The evidence in this case shows that over a wide period of time prisoners of war were used in the combat zone for the construction of field fortifications by units subordinate to him which could only have been done with his knowledge and approval. Reports show that prisoners of war were in fact killed and injured by an attack from enemy mortars.

We can only find from the evidence that prisoners of war were used under the defendant in hazardous work with the knowledge and approval of the defendant and that he is criminally responsible therefor.

4. Murder and ill-treatment of prisoners of war—This charge is based in part upon certain documents which show that prisoners of war were shot by units subordinate to the defendant. These documents are by no means clear as to the circumstances, or to the effect that the shootings were unjustified; but on the assumption that they were, it is considered that such instances would have to be classified as excesses committed by troops with which no criminal connection of the defendant is established.

The other exhibit on which the prosecution relies under this heading is [NOKW–2807, Pros.] Exhibit 1528, an order pertain-

ing to the shooting of parachutists. The Tribunal is not of the opinion that this order constituted an illegal order and we therefore find no criminal act established against the defendant under this heading.

5. Deportation and enslavement of civilians—The evidence in this case establishes without question the illegal use of civilian labor by units under the defendant's command with his knowledge and consent. This labor was not voluntary and involved the use of civilians in the construction of field fortifications contrary to international law.

The evidence also established that the defendant participated in the recruitment of slave labor for the Reich under the compulsion of orders to do so. He alleges that he was opposed to this program of recruitment of labor to be sent to Germany. [Document Hollidt 146.] Hollidt Exhibit 146 shows that any disapproval was based upon the fact that he needed such labor for his own purposes.

6. Plunder of public and private property—In connection with this charge we consider it established by the evidence and particularly by [Document NOKW–2788, Pros.] Exhibit 573 that the defendant considered civilian authorities subordinated to the army in matters concerning evacuation, and he directed that "everything which could be usable to the enemy in the area must be destroyed if no evacuation is possible." The Tribunal does not feel that the proof establishes that the measures applied were not warranted by military necessity under the conditions of war in the area under the command of the defendant. Nor does the proof establish what property was removed to the rear with his knowledge and consent.

We are therefore unable to find the defendant criminally responsible under this heading.

7. Murder, ill-treatment and persecution of civilian population—The proof in this case does not establish that the Barbarossa Jurisdiction Order was ever transmitted by the defendant. The order upon which the prosecution relies is a drastic military order for the suppression of partisans and to secure the area of the 50th Infantry Division against guerrilla activities by the population. The Tribunal does not believe that the issuance of this order in itself constituted an illegal act for which the defendant should be held criminally responsible. It is true that this order provides for the shooting of persons whose "partisan activities are proven by their confessions or by credible testimony of witnesses without court martial proceedings" and it can be inferred that it was derived from the Barbarossa Jurisdiction Order.

If in fact the Barbarossa Jurisdiction Order was received and transmitted in the 50th Division, the order of the defendant places

a limitation upon its enforcement to the effect that only those persons who were proved by their own confession or by credible witnesses to have been guerrillas were to be shot. The above limitation upon the provisions of the Barbarossa Jurisdiction Order is to his credit rather than detriment.

The Tribunal is unable to find beyond a reasonable doubt that the defendant is criminally responsible in these particulars.

Concerning the responsibility of the defendant for actions of the GFP or Secret Field Police, the documents cited do not establish criminal responsibility upon his part under international law.

With regard to the SD operations within the 6th Army, it is considered that there is no evidence to establish that those activities were confined to more than their legal functions as a police organization in connection with guerrilla warfare within the area of the defendant.

For the reasons set forth, in connection with the defendant's criminal responsibility for the illegal use of prisoners of war and for the illegal use of civilians and their illegal deportation to the Reich, we find the defendant guilty under counts two and three of the indictment.

PRESIDING JUDGE YOUNG: Judge Hale will continue with the reading of the judgment.

OTTO SCHNIEWIND

JUDGE HALE: He was born on 14 December 1887, and entered the navy in 1907 as a midshipman and received various promotions up to his appointment as admiral at the end of 1940. He became Commander of the Fleet in 1941 and remained in this position until his retirement at the end of 1944.

The principal charge against him was that of crimes against peace, which has been heretofore disposed of in this opinion.

The remaining charges under counts two and three are based upon (1) The Barbarossa Jurisdiction Order; and (2) The Commando Order.

The Barbarossa Jurisdiction Order was sent by OKW to OKM on 14 May 1941, and received the following day. The defendant did not see it until 20 May 1941. At that time he was Chief of the Naval Command Office and Chief of Staff of the Naval War Staff, a department in the Naval Command Office. He relinquished this command on 12 June 1941, to become Commander of the Fleet. The Barbarossa Jurisdiction Order was not passed on to subordinate units until 17 June, nearly a week after he had left his command. It seems the delay was due to some question as to the legality of this order. It was first sent to the Legal Department

of the Navy Defense Office before it was passed down to subordinate units, which, as pointed out, was after Admiral Schniewind's departure. The prosecution's brief has this rather naive statement, "For the period after the receipt of this order, during which time he was still Chief of Staff of SKL, Schniewind has offered no proof that he had done anything to discourage or stop the further distribution of this criminal order." We decline to adopt this line of reasoning.

The Commando Order was distributed by SKL to subordinate units on 27 October 1942, after the defendant became Commander of the Fleet. It was sent to his headquarters and his subordinate units.

There is no evidence it was implemented by him or enforced by any units subordinate to him. From the very nature of the order it is apparent it could but have little, if any, relation to his command of the surface vessels engaged in fighting and subordinate to him, viz, the battleships, cruisers, destroyers, torpedo boats, speed boats, and mine laying ships.

We find the defendant not guilty under counts two and three of the indictment and he will be discharged by the Marshal when the Tribunal presently adjourns.

KARL VON ROQUES

The defendant Karl von Roques was born 7 May 1880. During the First World War he was general staff officer, and after the war remained with the Reichswehr. On 31 January 1933, he was released from active duty until 23 May 1939, during which time he was active in the Civil Air Raid Protection Service at Berlin. On 1 December 1939, he became a divisional commander. From the middle of March 1941 until 15 June 1942, he was Commander of the Rear Area Army Group South. From about 10 September 1941 until 5 October 1941, he held a command at the front, also remaining during this time in command of the Rear Area Army Group South. From 27 October 1941, until 10 January 1942, he was absent from his command on account of illness, during which time Lieutenant General Friderici deputized for him as Commander of the Rear Area Army Group South. During April 1942, he was absent two weeks on furlough. On 15 June 1942, he was transferred to the Fuehrer reserve. At the end of July 1942, he was appointed Commander of the Rear Area Army Group A (Caucasus). This appointment became effective for the southern part of the former Rear Area Army Group South at the beginning of August and for the Caucasus at the beginning of September 1942. In the middle of December 1942, the defendant

was retired because of old age and did not participate further in the war. His last rank was lieutenant general to which he was promoted in 1941.

The defendant von Roques is charged with war crimes and crimes against humanity, which is all that we here consider in as much as we have elsewhere disposed of the charges of crimes against peace and the conspiracy to commit crimes against peace. These crimes under the evidence are only such as were committed while the defendant was Commander of the Rear Area of Army Group South and of the Rear Area of Army Group A. We shall consider these under the heading of: (1) The Commissar Order; (2) prohibited labor of prisoners of war; (3) murder and ill-treatment of prisoners of war; (4) The Barbarossa Jurisdiction Order; (5) hostages and reprisals; (6) ill-treatment and persecution of the civilian population; (7) partisan warfare.

Von Roques' testimony discloses that he had in the area of his command executive power as the representative of the occupying power in his area. He stated that he owed a duty to the civilian population because he needed its cooperation. Neither his testimony nor his actions show that he appreciated the fact that he owed a duty as an occupying commander to protect the population and maintain order.

General Halder in his testimony succinctly defined executive power as follows [*TR. p. 1853*]:

> "The bearer of executive power of a certain area unites all the legal authorities of a territorial nature and legislative nature in his own person."

The responsibility incident to the possession of executive power is well stated in the judgment of Tribunal V* as follows:

> " * * * This duty extends not only to the inhabitants of the occupied territory but to his own troops and auxiliaries as well. The commanding general of occupied territories having executive authority as well as military command will not be heard to say that a unit taking unlawful orders from someone other than himself was responsible for the crime and that he is thereby absolved from responsibility. It is here claimed, for example, that certain SS units under the direct command of Heinrich Himmler committed certain of the atrocities herein charged without the knowledge, consent, or approval of these defendants. But this cannot be a defense for the commanding general of occupied territory. The duty and responsibility for maintaining peace and order, and the prevention of crime rests upon

* United States *vs.* Wilhelm List, et al., Case 7, p. 1256, this volume.

the commanding general. He cannot ignore obvious facts and plead ignorance as a defense."

In the Yamashita Case decided by the Supreme Court of the United States, on which case we have elsewhere commented in the judgment, it is stated:*

"These provisions plainly imposed on petitioner, who at the time specified was military governor of the Philippines, as well as commander of the Japanese forces, an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population."

We are of the opinion that command authority and executive power obligate the one who wields them to exercise them for the protection of prisoners of war and the civilians in his area; and that orders issued which indicate a repudiation of such duty and inaction with knowledge that others within his area are violating this duty which he owes, constitute criminality. The record shows orders by the defendant, knowledge, approval, and acquiescence in acts by troops under his authority, and by agencies within his area which violated the most elementary duty and obligations owed to prisoners of war and the civilian population by the commander of an occupying army, having command authority and executive power.

1. The Commissar Order—We have heretofore held this order criminal and need not further comment thereon. Von Roques admitted that he learned of this order in June or July of 1941. He denies having passed it on but from a consideration of the documents and the extensive implementation of the orders by units under his command, serious doubt is cast on the truth of his testimony and that of some of his defense witnesses; but whether the order was or was not passed on by him, its implementation was so extensive in his territory as to require action on his part to prevent the criminal action that was carried on by the units under him and agencies in his area. Commissars were regularly shot with his knowledge, and he did nothing about it.

One paragraph of the Commissar Order in the light of the documentary evidence is important. It reads as follows:

"II. *In the rear areas*—Commissars arrested in the rear area on account of doubtful behavior are to be handed over to the 'Einsatzgruppe' or the 'Einsatzkommandos' of the SS Security Service (SD), respectively." [*NOKW–1076, Pros. Ex. 57.*]

* United States Reports, Cases Adjudged in the Supreme Court. In re Yamashita, 327 United States 16.

The documents disclose that the Security Divisions 444, 213, and 454 for much of the time were subordinate to von Roques. He contends that in the early part of the war against Russia, these security divisions were subordinate to Army Group South, but while they were subordinate to the army group in the early days of the war merely for simulating an attack they were "to remain *fully* subordinate to the commanders of the rear areas of the army groups."

On 20 June 1941, the 454th Division had the Commissar Order. An order of this division, 2 August 1941, provided for segregation in the camp of "politically intolerables" and suspected partisans, commissars, and "instigators" who were to be dealt with by the camp commandants, in accordance with special orders issued.

An order of the 444th Security Division, bearing date of 14 June 1942, requires the groups of the Secret Field Police to submit reports to section Ic of the division by the 10th and 25th of each month, giving the number of commissars identified and listing them as commissars with the troops, civilian commissars, and commissars turned over to the SD; and if no commissars had been identified, a report to that effect is required. This order, as noted before, is dated 14 June 1942 and von Roques says he left for the Fuehrer reserve on 13 June. There is a reference in the order to two previous orders that were dated, respectively, 29 August 1941 and 30 January 1942. It is apparent that the matter covered was not new to the divisions, and that a year after the war began von Roques' troops were carrying out the Commissar Order.

A teletype dated 25 July 1941 from von Roques' Rear Area Army Group to the Security Division 213 announces the arrival of an SS Brigade on 24 July and says it is to be committed on 26–28 July. Under the same date, 25 July 1941, Jeckeln, the Commander of the SS Brigade, issued an order for a mopping-up operation describing towns and locations shown by the operational maps of 20 July and 5 August 1941 to have been throughout that time in von Roques' Army Group Rear Area. In his order of commitment Jeckeln states that contact is to be established with the Ukrainian militia if present in the various towns. He states "that Ukrainians who are still wearing the Soviet Uniform are to be treated as prisoners of war for the time being"; that arrested commissars are to be transferred to him, Jeckeln, for thorough interrogation by the SS leader of his staff, and that similar agents or Jews who offered their services to the Soviets are to be treated accordingly. Six days later, this same SS and Police Leader, Jeckeln, reports as follows [*NOKW-1165, Pros. Ex. 81*]:

"To: 6th Army

"One copy each to:

"Reich Leader SS and Chief of the German Police

"Commander, Army Group Rear Area, General von Roques

"Commander, Army Rear Area, Major General von Puttkamer

"Chief of the Regular Police, General of the Police Daluege.

"II

"1. By request of Generalfeldmarschall von Reichenau, the Reich Leader SS made available the 1st SS Brigade for a mopping-up operation in the army rear area and/or army group rear area.

"The carrying out of this operation in the area of Zviahel, Sluch Valley, Nov. Miropol, Shepetovka, Zaslav, Ostrog, Horyn Valley, Hoszcza, took place according to the directives of the Chief of Staff of AOK 6 in accordance with the Commander of the Army Rear Area, Major General von Puttkamer, and the Commander of the Army Group Rear Area, General von Roques.

"2. The units subordinated to me had the order as far as they were available for this operation:

"Arrest and/or execution of (*a*) remaining parts of the 124th Soviet Rifle Division, (*b*) armed bands, (*c*) guerrillas, (*d*) persons who have assisted the Bolshevist system * * *.

* * * * * * *

"9. Total number of persons captured—135 soldiers of Ukrainian nationality transferred to transient prisoner camp (Dulag).

"Shot—73 Russian soldiers (guerrillas); 165 functionaries and other persons who have rendered considerable service to the Bolshevist system, among them 4 women; 1,658 Jews who have rendered considerable services to the Bolshevist system, and who reported Ukrainians to Bolshevist rulers."

It is clear from this that von Roques' Army Group South [rear area] knew of this commitment, permitted it in its area, and received a report after it was completed. It is clear that 73 Russian soldiers were shot as guerrillas, that 165 functionaries were shot, and that 1,658 Jews were shot. From the face of the report, it is apparent that these 1,896 executions were all in violation of international law. Von Roques says that this was done on Reichenau's responsibility and not his, but a large part of the operations were in the area of his command. He admits that he quartered the SS Brigade, and that his chief of staff reported the accomplished fact to him. Certainly after 1 August 1941 von Roques

could never contend that he did not know that it was the function of the SS and SD to exterminate commissars and Jews.

A report of the Chief of the Security Police and the SD, dated 17 July 1942, shows that the SD at Vladimir-Volnysk gave special treatment to 36 commissar functionaries from a Russian officer's camp and to 76 Jewish Bolshevist officers who were planning to escape. This place was in von Roques' area according to the operational map of 20 July 1941, and von Roques in his testimony said the boundaries of his area were fixed by 10 July 1941.

An activity report of the 454th Security Division for the month of November 1941 stated that 24 Politruks and officials of the NKVD were shot for illegal activities. [*NOKW-2926, Pros. Ex. 1310.*]

On 24 August 1941, only 24 days after the mass killing of Jews and functionaries which we have referred to, von Roques signed an order in which he stated that the SD is to participate in the screening of prisoners in order to have possible unsuitable elements segregated. This order was with respect to policies for the combating of partisans. The witness Fruechte was a physician at Dulag 160 in the rear area of Army Group South. At the prisoner of war camp, he testified the SD searched for commissars. His testimony in this respect is as follows [*Tr. p. 9100*]:

"To the best of my knowledge there was a directive to the effect that prisoners of war were to be screened for the presence of commissars and Politruks. In actual practice it only happened very rarely. I only remember two cases, since the commissars had, in most cases, been liquidated before the prisoners had arrived in the camp. I only know of two cases, one in the camp Kirovograd where a man who was charged with being a Politruk was interrogated by a judicial officer and by the commander. The second case which I recall occurred in the main camp Khorol where a noncommissioned officer of the field police, when a column of prisoners arrived at the camp, immediately segregated one commissar and shot him on the spot. He wanted him shot already in the camp; I happened to be in the camp at that time, but I told him that nobody must be shot in the camp. Therefore, he took him away, had him undressed, took off his clothes, and had him shot at the next corner."

And [*Tr. p. 9102*]—

"I want to refer back to the other subject matter. I don't believe I was understood correctly. I didn't say then that only on two occasions searches were carried out. Of course, searches were carried out all the time, but only in two cases something was actually discovered. It was a matter of course for the German guards that every incoming transport of prisoners of

war was screened as to the presence of political functionaries, but only on two instances something was actually discovered, as I said, because in most cases the people had been liquidated prior to the transport reaching the camp. I wanted to supplement this statement to my last answer."

Dulag 160, where Fruechte was medical officer, was located at Khorol. Fruechte's testimony is supported by that of the witness Blumenstick, who was an inmate of this camp, and testified that there was an order that commissars, Politruks, officers, and other staff workers were immediately to be assembled in one group; that on one occasion while there, he saw either seven or nine people shot, and that among them prisoners of war, commissars, and three Jews.

The commander of the Rear Area Army Group South, the defendant von Roques, is number four on the distribution list of the order from the OKH which we next consider. This order of 7 October 1941 definitely provides for the SD to enter the camps in the rear areas, and there can be no misunderstanding as to what was to happen to those whom they segregated and removed from the camp. Among other things contained in the order are the following:

"* * * Sonderkommandos of the Security Police and Security Service (SD) will be set up, in accordance with the directives enclosed herewith, in the *transit camps of the rear army area* to segregate *on their own responsibility* unbearable elements.

* * * * * * *

"*b.* In agreement with the commanding officers of the rear army area (district commanders for prisoners of war), the operations of the Sonderkommandos have to be regulated in such a way that the segregation is effected as unobtrusively as possible and that the liquidations are carried out without delay and at such a distance from transit camps and villages as to ensure their not becoming known to the other prisoners of war and to the population.

* * * * * * *

"*d.* In the transit camps of the rear army area in which a segregation by Sonderkommandos could not yet be effected, procedure according to previous regulations and under *the responsibility of the camp commanders* should be carried on. Upon arrival of the Sonderkommandos the segregation of unbearable elements is exclusively the task of the latter. Segregations executed jointly, etc., must not take place.

"3. This order must not be passed on in writing—not even in the form of an excerpt. District commanders for prisoners of war and commanders of transit camps must be notified verbally."

It is apparent from this order that it was considered so bestial as to be fit to be seen only by those to whom it was addressed, among whom was the defendant von Roques, for it was forbidden to pass it on in writing, even in the form of excerpts. It provides, as will be noted, that the district commanders for prisoner of war and transit camps must be notified verbally. Von Roques' Army Group Rear Area received this order for it was on the agenda for discussion at the "Commander's Conference" in the Rear Area Army Group South on 17 November 1941, under the heading "Authority of the SD in prisoner of war transient camps (new decree)." Whether von Roques saw this order is not material, for operations were carried on in camps under his jurisdiction and control in accordance with it by the SD, who could enter such camps only with his permission.

On 15 May 1942, five hundred prisoners segregated in Dulag 160 were shot. This is testified to by Dr. Fruechte, camp physician at Dulag 160. His testimony on this occurrence is as follows (*Tr. p. 9133*):

"Q. Now, with reference to the prisoners who were executed by the SD in Dulag 160, how were they accounted for? Was there any record ever made of what happened to them, or, how they were checked off, or, do you know the procedure?

"A. It was as follows: the SD came to Khorol with the mission—I myself talked with the SS Untersturmfuehrer, a non-commissioned officer; their mission was to shoot all Jews and all other persons who were in some way suspects. Some 50 civilians had remained in Khorol. Some were craftsmen who were still needed. In addition, all prisoners of war had remained in Khorol and a number of persons who were detained in the prisoner of war camp as suspects, that is a suspicion of being partisans, Jews, gypsies, Communists, functionaries, etc. The SD first had all Jews detained in the local prison in Khorol, all of them civilians; then the SS Untersturmfuehrer went to the camp; in the camp a list had been compiled by the camp management, recording all persons who were not Jews but who were suspects. The Jews didn't have to be checked because they were to be shot just as the Jewish civilians without any formalities. The SD Untersturmfuehrer then had two or three hundred suspects file past him on 2 days and put on his list, behind each name an 'F', which denoted 'Free', or an 'E', which

meant 'to be shot'. All persons who were assigned an 'E' were put together with the Jews and on 15 May they were shot together with the Jews.

"Q. And how many were there in all?

"A. I already stated, a total of approximately 500; thus, there must have been 450 Jewish prisoners of war and suspect persons from the camp because 50 local civilians were still there in addition."

No comment is required on this testimony. Again the testimony of the witness Blumenstick corroborated it, for he states that he was marched from Khorol, Dulag 160, to Kremenchug, with 12,000 or 15,000 Russian prisoners of war. Those unable to keep up in the march were shot. Blumenstick testified that three were shot by his side because they were exhausted and fell, and that he thought probably 1,200 were killed for this reason. Fruechte also heard from those of the troops who accompanied these marches that the exhausted prisoners of war were shot and left lying by the roadside. At the time of these occurrences at Dulag 160, it was within the area of von Roques. All of the foregoing incidents occurred in the rear area of Army Group South.

Those hereinafter noted occurred in the Rear Area Army Group A, of which von Roques assumed command at the beginning of August as to part and 1 September 1942 as to the remainder of such rear area. The 454th Division, subordinate to him shot two partisans for being Communists, also 37 active Communists. Part of this shooting was done by the SD, though the report showing it is a report of the 454th Division. From the foregoing documents and orders, and oral testimony and other evidence in the record, there can be no question but that defendant von Roques, if he did not hand down the Commissar Order, received it and from the beginning of the campaign knew it was being carried out in his area.

2. Prohibited labor of prisoners of war—Von Roques received the OKH order on 31 July 1941 with respect to the allocation of labor, in which it was directed that commanders in the army group rear areas would carry out labor allocations in the interest of the operations. It was directed further that prisoners must be offered for work to all large scale organizations, such as supply districts, road and bridge construction battalions, railroad engineer relay points, ground personnel units of the Luftwaffe, economic offices, Organization Todt, and officers charged with the construction of winter quarters. This order probably was illegal in that it may have permitted and authorized work not permissible under international law. Apparently von Roques passed it down to his divisions, but there is no evidence that prisoners were used except for

work such as clearing snow from roads and work of this character. There is a picture that shows prisoners of war loading ammunition at a point which on the date of the picture is not shown by the operational map to have been in von Roques' area. Other maps before and after show it in his area. Von Roques testified that no prisoners of war were used for forced labor in his area. On the whole record, we are not satisfied that the evidence is sufficient to establish the defendant's guilt of using prisoners of war for prohibited labor.

3. Murder and ill-treatment of prisoners of war generally— Von Roques denies that he distributed the Commando Order, but paratroopers were shot as guerrillas in his area. An order by the Chief of Staff of the Rear Area Army Group South, bearing date of 9 August 1941, was directed to be distributed to all departments. Apparently the order was issued in reply to an inquiry about the treatment of captured paratroopers. Statements contained in the order are as follows:

> "It has to be insisted that every paratrooper is a guerrilla who, as a civilian, in any way opposes the German Wehrmacht and its institutions.
>
> *"He is therefore also to be treated as a guerrilla on principle.*
>
> "Only if paratroopers report to a German headquarters on their own or have themselves brought there by Ukrainian militia to whom they voluntarily surrendered will they be treated as prisoners of war.
>
> "Statements of captured paratroopers that they were forced into this service are not to be believed at all, since these statements in all probability are made according to orders.
>
> "Only through ruthless measures can the paratrooper plague be opposed successfully."

The defendant von Roques in his testimony said that his troops understood this order in the way he intended it, which was that paratroopers in uniform were not to be shot but treated as prisoners of war. It will be observed that there is no such exception contained in the order. Clearly none was intended. Subordinate units understood it according to its literal terms.

A report of the director in charge of the [Secret] Field Police in the Army Group Rear Area 103, which was under von Roques, shows the shooting of 49 parachutists as guerrillas.

The war diary of the 444th Security Division, under date of 21 March 1942 [*NOKW–2871, Pros. Ex. 1317*] at which time the order of battle shows it was subordinate to von Roques, contains a report of the shooting of nine "parachute saboteurs" by the Field Police.

A report of the Einsatzgruppen, bearing date of 12 November 1941, contains the following [*NO–2830, Pros. Ex. 949*]:

"* * * Among those executed by Sonderkommando 4a in the second part of the month of October 1941, until the date of this report, in addition to a comparatively small number of political functionaries, active communists, people guilty of sabotage, etc., the larger part were again Jews, and a considerable part of these were against *Jewish prisoners of war who had been handed over by the Wehrmacht.* At Borispol, at the request of the commander of the Borispol PW camp, a platoon of Sonderkommando 4a shot 752 Jewish prisoners of war on 14 October 1941 and 357 Jewish prisoners of war on 18 October 1941, among them some commissars and 78 wounded Jews, handed over by the camp physician."

Defendant von Roques stated that Borispol at this time was in his area. It will be observed that this action occurred at the request of the camp commander. It will be observed further that it was subsequent to the mass murder by the SD on 27 and 28 of July, to which we have heretofore referred. Apparently at this time von Roques had taken no steps to advise his prisoner of war commanders that they were to have no further traffic with the SD.

A report of the Feldkommandantur 194 to the Commanding General, Rear Area Army Group South, on 13 April 1942 shows that 126 prisoners of war were handed over to the SD in Chernigov. While von Roques testified that he was on leave in Berlin and did not receive this report, we do not deem this material because at this time for a long period of time he had had knowledge that the SD were a murder group, and it was his business with such knowledge to see that prisoners of war were not turned over to them. He had had ample time to do this before going on leave to Berlin.

Another occasion on which prisoners of war were murdered is evidenced by a teletype which von Roques admitted having read. It is a report of the 24th Infantry Division, dated 15 October 1941. Therein is contained the following [*NOKW–1615, Pros. Ex. 257*]:

"Devoting every effort to the task, the removal of prisoners proceeds according to order. *Insubordinations, attempts to escape,* and exhaustion of prisoners make the march very difficult. Already there are *over 1,000 dead* following *executions by shooting,* and exhaustion. In Aleksandriya, *no preparations* have been made by PW transit camp 182 for the permanent accommodation of 20,000. Novo Ukrainia allegedly only for 10,000."

On the same day that the above report was received, the Commander in Chief of the Rear Area Army Group South made a report to the Army Group South in which he stated the following:

"At 24th Infantry Division the march is made difficult by insubordinations, attempts to escape, and exhaustion of PW's. Following executions by shooting and exhaustion 1,000 dead."

On the agenda for a commander's conference on 17 November 1941, under the heading of "Prisoners of War" appears this statement:

"Shooting to death by 24th Infantry Division of prisoners of war unable to march. Countermeasures."

Also appearing on the agenda is the statement:

"Lieutenant General of the Infantry von Roques, the Commander of the Rear Area Army Group South, starts a two months furlough for a cure. His deputy is Lieutenant General of Infantry Friderici. * * *".

It is clearly indicated by this that on 17 November it was known that the shooting of prisoners by the 24th Infantry Division because they were unable to march had occurred. It is clearly indicated that von Roques was still in command on 15 October for he initialed the teletype of that date and signed an order commending the 24th Infantry Division for its participation in the movement of prisoners, under date of 26 October 1941.

The witness Blumenstick, who made this march as a prisoner of war, testified that three men were shot near him because they were too exhausted to keep up with the march. He testified further [*Tr. pp. 9139, 9140*]:

"From Khorol to Kremenchug, we had to march in groups of 20 men and 5 men in breadth. The Jews who had remained alive were to head this group, then followed some commissars, another group of officers. They were guarded very heavily and then the other nationalities followed on this march from Khorol to Kremenchug. People who tried to obtain some food were shot immediately, whenever they deviated from the marching formation to the right or to the left. . People who were unfit to march, who couldn't go on any more, were shot immediately, and were left to the right and left of the road. They were lying prostrate with their faces to the earth and with their hands stretched forth."

* * * * * * *

"As we prisoners assumed at the time, we estimated the number between 1,200 and 1,500.

"Q. Can you tell the Tribunal how many people were transported at that time?

"A. We estimated about 12,000 to 15,000."

Dr. Fruechte, who was medical officer at the prisoner of war camp, testified [*Tr. pp. 9106–07*]:

"I can only remember one instance in which I know positively that on the march prisoners of war were shot, and this march was the one that took place in the middle of October. I cannot recall the exact date but it was directed from Khorol to Kremenchug. The camp Khorol was too crowded and there was an order to transfer about 20,000 prisoners of war cross country marching on foot to Kremenchug. I, as a camp physician, was ordered by the camp management to make notes when the prisoners filed through the gates of the camp and to segregate prisoners who looked weak and exhausted. I did that, and a number of people of whom one could see that they would not be able to physically withstand the strains of the march I segregated. Later on soldiers who either participated in the march or others who passed the stretch of road between Kremenchug and Khorol on vehicles said that all people who were exhausted * * *."

And—

"A. I said that shortly after the march had taken place, the personnel of the camp was informed by soldiers, some of whom had participated in the march as escorts, or by other soldiers who had passed the stretch of road where the march took place in some way or other, that those people who couldn't march any further were shot. They also told us that the corpses were left at the road and that the whole stretch of road up to Khorol was marked by the corpses left there.

"Q. Can you tell the Tribunal why you were ordered to segregate the weak people?

"A. So that only those people were to participate in the march who would be able to stand the strain of the march.

"Q. Who gave this order to you please?

"A. The camp commandant."

General von Tettau, who was in command of the 24th Infantry Division, gave an affidavit in which, among other things, he stated that he knew nothing about the shooting of prisoners of war unable to march. Since he knew nothing about it, he could not explain on cross-examination how the matter came to the knowledge of von Roques so that he could report it to Army Group South. This affidavit is not convincing on this point. It is

proper to state, however, that the order given by von Tettau which effected the transfer of the prisoners concerning which Dr. Fruechte testified is a clear and humane order.

An order from the High Command of the Army specifically states that security tasks in the rear area of the army and army groups embraces among other things "guarding and transfer of prisoners of war, the allocation of prisoner of war labor detachments." Von Roques as commander of the Rear Area Army Group South had control of the prisoners of war, and it was his duty under international law to provide and care for them within his area and to treat them humanely.

Bearing the date of August 1941 is a report of Jeckeln, Higher SS and Police Leader and Commander of an SS Brigade, giving an account of an operation. This report shows that 73 Russian soldiers were captured and shot as guerrillas.

As showing the general condition that prevailed in the Rear Area Army Group South, a report from von Roques' Army to the OKH, dated 20 December 1941, contains [*NOKW–1605, Pros. Ex. 272*]:

> *"Prisoners of war.*
>
> "The mass deaths of undernourished prisoners of war in the Dulags (transient camps) increasingly attracts unwelcome attention among the civilian population. The mass of the prisoners of war is unable to work due to exhaustion."

Another enclosed report shown in the same document, dated 21 December 1941, sets forth graphically the conditions of the prisoners of war in the Rear Area Army Group South. It reads as follows:

> "1. On 20 December 1941, the total of prisoners of war in the four prisoner of war camps located in the Rear Area Army Group was: (Dulag 160, 182, 205, Stalag 346) 52,513 prisoners of war.
>
> "2. Mortality rate of prisoners of war in the camps:
>
> "*a.* Dulag 160: From 12,959 prisoners of war, an average of 10 deaths per day, 28.02 percent a year.
>
> "*b.* Dulag 182: From 7,507 prisoners of war, an average of 18 deaths per day, 87.05 percent a year.
>
> "*c.* Dulag 205: From 9,271 prisoners of war an average of 21 deaths per day, 82.06 percent a year.
>
> "*d.* Stalag 346: From 22,776 prisoners of war an average of 50 deaths per day, 80.1 percent a year."

The testimony shows that many, in fact the greater part, of the prisoners here referred to were taken in the battle of Kiev and Urman, which occurred in the middle of September. This was

6 weeks before von Roques temporarily left the area. It would not have been possible for the conditions indicated to have grown up during the one month of his absence had proper provisions been made for these prisoners. This occurred in the area over which von Roques had control and is evidence of the gross neglect that was exercised in carrying out the obligations of international law as expressed in the Geneva and Hague Conventions.

There is evidence in the record that von Roques returned on 10 January 1942. There is a report of the Commander of the Rear Area Army Group South, dated 31 January 1942, which shows that conditions had not improved, and that in three of the Dulags, which then contained an aggregate of approximately 30,000 prisoners, they were dying at the rate of 106 percent yearly in one [camp], 262 percent yearly in another, and 254 percent in the third.

Another report shows the general mortality rate in February in five of the camps, containing 38,508 prisoners of war, to have been 2,814 dead or 7.5 percent monthly. For the month of March in the same camps, out of a total of 42,078, 1,707 dead were counted, or a mortality rate of 4.1 percent monthly.

The chief medical officer with the Commander of Rear Area Army Group South reports an inspection of the prisoner of war hospital and the prisoner of war camp of Dulag 205 and states that there are "impossible sanitary conditions and advanced starvation of prisoners of war".

A report of the Commander of the Rear Area Army Group South to the OKH Quartermaster General, which bears von Roques' initials and is dated 16 January 1942, states that on 13 January 1942 there were 46,371 prisoners of war in the camps. The lack of food is stressed and this statement appears:

> "Until 1 April, therefore, the high mortality rate will probably account for loss of 15,000 prisoners of war."

The report, which is signed by the Chief of the General Staff of the Rear Area Army Group South, concludes with this statement:

> "There is no doubt that for the time being labor allocations of these prisoners of war who still are in the camps must be abandoned almost completely. Only by this and by simultaneous improvement of food supplies will it be possible to save at least a fraction of the considerable labor potentiality which lies in the prisoners of war. Otherwise, it has to be expected that about 46,000 prisoners who are now in the Rear Area Army Group South will have eliminated themselves in a few months by death and diseases."

No comment is necessary to show the extent of the neglect of

these prisoners. Von Roques was responsible for the prisoners of war in his area during the time these conditions existed, as shown by the record in the case.

4. The Barbarossa Jurisdiction Order—We have discussed generally the character of this order, which opened the door for much of the criminal activity of the German Army in Russia. Von Roques handed it down to his subordinates. He says he emphasized the necessity of maintaining the discipline of the troops. It was sent to his three Security Divisions, 213th, 444th, and 454th, and to 14 Feldkommandanturen.

The 454th Security Division, on 2 August 1941, issued an order providing, among other things, for the arrest of civilians and that, "If they appear in any way suspect, they are to be handed over by the PW transient camps to the SD", and that, "In the rear area of the army group they are to be transferred to the Einsatzgruppen and Kommandos of the Security Police and SD".

An order of the 213th Security Division, dated 22 August 1941, contained the following:

> "Civilians, who are sufficiently suspected of espionage, sabotage, or partisan activity are to be shot after interrogation by the Secret Field Police. Nonresidents who cannot sufficiently prove the reason for their presence, should, if possible, be handed over to the SD commandos, or otherwise be transferred to a prisoner of war camp for further action by the SD commandos. Young boys and girls who are often used by the enemy are not to be excluded."

Not to be outdone by his divisions in implementing in bloody fashion the Barbarossa Jurisdiction Order, von Roques himself, on 23 August 1941, issued an order in which the following appears [*NOKW–2590, Pros. Ex. 605*]:

> "In case weapons are still found, the offenders will be punished according to the regulations concerning guerrillas with capital punishment. Should the participation of broad circles of the population be probable, or if it is the matter of an ammunition depot, an officer occuping the post of at least a battalion commander will order the execution of collective punishment, i.e., mass executions, or that villages be burnt to the ground partially or entirely. The latter shall, however, be carried out only if the billeting of the units is not endangered. In consideration of the Russian conditions it is required that each superior exercises ruthless measures for the security of the unit.
>
> "The execution of collective punishments will be reported daily in the evening reports as a special event."

Later, on 21 March 1942, von Roques' chief of staff issued an order cautioning units in the combat zone about shooting those arrested for espionage, suspicion of espionage, sabotage, or partisan activities without informing the intelligence officer of the Secret Field Police, because by so doing important information might not be uncovered or might be lost. Von Roques, on his examination, pointed out that such information would be lost "if those people are shot without the Secret Field Police." The life of a suspect was of no concern to the Wehrmacht; but the information which the Secret Field Police might extract from him was precious and must on no occasion be lost. Von Roques testified at some length that the Secret Field Police did not shoot suspects unless the matter was passed upon by an officer of the rank of lieutenant colonel, but he wavered so much that his testimony is not credible on this point. Von Roques turned cases over to the Secret Police and used them as his investigators. Under such circumstances, it was his duty to direct and channelize their action in such a manner that they did nothing that he could not control. It was his duty to see that his troops and the Secret Field Police which he used in his area did not have and act within a sphere of competence derived from some other source that permitted action by them that he was charged with a duty to see did not happen.

A teletype to von Roques, dated 2 October 1941, initialed by him, shows four suspects shot by the 213th Security Division. A report of 25 January 1942 by the Higher SS and Police Leader to the Commander of the Rear Area Army Group South says that on 23 January four suspect individuals were apprehended and "summarily shot". Von Roques says it was ordered by the police leader on his own responsibility and there was no reason for him to intervene, nor could he.

Other reports show that civilians and suspects were shot without even the minimum of judicial protection being afforded them, but merely on the order of a troop or police officer.

That von Roques knew of the criminal activities of the Senior SS and Police Leaders and their units is conclusively shown by an order issued by him under date of 1 September 1941, which is in part as follows:

> "3. Executive measures against certain parts of the population (in particular against Jews) are expressly reserved to the forces of the Senior SS and Police Leader, especially in those districts which have already been pacified.
>
> "The troops themselves will liquidate on the spot only such natives as have been proved or are suspected of having committed hostile acts, and this only in compliance with orders of

officers; collective measures may be ordered only by an officer with at least the rank of battalion commander. No doubts can be admitted in this respect. Any arbitrary shooting of natives including Jews by individual soldiers and any participation in executive measures of the Senior SS and Police Leader must be considered as insubordination and punished by at least disciplinary measures, unless court procedure is required."

From the foregoing, and a great amount of other evidence in the case, we find von Roques passed down the Barbarossa Jurisdiction Order; that he personally issued other orders in implementation of it or pursuant to it that are criminal; and that he bears responsibility for the acts of his subordinate units acting under such orders, and for the acts of other agencies acting within his area, which were criminal and which they were able to carry out only with his acquiescence and approval.

5. Hostages and reprisals—We have commented generally on the fact that the so-called hostage and reprisal orders and killings in this case are not such in fact but merely terror threats and killings.

Von Roques received an order from Army Group South on 1 October 1941, which he saw because he initialed it, which directed [*NOKW–1599, Pros. Ex. 613*]:

"1. Arresting hostages and all men not residing in any villages near the railway line Kazatin-Fastov-Smela-Dnepropetrovsk, possibly also near the line Aleksandriya-Dnepropetrovsk.

"2. Hanging hostages at the railway tracks in case of new acts of sabotage.

"3. In case of further acts of sabotage, complete evacuation of a strip 1-2 km. wide on either side of the railway line and firing on every civilian approaching the railway tracks."

He immediately sent it on to his subordinate Feldkommandanturen.

We do not find from the evidence that hostages were shot in von Roques' area. He says they were not.

6. Ill-treatment and persecution of the civilian population—Many of the documents heretofore set forth show ill-treatment and persecution of the civilians in von Roques' area of command. Other documents show the establishment of ghettos for the Jews; requirements that they wear the Star of David; prohibition of Jewish rites; confiscation of Jewish ritual articles; requirements that Jews surrender all foreign exchange securities, precious metals, and precious stones; terror killings of suspect partisans and partisan sympathisers; so-called mopping-up exercises and turning over of Jews and Communists to the SD; orders by von

Roques himself that the troops shall not participate in "arbitrary shooting" of Jews and the executive measures of the SD; orders that all headquarters shall help the SD detachments in carrying out its orders from the Reichsfuehrer SS, other than taking part in executions; and that "the right to object does not exist for the subordinated headquarters with regard to measures carried out by the SD detachments." Such orders show beyond doubt the complete subservience of the Wehrmacht in von Roques' area to the SD and its full cooperation with the SD program, with knowledge of its debased and criminal character.

7. Partisan warfare—With respect to partisan warfare in the light of the foregoing documents and orders set forth, we need only say that the execution of partisan suspects and other civilians not *francs-tireurs* was a regular and continued practice in von Roques' area.

On the matters herein pointed out, and the record in the case, we find the defendant von Roques guilty on counts two and three of the indictment.

PRESIDING JUDGE YOUNG: Judge Harding will continue with the further reading of the judgment.

HERMANN REINECKE

JUDGE HARDING: Hermann Reinecke was born in Wittenberg on 14 February 1888. He was a career officer in the German Army and served in the First World War as a captain in an infantry regiment. After the end of the war, he held various positions until 1938 when he was appointed chief of the newly activated office group, General Wehrmacht Affairs (AWA). In 1939, this group was renamed General Wehrmacht Office (AWA) and Reinecke became office chief which position he retained until the end of the war. He was promoted to brigadier general in 1938; to major general in 1940; and to lieutenant general of the Infantry in 1942.

In addition to his duties as Chief of AWA, in December 1943 by a Fuehrer order, he was appointed Chief of the National Socialist Guidance Staff of the OKW.

He received the Golden Party Badge in January 1943, and the Hitler Youth Honor Insignia on 30 January 1944. He states in his affidavit that in 1944, Hitler ordered that bearers of honor insignia would become automatically Party members so that this order affected him in the fall of 1944.

Aside from the charge of crimes against peace, heretofore disposed of in this opinion, we think that charges under counts two and three of the indictment may be disposed of under the

following headings: '(1) segregation and murder of prisoners of war; (2) ill-treatment of prisoners of war; (3) The Commando Order; (4) prohibited labor of prisoners of war; (5) looting; (6) murder and ill-treatment of civilians. We shall discuss these charges in serial order.

1. Segregation and murder of prisoners of war—The record in this case established numerous and far-reaching crimes by the Third Reich and its leaders committed against prisoners of war. These concern not only Russian prisoners of war but other Allied prisoners of war. The evidence in this case establishes the use of French prisoners of war in the manufacture of arms contrary to the Geneva Convention which was binding upon Germany as to French prisoners of war. It is alleged that this was done by agreement with the ambassador of the Vichy government to Berlin. There is no evidence of any agreement by the Vichy government in this case.

This matter was considered in both the case of the United States against Milch and the case of the United States against Krupp, et al., both of which Tribunals held such use illegal. We are of the opinion, for substantially the reasons cited in the Krupp Case, that if any such agreement existed, it was contrary to international law. Certainly a conquering power cannot set up and dominate a puppet government which barters away the rights of prisoners of war while the nationals of that country under substantial patriotic leadership are still in the field.

Concerning Russian prisoners of war the evidence establishes a series of colossal and stupid crimes under the Third Reich. Hundreds of thousands, millions, were doomed to die through neglect or were killed by ill-treatment or deliberately executed by the agencies of the Reich Government in order to exterminate the so-called bearers of Communist ideology, the "unfit", Jews, and others. The record also shows shooting of Russian prisoners of war who attempted to escape and were recaptured, and the branding of Russian prisoners of war.

This Tribunal, from the evidence in this case, finds that such uses of prisoners of war and the treatment of prisoners of war outlined above constituted international crimes. It now becomes our duty in this case to determine the connection, if any, of the defendant Reinecke with such crimes from the evidence before us.

The authority exercised by the OKW over prisoner of war affairs did not extend to camps within the operational area of the OKH or to camps of the air force and navy. In these camps the appointment of personnel and disciplinary power was exercised by the various services. In the Reich Commissariat the camps were under the jurisdiction of the armed services commander, a

subordinate of the OKW; also prisoner of war camps within the Reich and the Government General were under OKW jurisdiction except as to disciplinary powers which in the Reich were exercised by the Commander in Chief of the Replacement Army.

The organization of Prisoner of War Affairs in the OKW is shown by the chart of General Westhoff, Chief of Prisoner of War Affairs in the OKW. Subsequent to the appointment of Inspector of Prisoner of War Affairs it is shown by the chart of General Roettig, Inspector of Prisoner of War Affairs.

The OKW, within the Reich, controlled the appointment of district prisoner of war commanders, camp commanders, and other personnel of the prisoner of war administration and conducted training courses to prepare such personnel for their tasks although the actual appointment of this personnel was made by the Army Personnel Office.

The commanding general of the service commands exercised a dual function; one, as commander of service commands subordinate to the OKW; and the other as commander of troops subordinate to the Replacement Army, but his Referent for Prisoner of War Affairs was the commander of Prisoner of War Affairs in the service command, who in turn was a superior of the various camp commanders. The control of the OKW over prisoner of war camps and their personnel is shown in the document pertaining to the Meinel affair. It is also shown by the testimony of the affiant Westrem wherein he states in pertinent part as follows:

> "The controls from above (OKW, commanders of the prisoners of war, commander of the PW base camps, the competent battalion commanders, whose company commanders and officers travelled around at all times) * * *".

When he testified on the stand, he stated:

> "I am of the opinion that the OKW/AWA was the agency charged with dealing with prisoner of war matters." [*Tr. p. 8392*]

The defendant was the Chief of the AWA. One of the most important subsections of this office was that of Prisoner of War Affairs, and the evidence establishes the general control and responsibility of the defendant over these matters within the Reich, the Government General, the Reich Commissariat, and other areas under the OKW.

On or about July 1943, the general inspector of Prisoner of War Affairs was appointed and was directly subordinate to Keitel and not to the defendent. Notwithstanding this fact, the testimony of Adolf Westhoff, Chief, Prisoner of War Affairs in the OKW, shows that this general inspector reported concerning conditions of prisoner of war affairs to the Chief of Prisoner of War

Affairs under the defendant. It also appears from the evidence that there were other officers who acted as inspectors of prisoner of war camps for the AWA and who reported directly to the Chief of Prisoner of War Affairs under the defendant Reinecke.

This organization of prisoner of war matters remained in effect until Himmler became Commander in Chief of the Replacement army sometime in September of 1944, but apparently the change in prisoner of war matters did not take place until October of that year. After this period a great many of the important functions regarding prisoner of war affairs were transferred from the AWA organization to Berger who operated directly under Himmler. The situation after this change is shown by a chart of Colonel Fritz Meurer, former chief of staff under Berger.

Concerning prisoners of war in the camps under his jurisdiction, the defendant Reinecke issued many directives. Whether or not these instructions were designated as "directives", such "directives" issued by the OKW were orders and binding upon subordinate units to whom they were directed. This is shown by the testimony of many witnesses, including that of General Westram, former commander of prisoners of war in Wehrkreis XII, General Schemmel, former district commander of prisoners of war, Wehrkreis XIII, General Westhoff, and numerous other witnesses, both of the prosecution and defense. The testimony of the defendant himself also shows that his directives were considered by him as orders binding upon the units to whom they were directed.

We are not concerned in this case with the fact that the defendant did not have direct command authority or disciplinary authority over the personnel of camps or units of the army. He issued the over-all directives in the name of the OKW and the Commander in Chief of the OKW, with which they were compelled to comply. The evidence in this case shows that the defendant exercised direct authority over Wehrkreis XIII. That he by-passed the chain of command as stated in the testimony of General Schemmel is immaterial.

The defendant contends that such directives were always issued "by order" of his superior, Keitel, and in this respect the evidence on the whole bears out his contention but that fact does not absolve the defendant for responsibility in connection with such directives. The Chief of the AWA was not a stenographer who merely transcribed the orders of his superior and passed them on. Keitel undoubtedly had a secretary who performed that function.

The record in this case contains page after page of voluminous orders transmitted over the signature of the defendant by order

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of Keitel. The fact is that it was one of the defendant's major functions to draft and prepare orders for submission to Keitel for his approval (or sign in his name orders in conformity with his known policies). That this procedure was followed is shown by the testimony of General Westhoff, reproduced on page 55 of the defendant's brief, where he stated [*Tr. p. 7740*]:

> "I wrote out a draft decree in accordance with the Geneva Convention and sent this draft to General Reinecke. General Reinecke sent back this draft decree to me after he had made a few improvements in it; he turned sentences around, etc., and then he ordered me to send the draft to the various ministers for checking purposes."

and where he states further:

> "Then the draft had to be submitted to the Party Chancellery. The Party Chancellery thereupon announced that the draft in no way corresponded with their demands; that it must be altered, and the Party Chancellery then altered about 70 percent of this draft themselves. This new draft I then received back again by the AWA with the order to submit the decree in its form as it was then, and to submit it for signature."

The statement of the witness Kattner, secretary to the defendant Reinecke, also cited in the defendant's brief, states [*Tr. p. 8361*]:

> "As a matter of principle, these things were like this: the draft of such an order would be prepared in the Prisoner of War Department; would then be submitted to the Field Marshal and be initialed by him and he would also put a date thereon. Then this draft was returned to us and was copied out and signed by General Reinecke, 'I.A.—Im Auftrage—by order of'."

In other words, her testimony was to the effect that the drafts of these orders were prepared by the subordinates of General Reinecke before they were submitted to Field Marshal Keitel for his signature or approval. It is not even to be presumed according to normal staff procedure that where the ideas expressed in the order carried out a policy of Keitel known to the defendant, that Keitel saw and approved such orders before they were issued. It is to be noted in this connection that while the office of the AWA was located in Berlin, Keitel undoubtedly remained constantly with Hitler's headquarters in the East. Many of the directives signed by the defendant do not bear Keitel's initials or signature, showing they were seen and approved by him as is the usual procedure where such is the fact. In fact, [Prosecution] Exhibits

366, 411, 371, 1248, 363, 210, and 232 show neither Keitel's initials nor his signature.

These matters have been heretofore discussed in this opinion and the defendant in this case cannot escape responsibility for decrees issued under his signature merely by the fact that they were issued "by order". The defendant, in his own testimony, concedes that many of the ideas therein contained were his own but these, according to his contention, were always the beneficial provisions; a contention with which this Tribunal is not impressed in view of all the evidence.

It is alleged by the defendant that he could visit prisoner of war camps only with the permission of the commander in chief of the replacement army. This defense is considered without merit. Whether he and his subordinates formally obtained such permission is immaterial. If such a requirement existed, it was a mere formality.

The defendant's supervision and control of prisoners of war and prisoner of war affairs is also shown by the testimony of General von Westrem, who stated [*Tr. pp. 8392–93*]:

> "I am of the opinion that the OKW/AWA was the agency charged with dealing with prisoner of war matters."

He further stated:

> "Yes, AWA, that is, the department for prisoners of war, did use extensively its right to control the prisoners of war and the work in their camps. That was done in the first place by General Reinecke himself, who visited me twice, then by the inspector of prisoner of war matters who, in behalf of the AWA, was constantly travelling. It was also done by individual officers on the staff of the AWA who, by surprise, came to visit labor detachments and prisoner of war enclosures."

The evidence establishes that he made inspections himself and that the camps were constantly being inspected by his subordinates. Inspection of such camps and knowledge as to what occurred within them was a function of the defendant. Westhoff testified that the Inspector of Prisoner of War Affairs was subordinate to the AWA and could inspect camps within the jurisdiction of the AWA.

A Reinecke exhibit, an affidavit by Rudolf Schleier, shows that the right to inspect was vested in the defendant.

This Tribunal is not concerned with fine formalities or divisions of authority. The evidence establishes overwhelmingly the over-all control and supervision of the defendant Reinecke as to prisoners of war under the supreme authority of the OKW and

his power over prisoner of war camps and prisoner of war affairs. The evidence shows that he exercised that authority by issuing orders; that he had the right of inspection both in himself and his subordinate; that such inspection was a duty entrusted to him and carried out by him; that he had the sources of knowledge and the duty was placed upon him to know and supervise what took place in these camps, and that he did know and supervise what took place therein and directed certain operations in such camps.

As heretofore stated, it is established that prisoners of war were segregated and liquidated under the program of the Third Reich. The process of segregation and the resultant executions have been shown to have been carried out primarily by the SIPO and SD units sent to the camps.

The defendant has denied knowledge of this segregation and liquidation program of prisoners of war under his jurisdiction. The knowledge of the defendant, his approval, and cooperation with this program of murder carried out by Himmler and his police, particularly by the SIPO and SD is established from evidence too voluminous to recite in detail in this opinion. Broadly speaking, however, the sources of evidence may be classified under various headings; first, the directives and reports of the SIPO and SD through their own channels in which they refer to agreements with the OKW as to their operations. These documents, it is true, did not go through military channels, nor were the specific agreements with the OKW set forth, and some of the agreements referred to are antecedent to documents introduced in evidence which show the official action of the AWA and OKW in regard to operations of the SIPO and SD in prisoner of war camps. However, that such agreements did in fact exist is not only shown by these SIPO and SD documents, but from the fact that in view of the responsibility of the OKW and AWA over prisoner of war affairs and prisoner of war camps, the activities of the SIPO and SD could not have taken place without the assent of the OKW and AWA.

Most certainly this segregation and liquidation program was known to the commanders of the various camps where the segregation took place and to various other military officials within these camps. The evidence in this case discloses not only that it was the duty of the defendant to know what took place within them but that in fact from constant inspections by his subordinates and which he made himself, he could not have escaped such knowledge.

Not only did he have this power and duty of inspecting but it is also established by the evidence that at conferences which he called for the camp commanders, he was in contact with personnel who

knew very well what was taking place within their camps as to segregation and liquidation.

Another source of evidence which the defendant had as to this program was the various conferences which he is shown to have had with SS Obergruppenfuehrer Mueller who represented Himmler and the RSHA in carrying out this liquidation program. The witness, Otto Braeutigam, liaison officer between the Ostministerium and the Wehrmacht Operations Staff, has testified to one such conference between Reinecke and Mueller where the liquidation of prisoners of war was openly discussed. He testified that he took to the conference the orders of the SIPO and SD pertaining to this matter and that these orders were brought to the attention of the defendant. Certain conference notes of Ministerial Councillor Dr. Letsch show discussions of liquidation of prisoners of war who had been segregated for that purpose. Another conference between Reinecke and SS Obergruppenfuehrer Mueller and others was attended by Erwin Lahousen, Chief of Counterintelligence, Department II, as the representative of Admiral Canaris sent to protest against this program, and the witness, Lahousen, testified that not only was the matter discussed but that the defendant signified his approval of the program of Mueller as to segregation and liquidation of prisoners of war.

The defendant denies any such conference but the evidence, including that of his own witnesses, supports the testimony of Lahousen.

A final and most convincing source of evidence on this point is found in the documents signed by the defendant himself. [Doc. No.–3417, Pros.] Exhibit 363 shows an order of the OKW, dated 8 September 1941, distributed "by order" over the signature of Reinecke, providing for cooperation of the camp authorities with the SIPO and SD.

[Document 695–PS, Pros.] Exhibit 411, dated 24 March 1942, over Reinecke's signature shows the segregation program of the Einsatzgruppen and the cooperation prescribed for camp commanders with the SIPO and SD.

A decree of 5 May 1942, signed by Reinecke, shows an agreement by him and the Reich Leader SS in connection with segregation and refers to the "eliminations". This agreement was intended to avoid a double screening and provided that thereafter the screening would be east of the old Reich frontier.

Another decree signed by Reinecke is dated June 1942. This decree is termed "Policy regarding Commissars and Politruks" and provided for the "elimination" of commissars and Politruks while within the Government General. It further provided:

"Within the Government General, the elimination shall be carried out as before by the Security Police according to directives given by ordinance Az. 2 f 24.73 AWA/Prisoners of War Gen. (Ia) No. 389/42 g, dated 24 March 1942. Those sought out by the SD commissioners shall in future be conveyed to Security Police camps specially prepared for this purpose in the Government General or in the Reich and remain in custody there. Special treatment, as hitherto, will no longer be given, unless people are involved who have been convicted of criminal acts such as murder, cannibalism, and similar acts.

"To accelerate the proceedings, the Security Police shall reinforce their Einsatzkommandos in the Government General."

This shows the use of the term "special treatment", and that that term clearly meant liquidation. Furthermore, the testimony of many witnesses, including the defendant himself, established beyond a reasonable doubt that the defendant knew, participated in, and approved the segregation and liquidation program carried out by the SIPO and SD as to prisoners of war under his jurisdiction and the evidence in this case establishes that that segregation and liquidation were not confined to political commissars but included many other classifications among the prisoners of war, including the Jews. The evidence also establishes that those sick and unable to work, prisoners of war who had escaped and had been recaptured, and prisoners of war of Polish and certain other nationalities who had had sexual intercourse with German women, were turned over to the Gestapo, SIPO, and SD, and the defendant's connection therewith.

This Tribunal does not propose to enter into the question of how these liquidations were carried out or their precise number. Nor is it concerned with the fact that the program of the SIPO and SD was not entirely coextensive with the jurisdiction of the defendant. It is shown that it was carried out in camps under his jurisdiction by virtue of directives issued by him. Whether the unfortunates who were segregated were transported to concentration camps to be gassed or worked to death or otherwise disposed of, as described so graphically by the witness, Smolen, formerly with the political reception detachment at Auschwitz, and the question of whether or not their deaths were reported to the Wehrmacht Information Center, WASt, an office under the AWA, as he also testified or whether as described by the witness, Ohler, former inspector of the Nuernberg Gestapo, they were transported to the railroad station by the camp authorities, chained, and taken into Dachau where, five at a time, they were taken out, stripped of their clothing, and shot by the Einsatzkommando, is not the ques-

tion. The fact remains and is clearly proved that the defendant was an active participant in the program of segregation and illegal liquidation of prisoners of war under his jurisdiction; that he knew prisoners of war turned over to the police agencies were to be so eliminated; and that he arranged for turning them over to such units for that purpose.

Nor are we concerned with the fact that having participated in the ruthless policies of the Reich in the early stages of the war with Russia with regard to Russian prisoners of war, ultimately the leaders of the Reich came to the conclusion that they were depriving themselves of a valuable source of manpower and thereafter relaxed in a measure their program of extermination. This is a relaxation for which the defendant or anyone else can claim little credit at best, and according to the defendant's testimony, he can claim no credit because he asserts that he never knew of the existence of any extermination program in the first place.

For the reasons above stated, we find the defendant guilty of participation in the criminal segregation of prisoners of war for liquidation of certain elements and for turning others over to the Gestapo for confinement in concentration camps or elimination as they saw fit.

2. Ill-treatment of prisoners of war—The record in this case shows various inflammatory orders concerning prisoners of war issued by the defendant and his subordinates. These include [Doc. 888–PS, Pros.] Exhibit 1248 and [Doc. NOKW–035, Pros.] Exhibit 336.

On 24 March 1942, the OKW/AWA issued an order which the defendant claims favorably modified preexisting directives. However, the purpose of this order was apparently to increase the production of prisoners of war. This order contains the following provisions:

> "Ruthless and energetic action in cases of uncooperativeness, refusal to work, and negligence in work, especially toward Bolshevist agitators, is to be ordered; insubordination or active resistance must be completely removed *immediately* with a weapon (bayonet, gun butt, or firearms, no sticks)."

This order directed ruthless and energetic action for "uncooperativeness", "refusal to work", "negligence in work", especially "toward Bolshevist agitators". This directive also provided:

> "The decree concerning use of arms by the armed forces is to be interpreted strictly. Whoever does not use his weapon or does not use it energetically enough in seeing that an order is carried out is liable to punishment."

On 19 August 1942, Reinecke signed a decree. This order was distributed by the Plenipotentiary for the Four Year Plan and the Plenipotentiary General for Labor Allocation. This order states:

"During these visits it should be mentioned that a further OKW decree pertaining to the treatment of Russian PW's in case of refusal to work will follow soon. Furthermore, inquiries are to be made if and where it has become known that guards have neglected their duty in supervising the work output of PW's. In case this is ascertained, the most drastic steps are to be taken.

"For 10 September 1942, reports will be submitted to the OKW confirming that all NSDAP functionaries (Hoheitstraeger), in whose districts (Bezirke) PW's have been allocated to work, have received the decree referred to, and where disciplinary action has been taken against guards who have neglected their duty."

This order shows party interference and influence upon the defendant in connection with his treatment of prisoners of war and also directs vigorous measures in case of refusal to work and to increase the work output of prisoners of war.

On 29 January 1943, von Graevenitz, a subordinate of Reinecke, signed and distributed an order extending the power to inflict punishments upon prisoners of war for attacks upon the State. This order was distributed by the Party Chancellery to various Gauleiters.

On 17 August 1944, an OKW decree, signed by Reinecke, concerning the treatment of prisoners of war, again shows the party influence upon the defendant in regard to this matter. Pertinent parts of this order read as follows:

"* * *. The prisoners of war must definitely know at all times that they will be ruthlessly proceeded against, if necessary with weapons, if they slack in their work, offer passive resistance, or even rebel * * *."

Paragraph 5 provides—

"* * *. Minor offenses by the guard and auxiliary guard personnel in the treatment of prisoners of war are not to be prosecuted if they serve to help increase production * * *."

Paragraph 6 provides as follows:

"* * *. The guard and auxiliary guard personnel must therefore be briefed on political views as often as possible. The commanders of prisoners of war in the Wehrkreis are responsible that official NS political officers are speedily assigned to all men's prisoner camps * * *."

This paragraph clearly establishes that the ruthless policy of the Party as to treatment of prisoners of war in work production was put into effect by the defendant Reinecke.

In addition to assisting in the liquidation by the SIPO, SD, and Gestapo of "undesirable elements" among prisoners of war, the exhibit above cited discloses that the defendant directed that the remaining prisoners were to work under the merciless lash of the Party. For such inhuman orders and abandonment of prisoners of war under his jurisdiction to the supervision of a ruthless civilian agency, of whose nature and purposes he was advised and which he claims to have resisted, the defendant Reinecke is criminally responsible.

It is small wonder from the above cited directives that General Schemmel testified to the effect that the mortality rate of Russian prisoners of war engaged in heavy labor at Nuernberg was very high.

3. The Commando Order—The evidence in this case is not considered to establish beyond a reasonable doubt the defendant's connection with the execution of the Commando Order.

4. Prohibited labor of prisoners of war—The witness, Henri Bousson, former French prisoner of war in Wehrkreis VI, establishes the illegal use of French prisoners of war within Reinecke's jurisdiction in the manufacture of artillery weapons in the Krupp plants.

It is also established by Westhoff's testimony that he called the use of French prisoners of war in armament work to the attention of Reinecke and advised him that it was contrary to the Geneva Conventions, to which Reinecke replied that an agreement had been reached with Ambassador Scapini and the French Government permitting such use.

This and other evidence in this case clearly establishes the illegal use of French prisoners of war in the manufacture of arms and munitions and the defendant's knowledge thereof. That Reinecke was responsible for this use of prisoners of war is shown from the record which, as heretofore pointed out, establishes authority and jurisdiction over prisoners of war within the Reich. Reinecke's control over such prisoners of war is also shown by [Doc. NOKW–180, Pros.] Exhibit 230, wherein Goering on 4 November 1943, stated:

> "* * *. The Italians (Italian military internees) get beaten up when they do not work. If Reinecke cannot do the work, I shall dismiss him and get somebody else. * * *"

And by a meeting of the Central Planning Board wherein Field

Marshal Milch stated:

"Gablenz, I want you to get in touch with Reinecke concerning these French. I demand that if the people refuse to work they immediately be placed against the wall and shot before all the other workers. * * *."

While the proof in this case establishes many uses of Russian prisoners of war and while it establishes that they were used to replace French prisoners of war for use in the armament industry, it fails to establish the actual use of Russian prisoners of war in the manufacture of arms and munitions.

5. Looting—On 17 September 1940, Keitel issued an order to the military commander in occupied France providing for the illegal seizure of property and its transfer to the Reich. This order in pertinent part reads as follows [*138–PS, Pros. Ex. 547*]:

"Reichsleiter Rosenberg and/or his deputy Reichshauptstellenleiter Ebert has received clear instructions from the Fuehrer personally governing the right of seizure; he is entitled to transport to Germany cultural goods which appear valuable to him and to safeguard them there. The Fuehrer has reserved for himself the decision as to their use.

"It is requested that the services in question be informed correspondingly."

On 10 October 1940, Reinecke wrote to the Supreme Commander in France and requested that the directions given in the above directive of Keitel's be transmitted to the military administration in Belgium.

On 30 October, he addressed a communication to the Armed Forces Commander in the Netherlands, supplementing this order of Keitel's, a copy of which he sent for information to Reichsleiter Rosenberg.

For his connection with this looting program of the Third Reich, he is considered criminally responsible.

6. Murder and ill-treatment of civilians.—We do not feel that the proof in this case establishes beyond a reasonable doubt the criminal participation of the defendant in the screening and turning over of civilians to the SIPO and SD, or that he in fact had authority over civilians.

There has been much discussion in this case concerning the defendant's assignment as Chief of the National Socialist Guidance Staff of the OKW for the purpose of fostering the Nazification of the various services, particularly of the army. But the fact remains that the indoctrination of the army in the Nazi ideology, repulsive as that ideology might have been, does not in itself con-

stitute an international crime, and the fact that he was appointed and carried out such functions is not considered to have any significance in this case other than as it indicates his conformity to the ideals of Hitler and Keitel whose orders and directives he is shown to have formulated and transmitted, and his relation to Bormann and the Party to whom he, in a measure; surrendered the supervision and treatment of prisoners of war.

It has also been established that he was a member of the People's Court as one of the lay judges thereon and that he sat in the trial of the conspirators of 20 July 1944, where the contemptible Freisler presided, which is perhaps the most infamous travesty on human justice ever so completely recorded in the annals of man.

The fact, however, that he was a member of the People's Court and sat in this trial does not constitute an international crime and is of no significance in this case other than it reflects his character as a trusted and supine instrument of Hitler's will in any capacity

For the reasons above stated in this judgment, we find the defendant guilty under counts two and three of the indictment.

PRESIDING JUDGE YOUNG: I shall continue with the reading of the judgment.

WALTER WARLIMONT

Walter Warlimont was born on 3 October 1894. He saw service in World War I in the artillery as a combat officer. At the end of 1920, upon his own application, he was taken into the Reichswehr. From then on he served in various capacities and in 1929 was detailed to the United States Army to study the economic mobilization system. Later on he served in various capacities, and in April 1933 was transferred to the Reichswehr Ministry in Berlin, Army Armament Office, as group chief in the economic department. In the summer of 1934, he was appointed chief of this department. At the end of August 1936, he was sent by the Reich Minister of War, von Blomberg, as Military Plenipotentiary to Generalissimo Franco in Spain, where he remained until November 1936.

In October 1937, he was given command of an artillery regiment and in 1938, shortly after the Anschluss, he was ordered to Vienna by Keitel, Chief of the OKW, to represent the OKW there. After a few weeks he returned to his regiment. On 1 August 1938, he was transferred to the OKW in Berlin to become familiar with the position of chief of the section of national defense as a successor to Jodl. At that time his chief task was to represent the

OKW in ensuing conferences where the military occupation of the Sudetenland was being arranged with the military representatives of Czechoslovakia and the signatory powers of the Munich agreement.

On 10 November 1938, he was appointed Chief of the Section of National Defense and was at the same time charged with the affairs of the Chief of the Wehrmacht Operations Office, which shortly before had been activated. In August 1939, Jodl returned to the OKW and took over the affairs of the Chief of the Wehrmacht Operations Office and the defendant remained Chief of the Section for National Defense. On 1 August 1940, he was promoted to brigadier general. The first of January 1942, the Office Chief of National Defense was renamed Deputy Chief of the WFSt without incurring any changes in its duties. On 1 April 1942, he was promoted to major general. On 1 April 1944, he was promoted to lieutenant general of artillery. The Department of National Defense consisted of the following divisions:

A. Operations Section Army (OPH (I/H)).
   Operations Section Air Force (OPL (I/L)).
   Operations Section Navy (OPM (I/M)).
B. Quartermaster Section (Qu.).
C. Organization Section (Org.).

When in January 1942, these sections were directly incorporated into the WFSt, under Warlimont, Jodl explained Warlimont's duties as follows:

"Warlimont's principal activity was to assign the entire work of the staff and to issue directives for that work. He supervised everything. He received orders from me concerning his work, discussed it with the general staff officers, examined the drafts, signed, and sent them to me.

"Another special activity was his direct cooperation with Field Marshal Keitel, concerning all the questions which I did not handle, problems which did not concern me. I concentrated almost exclusively on operational problems. Warlimont handled, without my participation, any other administrative questions in the occupied territories, any economic questions, in short, all questions which were not of an operational nature, which had to be sent in the form of orders by Keitel to the other offices.

"As to operational questions, he prepared and submitted them to me. As to others, he cooperated independently with Keitel, who had no staff of his own at headquarters, without my participation, particularly as he was better trained in fact for these

matters (political and economic questions), than for the operational ones."

Warlimont is charged under all four counts of the indictment. Since counts one and four have been eliminated by the action of the Tribunal, the remaining charges under counts two and three may be summarized as charging the criminal connection of the defendant with the following subjects: (1) The Commissar Order; (2) The Commando Order; (3) prohibited labor of prisoners of war; (4) murder and ill-treatment of enemy belligerents and prisoners of war; (5) deportation and enslavement of the civilian population; (6) plunder of public and private property and wanton destruction; (7) murder, ill-treatment and persecution of civilian population, in which he is charged with (*a*) criminal connection with the Barbarossa Order, (*b*) illegal executions of the civilian population, (*c*) discrimination, persecution, and execution of Jews by the Wehrmacht and cooperation with Einsatzgruppen and SD, (*d*) cooperation with the Einsatzgruppen of the Rosenberg Staff, (*e*) reprisals against families of French officers, (*f*) The Night and Fog Decree, and (*g*) other illegal orders. These we will take up in serial order.

1. The Commissar Order—Prior to the Russian campaign, Hitler had announced at a conference of high officers and their military commanders and their chiefs of staff his intention to wage war on Russia, which would be a clash between two ideologies . It would be necessary to fight a war of extermination; it would be necessary to forget the comradeship between soldiers.

Subsequently, on 6 May 1941, General Mueller of the OKH sent a letter to the Chief of the OKW, marked attention Warlimont or his deputy, inclosing a draft of the directives for the treatment of political functionaries. This draft was the first pertaining to the so-called Commissar Order. Warlimont sent this to the defendant Lehmann, who, after a telephone conversation with Warlimont on 8 May, returned an amended draft after having crossed out paragraph III and suggested the following words be substituted as a new paragraph III [*1471–PS, Pros. Ex. 54*] :

> "The courts martial and the drumhead courts martial of the regimental and other commanders must not be charged with the execution of the measures indicated under I and III."

The note of transmittal is signed by Lehmann. On 12 May, Warlimont submitted a memorandum concerning this matter to Jodl, which shows the OKH draft as altered by Lehmann. This reads as follows [*884–PS, Pros. Ex. 55*] :

"I * * *

"1. Political functionaries and commissars are to be removed.

"2. Insofar as they have been captured by troops, *an officer with disciplinary power* shall have a final decision as to whether the prisoner in question is to be removed or not. It is sufficient to determine whether the prisoner is a political functionary.

"3. Political commissars *among troops* shall not *be recognized as PW's* and shall be liquidated [erledigen] at the latest in the transit PW camps. No evacuation to the rear.

"4. Expert directors of economic or technical enterprises shall be seized only if they offer resistance to the German armed forces.

"5. The carrying out of military operations must not be hindered by these measures. *Planned searching and purging actions* are not contemplated.

"6. *In the army rear area,* functionaries and commissars, with the exception of political leaders among the troops, shall be turned over to the Special Commitment Squads (Einsatzkommandos) of the SD.

"II. On the other hand, memorandum No. 3 of Reichsleiter Rosenberg provides that only high and highest functionaries shall be liquidated, since functionaries on the state communal and economic level are indispensable for the administration of the occupied territory."

This memorandum was signed by Warlimont. Warlimont in his affidavit of 14 November 1945 states as follows [*2884–PS, Pros. Ex. 113*]:

"I recognize a document entitled 'Directives Regarding Treatment of Authorized Political Representatives of the Russian State for the Uniform Execution of the Mission Received on 31 March 1941', which is an excerpt from a proposed directive drafted by the OKH and dated 12 May 1941 (*884–PS, Pros. Ex. 55*). That document is a true and accurate statement of the proposals made by the OKH with respect to Soviet political functionaries and military commissars captured with Soviet troops. That document states that political functionaries and commissars among the Soviet prisoners of war are to be eliminated. That document bears my initials [signature] indicating that it had been sent to my division in the OKW and had been seen by me before submitting it to General Jodl, my immediate superior. I added to the document parts II and III before submitting it to General Jodl. In addition, on my own initiative, I sent a copy of the document to the OKW Legal Department for information, expecting that department to examine

the entire question and to render an opinion thereon to the Chief of the OKW."

On 6 June 1941, [*NOKW-484, Pros. Ex. 56*] the so-called Commissar Order was distributed to the OKH, OKL, and the OKM, and certain offices, with the request that it be distributed down only to the arm and air fleet commanders and that the other chiefs and commanders be informed by word of mouth. The cover letter is signed by the defendant. On 8 June, this order was distributed by von Brauchitsch with certain additional clauses, which read as follows [*NOKW-1076, Pros. Ex. 57*]:

"To I number 1—

"Action taken against a political commissar must be based on the fact that the person in question has shown by a special recognizable act or attitude that he opposes or will in future oppose the Wehrmacht.

"To I number 2—

"Political commissars attached to the troops should be segregated and dealt with by order of an officer, inconspicuously and outside the proper battle zone."

The idea for the murder of prisoners of war in the name of ideological warfare did not originate with Warlimont. However, the evidence establishes that he contributed his part to moulding it into its final form. It was distributed "by order" under his signature. There is nothing to indicate that those contributions which he made in any way softened its harshness, and we find the defendant guilty of a participating part in the formulation of this criminal order.

2. The Commando Order—On 7 October 1942, Hitler made a radio speech in which it was stated:

"All terror and sabotage troops of the British and their accomplices, who do not act like soldiers but like bandits, have, in future, to be treated as such by the German troops, and they must be slaughtered ruthlessly in combat wherever they turn up."

On 8 October the defendant Warlimont apparently was instructed by Jodl to put the announcement in the form of a military order. The defendant alleges he was given detailed instructions with regard to the contents of the order. On 8 October, von Tippelskirch, a subordinate of the defendant and Chief of WFSt/Qu (IV), issued a memorandum in which, after referring to the above radio announcement by Hitler, it was stated in paragraph II:

"Supplementary thereto, the Deputy Chief (WFSt) Armed

Forces Operations Staff issues the following order to section Qu, which is to be carried out speedily:

"1. Transposition into order form.

"2. Similar to the Barbarossa Order given previously, this order too, must—in accordance with WR and counterintelligence —be very carefully considered and worded. Distribution only as far as the armies, from there only orally. To be destroyed after reading.

"3. With regard to the contents of the order, the following must be considered:

"In those cases in which temporary arrest of persons takes place in our interest, they must be handed over through the counterintelligence to the SD, after intensive interrogation at which SD, too, must participate.

"Under no circumstances confinement in prisoner of war camps. Proceedings on the lines of this order are later on to be taken against the people from Norway."

This memorandum also refers to a telephone call to Ministerialrat Dr. Huelle, a subordinate of Lehmann (in WR), concerning which the following entries were made:

"Members of terror and sabotage troops of the fighting forces of Great Britain, who can be proved to have disregarded the rules of honorable combat, are to be treated as bandits.

"They must be ruthlessly eliminated in combat or in flight.

"If military interests necessitate their temporary arrest or if they fall into German hands outside combat activities, they must be taken to an officer for immediate interrogation, and afterwards be handed over to the SD.

"Custody in prisoner of war camps is forbidden.

* * * * * * *

"He remarks further that the formulation could only be based on the facts as they appear in the press."

The significant part of this memorandum is contained in paragraph 2 which contains the order of the defendant as to this matter and which suggests certain procedure to be followed and certain provisions that must be *considered* in drafting the order. The defendant's contention that he received detailed instructions as to what the order was to contain is not borne out by the wording of these instructions. In the first place, with regard to the contents of the order, he states that "the following must be *considered*", which is not consistent with the contention that he had detailed instructions from Jodl. Nor is the substance of the order which he issued to section Qu. consistent with such contention.

The defendant has also introduced a rather elaborate and unconvincing defense to the effect that it was his intention to sabotage the order, first by conferences with counterintelligence and the legal section of the OKW, and secondly to sabotage it by having counterintelligence examine the persons captured, on the theory that counterintelligence under Canaris would see to it that they were not executed.

In connection with the first defense, it is to be pointed out that the instruction of the defendant was to the effect that the order must be prepared speedily. As to the second defense, the order of the defendant states that the following must be considered:

> "In those cases in which temporary arrest of persons takes place in our interest, they must be handed over through the counterintelligence to the SD, after intensive interrogation at which SD, too, must participate."

By 8 October 1942, intensive interrogation had certainly come to have a sinister significance, particularly when carried out by the SD, which was to participate in such interrogations, and it is difficult to understand how the action of counterintelligence was to sabotage the order if the SD was to be present. Examination of this document can lead to but one conclusion; that it does not bear out the contention of the defendant of any intention on his part to sabotage the order; and it further bears out the fact that these provisions which were to be considered came from the defendant himself and not from Jodl and certainly not from the radio speech of Hitler, for these matters go beyond the radio speech.

In the light of these instructions of the defendant, it is significant that the order itself as finally issued contains the following:

> "4. If individual members of such commandos, such as agents, saboteurs, etc., fall into the hands of the military forces by some other means, through the police in occupied territories for instance, they are to be handed over immediately to the SD. Any imprisonment under military guard, in PW stockades for instance, etc., is strictly prohibited, even if this is only intended for a short time."

Prior to the completed order, which it is noted was issued on 18 October 1942, only 10 days after the matter was submitted to the defendant, other proceedings were had with reference to the preparation of this order. On 9 October 1942, a teletype was sent to the Office Foreign Counterintelligence, inclosing a draft prepared by WR. This teletype was signed "by order" Warlimont. Certainly no time was lost in either the preparation of this draft by WR or its submission to counterintelligence.

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This teletype also states: "A close examination—if necessary under cooperation of the Reich Leader SS—is requested."

Surely the suggestion of a conference on this matter with the Reich Leader SS cannot be assumed as a sabotage measure. The draft submitted also contains provisions pertaining to the matters discussed heretofore in relation to [Doc. 498–PS, Pros.] Exhibit 124.

On 10 October a teletype was transmitted to the OKW, WFSt, stating the objections of the Office Foreign Counterintelligence to the draft of the order submitted to it; and on 13 October a teletype to the OKW/WFSt signed by the Office Foreign Counterintelligence, making changes in its original teletype, was transmitted.

On 13 October 1942, a telegram, signed Canaris, was transmitted to the Armed Forces Operations Staff [Quartermaster Section] (Qu) Prisoner of War Affairs (K) relative to this matter and stating Canaris' objection to it.

On 14 October 1942, a file note was made by von Tippelskirch with reference to a telephone conversation with the Chief of the WR in which WR requests a phone call to the deputy chief of the [Armed Forces] Operations Staff and suggests a conference pertaining to the matter.

On 15 October 1942, a letter signed by Lehmann was sent to the Armed Forces Operations Staff, WFSt, with reference to a previous telephone conversation and for information to the Office Foreign Counterintelligence, discussing the subject of the treatment of prisoners of war in connection with the proposed Commando Order.

On 14 and 15 October 1942, various drafts pertaining to the proposed Commando Order were transmitted, apparently to Jodl. [Doc. 523–PS, Pros.] Exhibit 123 contains various drafts prepared by WFSt/Qu. dated 14, 15, and 17 October 1942, initialed by Warlimont. Pertaining to these drafts the statement of Jodl in his affidavit is quoted as follows:

> "In reference to Warlimont's participation in the drafting, formulating, amending and execution of Hitler's 'Kommandobefehl' of 18 October 1942, and to the documents 506–PS, 531–PS, 1263–PS, and 1279–PS, submitted to me, I declare the following:
>
> "Every time when the heading is 'Wehrmachtfuehrungsstab, Qu.', it referred to the quartermaster section. In this case, and as a rule—I say, as a rule, not always—they were matters which were handled by Warlimont directly with Field Marshal Keitel. Sometimes I saw one thing or another, but generally

not. He participated in such things much more than I did. I have worked but little with the quartermaster section. In order to keep a clear head, I did not bother with all these things. Therefore, Warlimont has participated to a greater extent, in all things where it says quartermaster section.

"Of course, I saw many things, but most of them I did not see. Of course, I have seen everything pertaining to operational things with which he dealt, except small matters of a subordinate nature, which he signed himself once in a while, such as unimportant individual orders about which he may have called me up before. Important matters were prepared by him, and then submitted to me."

This affidavit, while not particularly enlightening as to the Commando Order, is most enlightening as to the procedure followed in such matters, and definitely does not bear out the statement of Warlimont that he received detailed instructions from Jodl as to what was to be contained in the Commando Order which he was to draft. The exhibit shows, on page 27 [of original document], the initials of Warlimont. This was the final form of the draft which he submitted to Jodl. The remaining drafts in this exhibit were apparently prepared by Jodl himself. It is noted in this draft (paragraph 2) that the words "no matter whether as soldiers and/or in what uniform" are contained.

[Document 1263–PS, Pros.] Exhibit 122 shows certain changes in the defendant's handwriting were made therein. (*Tr. pp. 6988–9.*) These changes are not without significance. On [transcript] page 6993 the defendant claims "the changes in handwriting which I had to read to you, I did not invent myself but they had been ordered to me or at least ordered to this effect." Under the circumstances, the attempt to shift the responsibility for them, presumably to Jodl, is not convincing.

It is argued by the defendant Warlimont in his testimony that since Hitler drew up the final draft of this order himself, that he had no further connection therewith, and his responsibility thereto was terminated. The Tribunal does not agree with this contention. While it appears that Hitler drew up the final order, he had before him the ideas which had been expressed by the defendant in various drafts, and part of these were incorporated in the final order. It is significant that the Hitler order departs in many ways from the original radio announcement and goes much further. The ideas of the defendant are considered by the Tribunal to be a material part of the final product.

The record in this case shows that the Commando Order was carried out, and British, American, and Norwegian soldiers were executed under its provisions.

On 26 November 1942, the defendant Warlimont, in a note for personal report, advised Jodl that in the East the Army General Staff considered the destruction of the written Commando Order issued below army and staffs of other Wehrmacht branches of the same level, important in consideration of the situation in the East. Warlimont, on his own initiative, states in this note, "On other fronts also there exists the danger of this order falling into the hands of the enemy." Pursuant to this note and Jodl's order, a teletype was transmitted by the OKW/WFSt Qu., directing that all copies with the German troops in Africa and Finland were to be destroyed. A similar text was sent to the Navy, the Army and the Luftwaffe.

On 13 December 1942, the Armed Forces Commander in Norway sent a telegram to the OKW/WFSt stating the importance of interrogating captured commandos before shooting them, calling attention to the protest of the Reich Commissar and the Chief of the Security Police because this had not been done in the case of Egersund where commando liquidation had been immediate. The purpose of interrogations is clearly brought out by this document. This teletype was answered by the OKW/WFSt Qu (III), initialed by Warlimont, to the effect that retaining commandos for interrogation conformed to the Fuehrer Order of 19 October 1942.

The evidence in this case establishes that WFSt/Qu tried to assist the foreign office in concealing the nature of the Commando Order, and that the defendant had knowledge of and participated in this effort. Other evidence establishes that the defendant advised the Chief of Prisoner of War Affairs that commandos were not prisoners of war but criminals and therefore their deaths should not be reported to the home country. The defense of this inhuman act on the part of the defendant as found on transcript pages 7014 and 7015 is not sustained by the record. On 26 February 1944, the defendant prepared and sent a telegram to the Commander in Chief Southeast, Ia, with reference to landings of English commandos on the islands of Patmos and Piscopi, which reads as follows [*510–PS, Pros. Ex. 154*]:

> "On the occasion of the reported landings by English commandos on Patmos on 19 February and on Piscopi on 23 February, reference is made once again to subject order."

The defendant claims that he knew this teletype order would not be carried out from conversations which he had with General Foertsch, Chief of Staff of the Southeast Command. The wording of the order is that of the defendant. It provides that with reference to a specific case, "reference is made once again to the

Commando Order". The teletype is addressed to the Commander in Chief, Southeast, Ia. It amounts to a direct order to him to apply the Commando Order. That Foertsch would receive this order we can only infer from his position as chief of staff. That he would ignore it, and his commander in chief would ignore it, we are asked to believe on the basis of some conversations of the defendant with him. As has been pointed out so frequently in this case, the chief of staff was charged with the responsibility of bringing such matters to the attention of his commanding general, and had no command authority over subordinate units of a command. The defendant could not assume that the order would not be carried out.

The defendant states that this order was signed "by order" and therefore it carried the weight of the Supreme Command of the German Wehrmacht. This Tribunal is not impressed with the defense that orders were issued by the OKW and OKH with the intention or understanding that they were not to be carried out, or meant something contrary to their express wording. The history of German arms and the record in this case do not indicate that the German Wehrmacht acted in an advisory capacity to subordinate units and their commanders' orders were issued to be obeyed as written.

In late May or early June 1944, the following teletype was prepared and transmitted to the Commander in Chief, Southeast, Ia, top secret [*NOKW–277, Pros. Ex. 155*]:

> "Since details transmitted are sufficient for presentation to the Turkish Government, according to information received from the Foreign Office, the English radio operator Carpenter, and Greek sailor Lisgaris captured at Alimnia are no longer needed and are released for special treatment according to the Fuehrer order."

This was signed "by order" Warlimont. Pursuant to this teletype the Commander in Chief, Southeast reported these men were released for special treatment. Warlimont testified with reference to another document of 7 November 1943, when asked what he understood by special treatment:

> "* * * at that time, I said to myself 'special treatment' means that these soldiers are not treated as prisoners of war. What further happened to them I didn't concern myself with."

Kipp, a subordinate of Warlimont, in his affidavit, states the meaning of the term as follows:

"Regarding the conception *special treatment* by the SD I state the following: We never gave it any thought in the WFSt as to what ways and means were used in carrying out this *special treatment.* It was, however, the general feeling that *'special treatment'* meant that the persons involved were somehow eliminated by the SD, that is, were liquidated."

This Tribunal finds that in May 1944, the defendant knew that the men whom he ordered released to the SD for special treatment were to be executed.

On 15 June 1944, the Chief of Staff of the Commander, Southeast, reported that pursuant to telephone instructions of Warlimont, the German Military Mission had arranged with the Bulgarian Army to treat enemy agents, saboteurs, etc., in accordance with the Commando Order. On 23 June 1944, in reply to an inquiry of the Commander in Chief West requesting instructions on the application of the Commando Order in the invasion of the West, Warlimont stated in a confidential memorandum the position of the WFSt as follows [*531–PS, Pros. Ex. 159*]:

"1. The Commando Order remains basically in effect even after the enemy landing in the West.

"2. Number 5 of the order is to be clarified to the effect, that the order is not valid for *those* enemy soldiers in uniform, who are captured in open combat in the immediate combat area of the beachhead by our troops committed there, or who surrender. Our troops committed in the immediate combat area means the divisions fighting on the front line as well as reserves up to and including corps headquarters.

"3. Furthermore, in doubtful cases enemy personnel who have fallen into our hands alive are to be turned over to the SD, upon whom it is incumbent to determine whether the Commando Order is to be applied or not.

"4. Supreme Command West is to see to it that all units committed in its zone are orally acquainted in a suitable manner with the order concerning the treatment of members of commando undertakings of 18 October 1942 along with the above explanation."

This was signed Warlimont and not "by order".

On 25 June 1944, an interoffice communication of Deputy Chief, WFSt to the Quartiermeister Section stated:

"Subject: Treatment of members of commando detachments.

"Chief WFSt desires that the following order be given without any formalities, but clearly and simply:

"1. All sabotage, etc., troops, encountered outside the actual combat area of Normandy will be eliminated, in special cases they will be delivered to the SD.

"2. Concise instructions will be given accordingly to all troops stationed outside the combat area of Normandy.

"3. The Commander in Chief West, starting immediately, will make daily reports on the number of saboteurs liquidated in this way. This number shall be given daily in the Wehrmacht report, in order to have a deterrent effect as it was already done in the same manner against previous commando operations. This applies in particular to the operations of the military commander."

This was signed by the defendant. This ruling was transmitted in substance by teletype, signed by Keitel, initialed by Warlimont, to the Commander in Chief West.

On 3 July 1944, he initialed a teletype "by order" to the effect that the order was not to be distributed further down than divisional staffs and comparable staffs, and that copies below this level were to be recalled and destroyed.

On 22 June, Warlimont initialed a letter to the WR stating that the Fuehrer order is to be applied, even if the enemy employs only one person for a task.

On 22 July, the opinion of various offices was obtained as to what should be done with regard to military missions captured with partisan groups. [Doc. 1279-PS, Pros.] Exhibit 165 contains opinions of various offices as to the action they believed should be taken. The document, in paragraph three, gives the opinion and proposal of the Armed Forces Operations Staff, which reads as follows:

"According to the orders issued to date even for example the British captured in the Roesselsprung operation must be treated as prisoners of war.

* * * * * * *

"The Commando Order has never yet been applied to such missions, its extended application to cover them has not yet been ordered. If the missions are to be treated otherwise than in accordance with the orders to date, it must first be decided whether a foreign mission acting with the partisan groups in the southeast is to be called a commando operation and therefore treated as such. Such a decision seems to be indicated even if it does not correspond completely to the wording of the Commando Order or to the previous definition of a commando operation (as an especially underhand and still unusual form

of warfare which must be combated with the appropriate countermeasures). The principle must be adopted from the start that all members of partisan groups, even in the Southeast, are fundamentally guerrillas. Indeed, they are treated as prisoners of war, for reasons of expediency, in order to obtain the largest possible number of deserters and workers. There is no reason for this with regard to the members of foreign missions who are not numerous. There is therefore no necessity to treat them in every case, in the same way as the members of partisan groups themselves. Basically, it would be far more appropriate to consider Anglo-American as well as Soviet Russian military missions as commando operations and to treat their members accordingly.

"The appended order is therefore proposed."

This part of the document, including the appended order as proposed, is initialed by Warlimont. The minutes of the meeting also inclosed in this document show the handwritten note of the defendant Warlimont—

"Why still all these discussions *after* decisions have been taken according to paragraph 1?" (Initialed, Warlimont)

The final draft of the order, signed by Keitel, shows that the proposal initialed by Warlimont to the effect that military missions should be treated as commandos, became a part of the final order.

On 6 June 1944, Ambassador Neubacher sent a teletype message to the foreign office stating [*NOKW–3240, Pros. Ex. 1635*]:

"Wehrmacht Operations Staff, General Warlimont, gave the order to the Chief of Staff of Army Group F by telephone to hand over the captured war correspondents Talbot, Slapo, and Fowler to the SD, after they had been interrogated by military authorities and the foreign office, in accordance with the Fuehrer Order of 18 October 1942, on the treatment of prisoners from British commando operations."

From this evidence it is apparent that not only did the defendant Warlimont contribute to the formulation of this order but that he participated in its enforcement.

3. Prohibited labor of prisoners of war—While the record in this case establishes many orders prepared by the sections of the WFSt under Warlimont's supervision pertaining to the use of prisoners of war, we are unable to find beyond a reasonable doubt any criminal connection of the defendant as to the illegal use of prisoners of war.

4. Murder and ill-treatment of enemy belligerents and prisoners of war—In the program adopted by the leaders of the Third Reich wherein they undertook to inspire the German population to murder Allied fliers by lynch law or "mob justice", they were indeed sinking deeper into the morass of depravity. For in this they undertook to incite the German people to set aside the safeguards of law built up through centuries and to resort to mob violence. That such a plan was fostered and encouraged by the Third Reich is established by the record. It has been commented upon in the judgment of the IMT and was passed upon by Tribunal III in the Justice Case.

This plan constituting a crime against humanity, the question arises as to the connection of the defendant Warlimont with this criminal undertaking. As shown by the record, this plan as to so-called Allied terror fliers was divided into two parts. The first of these had to do with fliers who had been captured and were in the air force prison at Oberursel. Those who it was decided had taken part in alleged illegal activities were to be turned over to the SD for liquidation, contrary to the provisions of the Geneva Convention. In this regard the prosecution concedes that the proof does not establish that any orders pertaining to this were ever issued or carried out. The animus of the defendant in this matter, however, is established by documents which show his consent and approval of this proposal.

The second part of this illegal program provided that, through the Party and the agencies of propaganda under Goebbels, the German people were called upon to execute Allied fliers who fell into their hands and were assured that they would not be called to account for their actions in such cases. This was done by orders issued to the police, by information disseminated by the Party, by suspension of prosecutions against the populace, and also by preventing interference of the army in such cases. The record shows the defendant Warlimont was well informed on the entire matter. He attended numerous conferences and personally discussed the matter with Kaltenbrunner, one of the active participants in the whole procedure, who informed him that lynch law was to be the rule. There was much correspondence, in which he took a part, with the foreign office and with Goering, who was reluctant to consent to participation in this scheme for fear of reprisals. The authors of the plan desired on the one hand to intimidate the enemy and at the same time to cloak its operations in such a manner that it would not result in reprisals. The problem was to outline for publication certain alleged acts of Allied fliers which were contrary to international law and therefore deprived them of the status of prisoners of war. This was not easy to do.

At the conference of 6 June 1944, attended by the defendant, it is shown that he mentioned that [*735–PS, Pros. Ex. 346*]:

"* * * apart from lynch law, a procedure must be worked out for segregating those enemy aviators who are suspected of criminal action of this kind, until they are received into the reception camp for aviators at Oberursel; if the suspicion was confirmed, they would be handed over to the SD for special treatment.

"For this purpose the WFSt would cooperate with the Supreme Command of the Air Force to get out the necessary regulations for the use of the head of the camp at Oberursel.

"Obergruppenfuehrer Kaltenbrunner expressed his complete agreement with this view and that the SD take charge of those aviators segregated."

On 14 June a draft was prepared by the quartermaster section of the OKW, and initialed by Warlimont, which contained a statement [*734–PS, Pros. Ex. 348*]:

"In connection with the press notices at home and abroad about the treatment of terror fliers who fall into the hands of the population, an unequivocal determination of the concept of those facts which characterize a criminal action in this sense is called for."

Regarding this statement, Warlimont made the comment on the draft, "This is not quite the point"; and he further amended the draft by stating that the definition of criminal acts is necessary "only for publication". The matter was taken up with the Foreign Office by Keitel in a letter initialed by Warlimont, requesting approval of the Foreign Office to the proposed action. On the same date a similar letter was sent to Colonel von Brauchitsch, Goering's adjutant. This draft was corrected by Warlimont and contains his initials. This letter stated as follows:

"I. On the basis of preliminary discussions and pursuant to an agreement with the Reich Minister for Foreign Affairs and the Chief of the Security Police and SD the following are to be regarded as acts of terror when a case of lynch law is made public and/or to justify the handing over of prisoners of war among enemy fliers from the receiving (PW) camp for fliers at Oberursel to the SD for special treatment."

On 23 June 1944, [*NOKW–009,/Pros. Ex. 347*] a letter prepared by the WFS/Qu. [Verw. 1] addressed to the Commander in Chief of the Air Force, for the attention of Colonel von Brauchitsch, undertook to speed Goering's decision with regard to this matter.

On 20 June, Ambassador Ritter answered Keitel's letter of 15 June 1944, enclosing a draft by the Foreign Office which states as follows [*728-PS, Pros. Ex. 1638*]:

"In spite of the obvious objections, founded on international law and foreign politics, the Foreign Office is basically in agreement with the proposed measures.

"In the examination of the individual cases a distinction must be made between the cases of lynching and the cases of special treatment by the Security Service (SD).

"I. In the cases *of lynch law* the sharp definition of the criminal acts, as given in numbers 1 to 4 of the letter of 15 June, is not very important. First of all no German official agency is directly responsible; death has already occurred before a German agency is concerned with the case. Furthermore the accompanying circumstances will, as a rule, be such that it will not be difficult to present the case in a most suitable manner when it is published. In the cases of lynch law it will therefore be mainly a question *of correctly dealing with the individual case when it is published.*"

Concerning the last statements of this above-quoted draft, a notation of Warlimont's appears on the margin as follows: "That is the whole point of our letter" (initialed Warlimont).

In paragraph II concerning airmen captured by the armed forces, Ritter shows that in his opinion these men acquired the legal status of prisoners of war. After this statement Warlimont placed a question mark and noted, "Precisely, this will be prevented by the proposed segregation". Ritter then went on to state:

"These rules are so precise that any attempt to disguise an individual case of violation by a clever wording of publication would be hopeless."

To this statement Warlimont wrote on the margin:

"No—through the segregation and immediately following special treatment."

Goering finally agreed in general to the procedure recommended and Warlimont wrote, "We finally have to *act.* What else is required for that?"

During all these discussions the defendant is shown to have had an active part and to have been concerned not only with the legality of the question, but with the possibility of handling the entire matter by publication in such a way as to avoid reprisals.

In a file note dated 2 October 1944 it is stated:

"The Herr Reichsmarschall agrees that the order OKW/WFS Qu (Administration 1) No. 05119/44 secret of 9 July 1944, concerning the conduct of soldiers, in case of 'mob justice' being attempted by the population on downed terror fliers, is issued within the Luftwaffe as an order of the Supreme Command of the Armed Forces, but *not* as an order of the High Command of the Luftwaffe." [*NOKW–548, Pros. Ex. 355*]

It is shown that the Air Force Administrative Command VI Tactical Group Ia issued on 11 December 1944 the following order, pertinent parts of which are quoted [*NOKW–3060, Pros. Ex. 1462*]:

"The Chief OKW has issued the following order (OKW/WFS/Qu 'Verw. 1' No. 01 119/44 secr. dated 9 July 1944) concerning the behavior of the soldiers in cases of self-help action taken by the civilian population against terror fliers shot down:

"Recently, it has happened that soldiers have actively protected Anglo-American terror fliers from the civilian population, thus causing justified resentment. You will take immediate steps in order to ensure by *oral instruction* of all subordinate units and command authorities that the soldiers do not counteract the civilian population in *such* cases by claiming the handing over to them of the enemy fliers as prisoners of war and by protecting, and thus ostensibly siding with, the enemy terror fliers.

"No fellow German can understand such attitude from the part of our armed forces. The inhabitants of the occupied territories, too, must not be restrained from either resorting to self-help out of their justified indignation against the Anglo-American terror fliers, or from giving other utterances to their justified resentment against the prisoners belonging to the enemy powers. In addition, I refer to the article by Reich Minister Dr. Goebbels published in the 'Voelkischer Beobachter', Berlin edition dated 27 May 1944, No. 148, and entitled: 'A comment on the enemy air terror.'"

The significant part of this order is that it was based on an order of the OKW WFS/Q (Verw. 1), dated 9 July, at the time when this matter was being discussed as outlined above. It is contended that from the date of this order it could not have been based upon any order actually issued by the WFSt but must have been based upon a personal order of Hitler as Commander in Chief of the Replacement Army. With this contention, this Tribunal cannot agree. Regardless of the date that this order was finally issued by the Luftgau Command, the date of the order referred to derives from the quartermaster section under Warlimont, and

the date was at the time when he was concerned with this entire matter.

We therefore find the defendant Warlimont connected with the illegal plan of the leaders of the Third Reich fostering the lynching of Allied flyers and that he contributed a significant part to this criminal program. The record shows many instances where the German population, pursuant to this plan, murdered Allied fliers who fell into their hands.

In commenting upon the defendant, Jodl stated:

"Developed better and better from year to year. In addition to his ever eminent mental qualities his far sightedness and his comprehensive knowledge and experiences, his National Socialist attitude also has become strongly marked. As my deputy and chief of the whole staff of irreplaceable value to me. Excellent. By the Fuehrer's order compelled to stay in present position."

5. Deportation and enslavement of the civilian population— The record in this case, from various communications, reports and conferences, establishes that the defendant Warlimont was well aware of the criminal program of the Third Reich as to the deportation and use of civilians from the occupied territories for slave labor in Germany. As to his connection therewith, [Doc. 3819–PS, Pros.] Exhibit 536 shows that Warlimont attended a conference in the Chancellery of the Third Reich, called for the purpose of taking intensive measures for the recruitment of foreign laborers. The minutes of this conference, in pertinent part, read as follows:

"*The representative of the head of the OKW*, General Warlimont, referred to a recently issued Fuehrer order, according to which all German forces had to place themselves in the service of the work of acquiring manpower. Wherever the Wehrmacht was and was not employed exclusively in pressing military duties (as for example, in the construction of the coastal defenses), it would be available but it could not actually be *assigned* for the purposes of the GBA [Plenipotentiary General for Labor Allocation]. General Warlimont made the following practical suggestions:

"*a*. The troops employed in fighting partisans are to take over in addition the task of acquiring manpower in the partisan areas. Everyone, who cannot fully prove the purpose of his stay in these areas, is to be seized forcibly.

"*b*. When large cities, due to the difficulty of providing food, are wholly or partly evacuated the population suitable for labor commitment is to be put to work with the assistance of the Wehrmacht.

"*c.* The seizing of labor recruits among the refugees from the areas near the front should be handled especially intensively with the assistance of the Wehrmacht."

The Tribunal is of the opinion that these suggestions of the defendant Warlimont made at these conferences are themselves sufficient to connect him criminally with the illegal program of the Reich for recruiting slave labor. Further, we find from the evidence as shown in [Doc. NOKW–564, Pros.] Exhibit 1631 of 1 August 1944 and [Doc. NOKW–552, Pros.] Exhibit 1632 of 10 August 1944, shortly after the conference of 12 June 1944, that the methods which he suggested were put into operation.

The Tribunal finds the defendant guilty of criminal participation in and connection with the deportation and enslavement of civilians.

6. Plunder of public and private property and wanton destruction—The record in this case shows that the defendant Warlimont had knowledge of this matter, but we are unable to find from the evidence in this case beyond a reasonable doubt that he was connected therewith.

7. Murder, ill-treatment, and persecution of civilian population.

a. Criminal connection with the Barbarossa Order—The evidence in this case, including but not limited to Exhibits 590 and 593, establishes the criminal participation of the defendant in the formulation of the Barbarossa Jurisdiction Order and we so find. We have discussed this order in other parts of this judgment, and in particular as to the defendant Lehmann, and shall not go into it further here.

b. Illegal executions of the civilian population—The defendant is also charged with participation in the formulation of the so-called Hostage Order. This order is in fact not a hostage order in any meaning of the term but, regardless of the designation that may be given to it, it is a criminal and illegal order and we so find. It is claimed by the defendant that page two of this order was taken out and rewritten without his knowledge while page one and three remained unchanged. It is conceded by the defendant, however, that the type is the same on the three pages, and that the second page might have been written in the Regional Defense Division of the OKW. Careful examination of this document and the testimony of the defendant in regard thereto brings out further significant facts. Page two begins with paragraph two. It ends with the second paragraph under the heading "c". It is obvious that page three refers to the last paragraph on the preceding page. From the statement "clever propaganda of this kind, etc.," it is clear that the first paragraph on page three fol-

lows the last paragraph on page two. It is further evident that in the original unchanged document there must have been a paragraph three with subheadings a, b, and c. It is very unlikely that either Hitler or Keitel, in changing a draft of the defendants with which they were not satisfied, would have followed the paragraphing of the defendant in so doing. Apparently one of these paragraphs had to do with the number of people who were to be shot in atonement for each German soldier. In respect to that number, the defendant no longer remembers whether or not the original draft, prepared by the defendant, contained the figures 5 to 10 as the ratio established, and he states to the best of his recollection, no figures were contained in the original draft. It is apparent, however, from the evidence that some ratio was to be established. Keitel's testimony before the IMT regarding this matter merely shows that the ratio submitted by him to Hitler was changed from 10 and 5 to 100 and 50 by Hitler.

Paragraph 3(a) provides—

> "It should be inferred, in every case of resistance to the German occupying forces, no matter what the individual circumstances, that it is of Communist origin."

This provision in itself was illegal. Defendant's recollection on the whole matter appears to be somewhat vague but he recalls that in the headquarters it was general talk that Hitler added the zeros to the 5 and 10 figures. This we can readily believe. The first and third pages of this order, which the defendant admits having drawn, do not support the contention that the second page claimed to have been submitted by him made his draft legal. We are convinced that the original draft as submitted to Keitel was illegal regardless of the figures inserted or whether the ratio was left in blank to be filled in by his superiors.

Warlimont's defense that he immediately took steps to see that it would not be carried out throughout the wide domain of the Wehrmacht to which it was distributed is not convincing. His testimony that his was a negligible position is not consistent with such a far-reaching capacity to nullify an order of the OKW.

c. Discrimination, persecution, and execution of Jews by the Wehrmacht, and cooperation with the Einsatzgruppen and SD— From the record in this case showing the defendant's official position, his associates, both superior and inferior, from his many activities to which he has testified, and from the documents before us, this Tribunal is thoroughly convinced that the defendant knew of the extermination program which was being carried out by his superiors and associates. Just when he acquired this knowledge it would be impossible to determine, and we are unable

to find beyond a reasonable doubt from the evidence before us that he knowingly was connected with or participated in its execution.

d. Cooperation with the Einsatzgruppen of the Rosenberg staff—From his position as Jodl's deputy as liaison agent with the Rosenberg organization, we also are convinced of his knowledge of the illegal activities carried out by this organization. But we are, from the evidence before us, unable to find beyond a reasonable doubt that he was connected with its illegal activities.

e. Reprisals against families of French officers—The record in this case establishes the discreditable and inhumane attitude of the defendant toward innocent members of families of French officers, but we are unable to find from the evidence where he participated in any international criminal act in this matter.

f. The Night and Fog Decree—The question arises as to the connection which the defendant Warlimont had with this decree, but we are unable to find from the evidence beyond a reasonable doubt any criminal connection therewith.

g. Other illegal orders—On 1 July 1944 Warlimont sent the following teletype to the Chief of the WR [*NOKW-2576, Pros. Ex. 823*]:

"Subject: Combating of enemy terrorists in the occupied territories

"On account of events in Copenhagen, the Fuehrer has decreed that court martial proceedings against civilians in the occupied territories must be discontinued with immediate effect. WR is requested to submit suggestions for the draft of an order concerning the treatment of enemy terrorists and saboteurs among the civilian population in the occupied territories by 2 July, 2000 hours.

"*Policies*

"Terror can be countered only by terror, but court martial sentences only create martyrs and national heroes.

"If German units or individual soldiers are attacked in any manner, the commander of the unit and/or the individual soldier are bound to take countermeasures independently and, in particular, to exterminate terrorists. Terrorists or saboteurs who are arrested later, must be turned over to the SD."

As a final paragraph, which is hardly adapted to relegate the Commando Order to the oblivion which he claims to have so earnestly sought, the defendant states:

"The Fuehrer Decree on the treatment of enemy commandos, dated 18 October 1942 (The Fuehrer No. 003830/42 top secret (mil.) OKW/WFSt) will remain in force as it does not apply to the civil population."

The record in the case shows that the defendant, during the course of the war, was located at Hitler's headquarters and in constant contact with Keitel and Jodl, and attended almost daily conferences with Hitler.

We have found the defendant guilty of participating in many criminal orders which permeated the conduct of the war. He may not have furnished the basic ideas, but he contributed his part and was one of the most important figures of the group which formed them into the final product which, when distributed through the efficient agencies of the Wehrmacht and police, brought suffering and death to countless honorable soldiers and unfortunate civilians.

The defendant Warlimont is guilty under counts two and three of the indictment.

OTTO WOEHLER

Otto Woehler was born on 12 July 1894. He participated in the First World War as troop leader and was wounded three times. Following the war he became an officer in the Reichswehr, or One Hundred Thousand Man Army, and served in various capacities until 1 April 1938, when he was transferred to the staff of the Army Group 5 in Vienna under General List. This became the 14th Army and he continued to serve with this army as Ia throughout the Polish campaign. After this he was transferred and became Chief of the General Staff of XVII Corps. He participated as such in the Western Campaign.

In the fall of 1940 he was transferred and became Chief of Staff of the 11th Army which was newly activated. On 1 May 1942, he was transferred and appointed Chief of Staff of the Army Group Center where he remained for 10 months. In March of 1943, he was given command of I Army Corps as acting commanding general and later, on 1 June 1943, was designated as the commanding general of this corps. On 1 July 1943, he took over command of XXVI Corps which he held until approximately 14 August 1943. At approximately this time he was transferred to Army Group South and became Commander of the Army [Armee-Abteilung] Kempf which on 15 August, when he took over, was known at times as the Army Group [Armee-Gruppe] Woehler and ultimately became the 8th Army. He was Commander in Chief of the 8th Army until December 1944. On 22 December he was designated as Commander in Chief of Army Group South which he held until 6 April 1945.

He did not belong to the Nazi Party or any of its formations.

Aside from the charge of crimes against peace, heretofore dis-

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posed of in this opinion, we think that charges under counts two and three of the indictment may be disposed of under the following headings: (1) The Commissar Order; (2) The Commando Order; (3) murder and ill-treatment of prisoners of war; (4) prohibited labor of prisoners of war; (5) The Barbarossa Jurisdiction Order; (6) hostages and reprisals; (7) plunder and wanton destruction; (8) deportation and enslavement of civilians; (9) murder, ill-treatment, and persecution of civilians.

1. The Commissar Order—The proof in this case shows the defendant, as chief of staff of the 11th Army, knew of the receipt of this order. It does not, however, establish any participation in its transmittal to subordinate units. It also shows that he knew of the enforcement of this order in the 11th Army but the responsibility for carrying out this order within the 11th Army must rest with the commander in chief and not with the chief of staff. Criminal acts or neglect of a commander in chief are not in themselves to be so charged against a chief of staff. He has no command authority over subordinate units nor is he a bearer of executive power. The chief of staff must be personally connected by evidence with such criminal offenses of his commander in chief before he can be held criminally responsible.

2. The Commando Order—The proof in this case does not establish that it was distributed by the defendant or that it was executed with his knowledge and consent.

3. Murder and ill-treatment of prisoners of war—As Chief of Staff of the 11th Army, he is charged with responsibility for an order issued by the OQu for "AOK". While part of this order is considered criminal by the Tribunal, the fact that this order was issued by a subordinate of the defendant in the staff organization over whom he had no command authority leads the Tribunal to conclude that the defendant was not connected therewith. The OQu was a subordinate of the chief of staff but he was also a subordinate of the commander in chief and to hold the chief of staff responsible for this order, we must necessarily make the assumption that it was not issued by the commander in chief without his intervention which the document in itself does not establish. The fact that this order was actually carried out by subordinate units as shown by evidence in the record is the responsibility, as stated above, of the commander in chief and not of the chief of staff.

As Commanding General of the I Army Corps, the record establishes that he reported to the AOK 18 the illegal shooting of two captured Red Army soldiers. The defendant made these reports as commanding general and apparently did nothing about them

but his acquiescence and approval are not considered established by the evidence.

4. Prohibited labor of prisoners of war—Documents in evidence show that while Commander in Chief of the 8th Army, units subordinate to Woehler used prisoners of war in the combat area and that such prisoners were allocated to regiments for the construction of field positions. It is the opinion of this Tribunal as heretofore stated, that the use of prisoners of war by regiments and forward units of command in a combat area constituted a use in a position of danger. We are further of the opinion from the evidence that the defendant knew and acquiesced therein. The fact that similar use was made of German prisoners by the enemy is only a factor in mitigation and not in defense.

5. The Barbarossa Jurisdiction Order—It is shown that this order was received by the 11th Army but no criminal connection with its distribution has been established by the evidence as to this defendant. Criminal acts thereof are to be charged against the commander in chief, not the chief of staff as heretofore stated. However, on 5 September 1941, an order was issued by the 11th Army, signed for the AOK by Woehler, as chief of staff. From the nature of this order, it would appear that it was not of that basic nature which necessarily would be submitted to a commander in chief. It is such an order as a chief of staff would normally issue of his own volition. Whether or not that be so, the wording of this order would certainly be a matter that would come within the jurisdiction of a chief of staff of an army. This order provides in paragraph 5 as follows:

> "Guarding the front lines alone is not sufficient. Corps as well as the Commander of the Army Rear Area has to send patrols constantly to the main rear lines of communication for 'raids', which arrest all suspicious civilians and check whether they reside in the area. Civilians who are sufficiently suspected of espionage, sabotage, or of partisan activities are to be shot by the GFP after interrogation. Strangers in the area who are unable to establish the purpose of their stay credibly are, if possible, to be turned over to the SD detachments, otherwise to prisoner camps to be sent on to the SD detachments. Young boys and girls, which are preferentially employed by the enemy, are not to be excepted."

Under this paragraph it is provided that civilians who are "sufficiently suspected" of certain offenses are to be shot, including boys and girls. The defendant's explanation that this order does not mean what it says is not convincing. At its best it could only be construed as ambiguous and if it meant something other than

what it states, it was certainly the province of the chief of staff to see that that error was corrected. The Tribunal is of the opinion that it meant precisely what it stated and that the defendant was criminally connected therewith and is responsible therefor.

We are not impressed with the contention that suspects were interrogated before being shot. The record in this case shows that the purpose of such interrogations was primarily to obtain information of value to the German Army and not in the interest of the person interrogated under such orders.

The Kodyma incident had been suggested as establishing criminal responsibility upon the defendant. The record shows that the report on this matter came to Woehler's knowledge and was initiated by him and he testified that he called the matter to the attention of his commander in chief. If he did so, this was all that could be expected of him. The responsibility in this case rests with the commander in chief and was not the responsibility resting upon the chief of staff.

6. Hostages and reprisals—As regards this matter the charges against the defendant are based upon transactions which took place within the area of the 11th Army while he was chief of staff.

No personal action which he took or neglected to take within the scope of his authority is shown by the evidence and for the reasons above stated, the opinion of the Tribunal is that the proof fails to establish his criminal connection.

7. Plunder—The Tribunal is of the opinion that the evidence in this case fails to establish under this heading any connection of the defendant with criminal responsibility for plunder not justified by military necessity.

8. Deportation and enslavement of civilians—The evidence in this case shows that as Chief of Staff of the 11th Army, orders pertaining to the use of civilians were issued for the 11th Army which were signed by Woehler. These orders are not basic orders and would normally be issued by a chief of staff without even consulting the commander in chief and certainly without such orders being drawn by the commander in chief. These orders show the illegal use of civilians with which the defendant is criminally connected.

Further, the evidence in this case establishes the practice of compulsory illegal use of civilians under Woehler as Commander in Chief of the 8th Army by units subordinate to him. The evidence further shows that on 25 June 1944, an order was issued for the headquarters of the Army Group Woehler "by order," and signed by his quartermaster. This order provided for the

compulsory recruitment of civilians and others to the Reich for slave labor in the mines.

9. Murder, ill-treatment, and persecution of the civilian population—The evidence in this case establishes the elimination of so-called undesirables, mostly Jews, within the area of the 11th Army while Woehler was chief of staff. This murder program was carried out under the direction of Ohlendorf who appeared as a witness for the defense in this case. The approximate number of murders committed within this area was in the neighborhood of 90,000 including men, women, and children. The evidence establishes that this murder program was known in part at least to staff officers under Woehler. The defendant denies knowledge of this program.

The evidence establishes that he held various conferences with Ohlendorf and Ohlendorf testified that the matter was not specifically discussed because he assumed the defendant was aware of the program. This program was carried out over an extensive period of time and in many places within the occupational area of the 11th Army. It was executed by Einsatzgruppen and Sonderkommandos of the SIPO and SD attached to that army, sheltered, fed, and placed by that army. Certainly the slaughter of 90,000 people by these police units under these circumstances could not have escaped the knowledge of the chief of staff of that army unless he was grossly incompetent. The defendant did not indicate incompetence while on the stand and the comments of his various commanders as shown by his service record refute any such appraisal. But we need indulge in no general presumptions. The record establishes knowledge by the defendant of the extermination activities of these Einsatzgruppe units.

Ohlendorf whom the defendant called as his own witness, testified that staff officers of the 11th Army, over whom the defendant exercised supervision, knew of his activities. He also testified that he received cooperation from various units of the army, such as the furnishing of trucks to take his victims to the places of execution, and that at times the army called on him for assistance in these matters. Surely the knowledge of these staff officers was not kept from the chief of staff. Further, the documentary evidence in this case establishes the defendant's knowledge. Among those we cite:

[NOKW–3437, Pros.] Exhibit 1601—initialed by Woehler.

[NOKW–641, Pros.] Exhibit 871—bearing his signature.

[NOKW–3238, Pros.] Exhibit 1606—initialed by Woehler.

[NOKW–584, Pros.] Exhibit 781—pertaining to the execution of some 1,184 people in retaliation for activities in Yevpatoriya.

[NOKW–1687, Pros.] Exhibit 780—which refers to the same instance and states that 1,300 were executed.

[NOKW–1573, Pros.] Exhibit 883—A report of the Ortskommandantur, 14 November 1941, to the rear area of the 11th Army, which states that 10,000 Jews remaining were being executed by the SD.

[NOKW–1632, Pros.] Exhibit 872—Report of Ortskommandantur at Melitopol, 13 October 1941, wherein it is shown that 2,000 Jews were executed by the SD; an instance which occurred within 15 to 20 miles of the headquarters of the 11th Army.

[NOKW–1702, Pros.] Exhibit 861—A communication from the Ortskommandantur of Anayev of 3 September 1941, which reports the shooting of 300 Jews and Jewesses on 18 August 1941, to the commander of the rear area of the 11th Army.

[NOKW–3236, Pros.] Exhibit 1607—A report to the 11th Army by Ohlendorf, initialed by Woehler.

[NOKW–3234, Pros.] Exhibit 1609—A report by Ohlendorf, initialed by Woehler, showing the imprisonment of 227 Jewish suspects and showing the execution of Jews as hostages and the shooting of political functionaries of the Communist Party by the Einsatzgruppe unit.

[NOKW–3237, Pros.] Exhibit 1595—A report of 4 August 1941, showing that 97 Jews were executed in Kodyma by units of the Einsatzgruppen and 24 soldiers subordinate to Salmuth, which instance Woehler states he reported to his commander in chief.

[NOKW–3233, Pros.] Exhibit 1594—A report of 4 August 1944, by Ohlendorf to the effect that 68 Jews had been shot for Communist activities, and showing the establishment of a ghetto in Kishinev, and further stating that on 31 July, Jewish hostages were shot.

The defendant disavows knowledge of events occurring in the rear area of the 11th Army on the basis that the Oberquartiermeister or Qu. 2 did not report to him such matters in connection with the army rear area. Field Manual 90 for 1 June 1938, edition 1940, states "The Oberquartiermeister is subordinate to the Chief of the General Staff of the Army". As Chief of the General Staff of the 11th Army, the defendant was chief of staff for the whole army area including the army rear area. It was his duty as Chief of Staff of the 11th Army to consult with subordinates on his staff as to matters occurring therein and to advise his com-

manding general concerning such matters. We cannot believe that in neglect of that duty the defendant's knowledge of matters concerning the 11th Army stopped at the boundary of the rear area.

On this evidence the Tribunal can only find that the defendant Woehler had knowledge of the extermination activities of the Einsatzgruppen when he was Chief of Staff of the 11th Army.

He was not, however, the commanding officer, and his criminal responsibility must be determined from personal acts in which he participated or with which he is shown to have been connected. This resolves itself into the question as to whether as chief of staff he assigned Einsatzgruppen to various localities wherein they operated and carried on their illegal activities. That he did so is shown by both the testimony of Ohlendorf and by documents in evidence. [Doc. NOKW–3453 Pros.] Exhibit 1605 shows that the defendant on 3 July 1941 issued an order, signed by him, assigning a Sonderkommando to Stanca. This order states that the Sonderkommando performs its duties at the order of the chief of the Security Police and on its own responsibility.

On 14 July a similar order was issued assigning Einsatzkommando 11a to LIV Army Corps "in order to carry out its assignment in Kishinev". This order states:

> "Einsatzgruppe D of the Security Police, except for the Sonderkommando in action, will continue to be subordinated in Piatra Neamt to AOK 11."

It states further:

> "In accordance with information received from Army Group South, it is not intended to employ Einsatzgruppe D, in the army area."

On 22 July he signed an order stating that the Einsatzgruppe D "except Sonderkommando 11a and 10a is to be moved from Piatra Neamt to Iasi," and providing that "Sonderkommando 11b will be employed in the area of the 2d Rumanian Army with the task to carry out assignments of a political nature".

On 7 August he signed a similar order to the Einsatzgruppe D, stating "The Einsatzkommandos which are employed have to look after security in the combat area behind the combat troops from the counterintelligence point of view in addition to the tasks given them so far".

This same exhibit shows that on 20 September the defendant initialed a communication addressed to the 11th Army which was transmitted under date of 29 September to the counterintelligence officer to take action, concerning measures taken by the Ein-

satzgruppen of the 22d Infantry Division and also shows on 6 October 1941 from Army Headquarters with the subject "Measures taken by the Einsatzkommando with the 22d Infantry Division" and addressed to the Einsatzgruppe D, the following directive:

> "The Einsatzkommando of the Security Police with the 22d Infantry Division is in the combat area of the division. It is expected that all measures in the town of Genitchek, especially public executions, setting up and arming the Ukrainian Home Guard, etc., will only be taken after previous agreement with the Ic of the division."

This is signed by the AOK, Chief of Staff, initialed by Riesen, R-i-e-s-e-n, and evidently bearing another initial "R", a major of the general staff corps. This directive to the Einsatzgruppen is also shown in [Doc. NOKW-641, Pros.] Exhibit 871.

Certainly these orders as to the location of Einsatzgruppe units were not such basic orders as can be charged to the commander in chief, but would clearly be within the sphere of authority of a chief of staff.

For the reasons herein stated, and on the whole record, we find the defendant guilty under counts two and three of the indictment.

RUDOLF LEHMANN

Rudolf Lehmann was born in 1890 at Poznan. After preliminary education, he studied law and received his doctor's degree in 1920 at Marburg. His practice, however, was interrupted by the First World War in which he participated as an officer in the reserve. From then on he followed the career of jurist in various capacities.

In 1925, he became an assistant in the Reich Ministry of Justice and continued in the Ministry in various capacities until 1937. In that year he became presiding judge at the newly created Reich Armed Forces Court which was the highest military court in the German Reich. He sat on the tribunal which was appointed by Hitler to investigate the charges against General Freiherr von Fritsch. He testified that he drew up the verdict in this case. On 15 July 1938, he became Chief of the Legal Department of the OKW, designated in the documents as WR, which position he held until the capitulation of Germany. He held this position as a civil servant. On 1 May 1944, he was given the military title of Generaloberstabsrichter which was in fact a general in the German Army, which corresponds to that of a lieutenant general in the Army of the United States. He was not a member of the Nazi Party or any of its formations. The record does not establish that any honors were conferred upon him by the Nazi Party.

Aside from the charge of crimes against peace, heretofore disposed of in this opinion, we think that charges under counts two and three of the indictment may be disposed of under the following headings: (1) The Commissar Order; (2) The Barbarossa Jurisdiction Order; (3) The Commando Order; (4) Night and Fog Decree; (5) Terror and Sabotage Decrees. These subjects will be discussed in the order herein designated.

1. The Commissar Order—The only connection which the defendant is shown to have had with the issuance of the Commissar Order was an immaterial change in the wording of section 3 as to courts martial and the Tribunal is unable to find from the evidence any criminal connection of the defendant Lehmann with the issuance of this order.

2. The Barbarossa Jurisdiction Order—In this judgment we have previously discussed the legality of the Barbarossa Jurisdiction Order and have found it to have constituted an illegal order. The question now arises as to the criminal connection of the defendant Lehmann therewith.

The defendant Lehmann first received an order concerning this matter sometime in late April of 1941. The early stages of the development of the order are shrouded in obscurity as far as they appear in the documents in evidence. The defendant Lehmann, in his testimony, has given a rather elaborate statement as to what these developments were and his connection therewith. We shall not go into these early developments extensively. From his testimony it would appear that the circumstances of the order as communicated to him by Keitel's adjutant so aroused him that he drew an impracticable order to the effect that legal officers would be dispensed with in the German Wehrmacht and sent into combat service. According to his testimony, his reaction to the communication he received was primarily based upon the effect of the order upon military jurisdiction.

The Barbarossa Jurisdiction Order which was finally produced is an excellent example of the fundamental and essential functions which a staff performs in producing a military order from an original idea. The record discloses conferences, telephone calls, and much correspondence, all independent of Hitler. In this way the details of the order were worked out. Many of these details originated in the minds of various staff officers and some in the mind of the defendant.

In summarizing the generally significant parts of these proceedings, it is shown that on 28 April 1941, the defendant prepared a draft of the Barbarossa Jurisdiction Order. On or about 6 May he received a copy of an order which had been prepared by the OKH, apparently by General Mueller, the General for Special

Assignments with the OKH, which embodied certain ideas of Generaloberst Halder, Chief of Staff of OKH. On 9 May the defendant reported to the Chief, WFSt, Department L (Warlimont) concerning certain discussions which he had with General Mueller and General Jeschonnek, and also as to discussions with the chiefs of the legal sections. The defendant had conferences with both General Mueller and General Jeschonnek concerning this matter. As an outgrowth of these activities a final and fourth draft was submitted to Keitel which, with a few minor modifications, was issued over the signature of Keitel and became what is known as the Barbarossa Jurisdiction Order.

In connection with these various conferences and various drafts and the correspondence connected therewith, it is apparent that the defendant's ideas for good or evil became a part of this order as issued. On the favorable side as to these details it can be said that he did not embody in the final draft which he submitted the inflammatory language which was contained in the first draft submitted by the OKH. Furthermore, in his favor in this connection, it is pointed out that that draft provided that inhabitants "who take part *or intend to take part* in the hostilities as guerrillas, etc.", and that in the defendant's final draft the words "or intend" were not included. His final text, however, contained the provisions as to collective punishments which left the door wide open to the decision of an officer of at least the rank of a battalion commander to impose such collective punishments as he saw fit.

This evidence also shows that due to the influence of the defendant the provision was finally inserted in the order to the effect that troops would dispose of all cases and that courts were to have no jurisdiction whatsoever, whereas General Mueller had urged that troops were to dispose of only those clear cases and that doubtful cases were to be left to the jurisdiction of the courts. The defendant's comments on this matter are significant as shown by the document where he states:

> "The draft of the army comes very near to our own proposals. The only sentence missing is the provision that the courts of the armed forces have no jurisdiction at all over the indigenous inhabitants. General Halder wished to have this jurisdiction maintained for those cases in which the troops have no time for investigations and for the large number of offenses of minor kinds in which execution by shooting is now justified. I have objections to this, shared by General Jeschonnek.
>
> "Once we take this step, we must take it fully. Otherwise it is to be feared that the troops will get rid just of those cases

which they consider awkward, namely, the doubtful cases by handing them over to the courts. Thus, the outcome will be contrary to the result we aim at."

In this decision his position was approved by the defendant Warlimont as is shown by the same page of the document. This provision in the order, which obviously was not derived from Hitler, or Keitel, or Jodl, is one of the most vicious parts of the order. The defendant's reasons for this provision appear from the documents and his own testimony to have been that in the event such cases were handed over to the courts, the courts would acquit the defendants for lack of evidence; that those acquittals would bring upon the military courts criticism by Hitler to the effect they were too lenient, as he had done with reference to certain decisions made during the Polish campaign. In other words, it is apparent that, in order to avoid criticism of military courts by the Fuehrer, he was ready to sacrifice the lives of innocent people.

The discussions about the disciplinary features of this order also show the part that a staff officer plays in the final structure of an order. The net result of the entire proceedings as to this order was that Lehmann became the main factor in determining the final form into which the criminal ideas of Hitler were put; that he modified those ideas within his own sphere up to a certain point and placed the whole into an effective military order which was transmitted to the troops and carried out.

Under the record, we find him responsible for criminal connection with, participation in, and formulation of this illegal order.

3. The Commando Order—The Commando Order is another example of the part a staff officer plays in the final structure of a military order. Like the preceding Barbarossa Jurisdiction Order, it cannot be said that the whole of the Commando Order, or the major part of it, is a product of one man's mind. We are not concerned with the question of determining just how far the ideas of any one man are embodied in these orders except insofar as ideas that can be traced to a given defendant show his own state of mind in contributing criminal parts to the criminal whole. The basic criminal offense is in the essential part a staff officer performs in making effective the criminal whole.

This was a criminal order in which the defendant Warlimont, as has been pointed out, was a major factor and the defendant Lehmann's activities were subordinate to a large extent. The defendant was well aware of the criminal nature of this order. This had been pointed out by Admiral Canaris in various telegrams with which he was familiar. He made certain sugges-

tions as to methods which might, by a strained construction, give some appearance of legality and be suitable for publication; constructions which he apparently did not believe himself.

We find no provisions in this order where he contributed to its inherent viciousness but he was one of those responsible for its final production in the form in which this criminal order was transmitted to the army and he was criminally responsible for a part of the vicious product.

4. The Night and Fog Decree—The Night and Fog Decree basically involved legal questions, and in this, as in the Barbarossa Jurisdiction Order, the defendant Lehmann was the major craftsman of its final form. It was the defendant Lehmann who conducted the negotiations whereby the Ministry of Justice was given the task of trying those persons charged under this decree before the Special and, later, the People's Courts, wherein they were deprived of the rudimentary rights which defendants have in the courts of any civilized nation.

His defense as to this charge is not without some merit, in that it was apparently the original idea of Hitler that these unfortunates were to be turned over to the tender mercies of the police for disposition. But for the reason stated above, we find him guilty as a participant of the final production of this terror program.

5. Terror and Sabotage Decrees—On 1 July 1944, from WFSt, Qu. Section, Lehmann received the following communication [*NOKW–2576, Pros. Ex. 823*]:

"Subject: Combating of enemy terrorists in the occupied territories.

"On account of events in Copenhagen, the Fuehrer has decreed that court martial proceedings against civilians in the occupied territories must be discontinued with immediate effect. WR is requested to submit suggestions for the draft of an order concerning the treatment of enemy terrorists and saboteurs among the civilian population in the occupied territories by 2 July, 2000 hours.

"Policies.

"Terror can be countered only by terror, but court martial sentences only create martyrs and national heroes.

"If German units or individual soldiers are attacked in any manner, the commander of the unit and/or the individual soldier are bound to take countermeasures independently and, in particular, to exterminate terrorists. Terrorists or saboteurs who are arrested later, must be turned over to the SD."

With this directive before him, he proceeded to make effective the illegal desires of his superiors, which apparently bore fruit

in the Terror and Sabotage Decree of 30 July 1944, signed by Hitler. In August 1944, apparently in conjunction with the quartermaster section of the OKW, he participated in the supplemental order enlarging the scope of the original decree. He was therefore in a minor capacity connected with both the order and the supplemental directives.

On the matters above noted and on the record, we find the defendant Lehmann guilty under counts two and three of the indictment.

PRESIDING JUDGE YOUNG: At this time the Tribunal will take a short recess after which the sentences will be pronounced.

SENTENCES

PRESIDING JUDGE YOUNG: One final concluding paragraph was omitted from the reading of the judgment. I shall now read it.

"In the event there shall be any variation between the reading or translation or the stenographic report of the judgment as read and the copy thereof signed and lodged in the office of the Secretary General the latter shall control in all particulars."

The reading of the opinion and judgment having been concluded, the Tribunal will now impose sentences upon those defendants who have been adjudged guilty in these proceedings. Each defendant receiving a sentence for a term of years shall receive credit upon the sentence imposed upon him for such a period or periods of time as he has been in confinement, whether as a prisoner of war or otherwise, since 7 May 1945.

As the name of each defendant is called, he will arise, proceed to the center of the dock and put on the earphones.

OTTO SCHNIEWIND, the Tribunal having found you not guilty, you will arise and retire with the guards. You will be released as heretofore ordered when the Tribunal presently adjourns.

HUGO SPERRLE, having been found not guilty, in accordance with the order heretofore made, will be released when the Tribunal presently adjourns.

The defendant Wilhelm von Leeb will arise.

WILHELM VON LEEB, on the count of the indictment on which you have been convicted, the Tribunal sentences you to three years' imprisonment. You will retire with the guards.

The defendant George Karl Friedrich-Wilhelm von Kuechler will arise.

GEORG KARL FRIEDRICH-WILHELM VON KUECHLER, on the counts of the indictment on which you have been convicted, the Tribunal sentences you to twenty years' imprisonment. You will retire with the guards.

The defendant Hermann Hoth will arise.

HERMANN HOTH, on the counts of the indictment on which you have been convicted, the Tribunal sentences you to fifteen years' imprisonment. You will retire with the guards.

The defendant Hans Reinhardt will arise.

HANS REINHARDT, on the counts of the indictment on which you have been convicted, the Tribunal sentences you to fifteen years' imprisonment. You will retire with the guards.

The defendant Hans von Salmuth will arise.

HANS VON SALMUTH, on the counts of the indictment on which you have been convicted, the Tribunal sentences you to twenty years' imprisonment. You will retire with the guards.

The defendant Karl Hollidt will arise.

KARL HOLLIDT, on the counts of the indictment on which you have been convicted, the Tribunal sentences you to five years' imprisonment. You will retire with the guards.

The defendant Karl von Roques* will arise.

KARL VON ROQUES, on the counts of the indictment on which you have been convicted, the Tribunal sentences you to twenty years' imprisonment. You will retire with the guards.

The defendant Hermann Reinecke will arise.

HERMANN REINECKE, on the counts of the indictment on which you have been convicted, the Tribunal sentences you to life imprisonment. You will retire with the guards.

The defendant Walter Warlimont will arise.

WALTER WARLIMONT, on the counts of the indictment on which you have been convicted, the Tribunal sentences you to life imprisonment. You will retire with the guards.

The defendant Otto Woehler will arise.

OTTO WOEHLER, on the counts of the indictment on which you have been convicted, the Tribunal sentences you to eight years' imprisonment. You will retire with the guards.

The defendant Rudolf Lehmann will arise.

RUDOLF LEHMANN, on the counts of the indictment on which you have been convicted, the Tribunal sentences you to seven years' imprisonment. You will retire with the guards.

DR. LATERNSER: Your Honors, on behalf of the entire defense, I should like to make a brief statement. The defense has ascertained that the judgment just pronounced is in contradiction with the decisions of other military tribunals in Nuernberg with respect to basic and important legal points. In accordance with Ordinance No. 11, the defense asks the Military Tribunals to make a decision on that point by calling a plenary session of all Tribunals.

* Defendant von Roques, while still serving sentence, died of natural causes on 25 December 1949, in the City Hospital, Landsberg/Lech, Germany.

The substantiation of this motion will be handed in later in view of the time period allowed in that ordinance.

This motion just read has been laid down in writing by me and I am now handing it over to the Secretary General.

PRESIDING JUDGE YOUNG: The motion may be filed.

* * * * * * *

PRESIDING JUDGE YOUNG: The motion filed last night before the close of the session has been translated and submitted to the Tribunal.

The Tribunal considered the judgments of other tribunals heretofore rendered in arriving at the judgment in this case, and is of the opinion there is no conflict with them and does not desire to hear argument on the motion. Accordingly, the motion for a plenary session filed on behalf of all of the defendants is overruled without prejudice to such further rights in the matter as defendants may have.

The Tribunal is now about to adjourn.

The Tribunal is adjourned without day.

DR. LATERNSER: Your Honor, may I make a communication to the Court: May I make a statement to the Court?

PRESIDING JUDGE YOUNG: The Court has adjourned and I think it would not be proper to hear a statement to the Court. Adjourned.

THE MARSHAL: Military Tribunal V is adjourned without day. (The Tribunal adjourned *sine die.*)