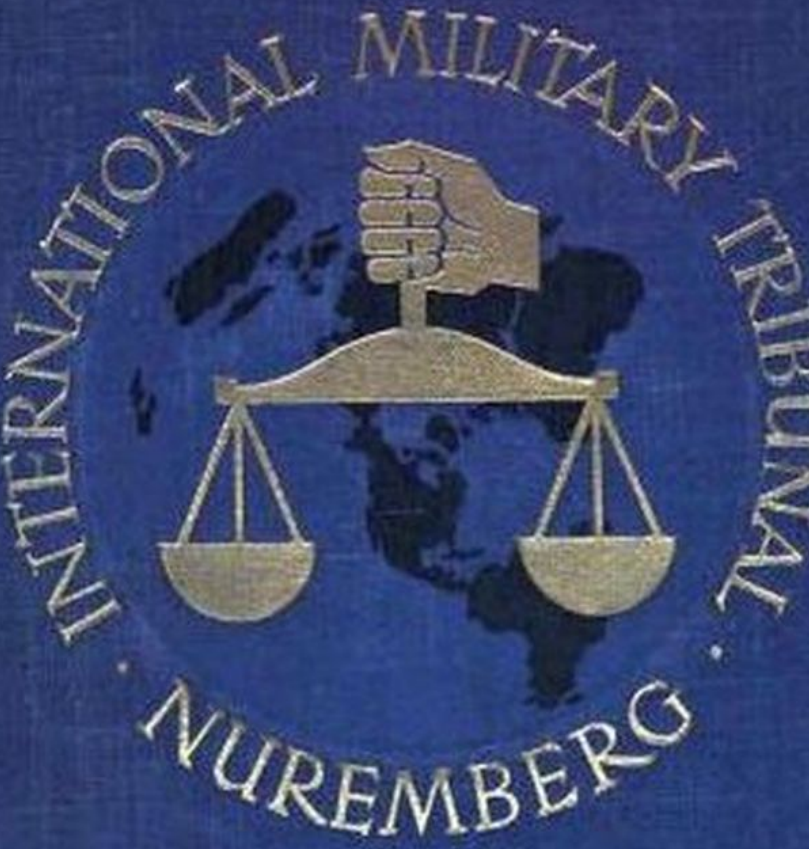
INTERNATIONAL MILITARY TRIBUNAL
NUREMBERG

Title: Trial of the Major War Criminals Before the International Military Tribunal: Nuremberg 14 November 1945-1 October 1946 (Vol. 18)
Date of first publication: 1948
Author: International Military Tribunal
Date first posted: January 29, 2025
Date last updated: January 29, 2025
Faded Page eBook #20250137

This eBook was produced by: John Routh, Cindy Beyer & the online Distributed Proofreaders Canada team at https://www.pgdpcanada.net

TRIAL
OF
THE MAJOR WAR CRIMINALS

BEFORE

THE INTERNATIONAL MILITARY TRIBUNAL

NUREMBERG
14 NOVEMBER 1945—1 OCTOBER 1946

PUBLISHED AT NUREMBERG, GERMANY
1948

This volume is published in accordance with the direction of the International Military Tribunal by the Secretariat of the Tribunal, under the jurisdiction of the Allied Control Authority for Germany.

VOLUME XVIII

OFFICIAL TEXT

IN THE

ENGLISH LANGUAGE

PROCEEDINGS

9 July 1946—18 July 1946

CONTENTS

Editor's Note: *In respect to the presentation of the final pleas by Counsel for the Defense, the Tribunal in several instances directed that written speeches of excessive length be shortened for oral presentation in Court and that notice would be taken by the Tribunal of the paragraphs omitted. In the sessions to follow such passages have been reproduced in small type.*

ONE HUNDRED AND SEVENTY-FOURTH DAY

Tuesday, 9 July 1946

Morning Session

MARSHAL (Lieutenant Colonel James R. Gifford): May it please the Tribunal, the Defendants Hess and Fritzsche are absent.

THE PRESIDENT (Lord Justice Sir Geoffrey Lawrence): I have an order to read. The Tribunal orders:

> 1. Applications for witnesses for organizations to be heard by the Tribunal in open court in accordance with Paragraph 5 of the Tribunal's order of 13 March 1946 should be made to the General Secretary as soon as possible, and in any case not later than 20 July.
>
> 2. The Tribunal believes that so much evidence has already been taken, and so wide a field has been covered, that only a very few witnesses need be called for each organization. That is all.

DR. OTTO NELTE (Counsel for Defendant Keitel): Mr. President, Gentlemen of the Tribunal, yesterday I dealt with the problem of Keitel and the Russian campaign. Now I recall to you what Keitel said in the witness box concerning the so-called ideological orders:

> "I knew their content. In spite of my personal misgivings I passed them on without letting myself be deterred by the possibility of serious consequences."

I wanted to point that out in order to make what I have to say now comprehensible, above all, in its extent. In the course of time the opinion arose and was disseminated throughout the Army, that Field Marshal Keitel was a "yes man," a tool of Hitler's and that he was betraying the interests of the Armed Forces. These generals did not see, nor were they interested in the fact that this man was fighting a constant battle, day after day, in every possible field, with Hitler and the forces which were influencing him on all

sides. The effects of this distorted picture shown here in detail, which definitely did not apply to Keitel, especially not in the sphere of strategic operations, planning, and execution, made themselves still felt even in this Trial; perhaps not without the fault of the Defendant Keitel himself. As to the justification of his conception of duty there can in principle be no argument. It has also been confirmed here by the witness Admiral Schulte-Mönting for the Defendant Grossadmiral Raeder. There can be no doubt that the rest of the admirals and generals were in principle of the same point of view, that it is impossible in military spheres to criticize before subordinates the decision of a superior as expressed in an order, even if one has misgivings about the order.

One may say that every principle, every basic rule must be interpreted and applied in a reasonable way, that every exaggeration of a good principle detracts from it. In the case of Keitel this objection affects the problem of his responsibility and guilt.

Does nonrecognition of the point where a principle, correct in itself, is being carried to excess and thus endangers the object for the protection of which it has been established, constitute guilt? In the case of Keitel we must consider this crucial question from the point of view of a soldier. The thoughts and ideas which the Defendant Keitel had in this connection were the following:

It is incontestable that the principle of obedience is necessary for every army; one might say that obedience—in civilian life a virtue and therefore more or less unstable in its application—must be the essential element of a soldier's character, because without this principle of obedience the aim which is to be accomplished by the army could not be achieved. This aim—the security of the country, the protection of the people, the maintenance of the most precious national possessions—is so sacred that the importance of the principle of obedience cannot be valued highly enough. Hence, the duty of those called upon to preserve that national institution, the Armed Forces, in the sense of its higher task, is to emphasize the importance of obedience. But what the general demands of the soldier, because it is indispensable, must hold good for himself too. This also applies to the principle of obedience.

It would be dangerous to weaken an order, still less an essential principle, by mentioning exaggerations and taking them into consideration at the outset. That would leave the principle of decision to the individual, that is, to his judgment. There may be cases where the decision depends, or must be made dependent, on actual circumstances. In theory, that would lead to a devaluation or even to an abrogation of the principle. In order to forestall

this danger and to eliminate any doubt as to its absolute importance, the principle of obedience has been changed in military life into one of "absolute obedience," and embodied in the oath of allegiance. This is equally valid for the general as for the common soldier.

The Defendant Keitel not only grew up in this school of thought, but during the 37 years of his military service, up to 1938, including the first World War, he had become convinced that this principle of obedience is the strongest pillar upon which the Armed Forces, and thereby the security of the country, rests.

Deeply imbued with the importance of his profession, he had served the Kaiser, Ebert, and Von Hindenburg in accordance with this principle. As representatives of the State, they had to a certain extent an impersonal and symbolic effect on Keitel; Hitler, from 1934, at first appeared in the same light to him, that is, merely as representing the State, without any personal connection, in spite of the fact that his name was mentioned in the oath of allegiance. In 1938 Keitel as Chief of the OKW came into the immediate circle and the personal sphere of Hitler. It appears important for further explanation and in assessing the personality of Keitel to bear in mind that Keitel, as the result of his highly-developed soldierly conception of duty described above, and the pronounced feeling of soldierly obedience, was now exposed to the direct effects of Hitler's personality.

I am inclined to assume that Hitler had clearly realized, in the preliminary discussions with Keitel which led to the Führer Order of 4 February 1938, that Keitel was the type of person he was including in his calculations: A man upon whom he could rely as a soldier at any time; who was devoted to him with sincere soldierly loyalty; whose bearing fitted him to be a worthy representative for the Armed Forces in his sphere; and who in the opinion of his superiors was an extraordinarily able organizer as shown by the report of Field Marshal Von Blomberg. Keitel himself has admitted that he sincerely admired Hitler, and that the latter subsequently attained a strong influence over him and brought him completely under his spell.

This must be borne in mind if we wish to understand how Keitel could have made out and transmitted orders from Hitler which were irreconcilable with the traditional conceptions of a German officer, such as, for instance, orders C-50, 447-PS, et cetera, submitted by the Soviet Russian Prosecution.

By exploiting the willingness to fight for Germany, which might be taken for granted in the case of every German general, Hitler was able to camouflage his party political aims with the pretext of defending the national interests and to present the impending struggle with the Soviet Union as a dispute which must inevitably be settled—even as a war of

defense, the necessity for which was made clear by definite information which had been received and on which depended the existence of Germany.

In this way Hitler broached the fateful question. General Jodl has testified here to the fact that, as an officer of long standing, Keitel's conscience pricked him nevertheless; and that he repeatedly, but unsuccessfully, raised objections and suggested alternatives to the orders drafted.

During his cross-examination by the representative of the American Prosecution, the Defendant Keitel has openly declared that he was aware of the illegal nature of these orders, but that he believed that he could not refuse to obey the orders of the Supreme Commander of the Armed Forces and head of the State, whose final pronouncement in the case of all objections was: "I do not know why you are worrying; after all, it is not your responsibility. I myself am solely responsible to the German people."

This is a reasoned analysis of Keitel's attitude toward the so-called ideologically-based orders of Hitler.

Keitel's last hope, which in many cases proved to be justified, was that the commanders-in-chief and subordinate commanders of the Armed Forces would at their discretion and within the scope of their responsibility either fail altogether to apply these harsh, inhuman orders, or would apply them only to a limited degree. In view of his position, Keitel had only the choice between military disobedience by refusing to transmit the orders, or complying with the instructions to forward them. I shall investigate in another connection the question of what alternative cases of action might have been open to him. The problem here is to show how Keitel came to forward orders which indisputably violated the laws of warfare and humanity and why, by reason of his duty to obey, his sworn loyalty to the Supreme Commander, and the fact that he saw in the order of the head of the State the absolution of his own responsibility, he failed to recognize the point at which even the soldier's strict duty of obedience must end.

Every soldier who has appeared here as a defendant or as a witness has mentioned the duty of allegiance. All of them, when they sooner or later realized that Hitler had drawn them and the Armed Forces into his egocentric gamble for the highest stakes, have considered their oath of allegiance as rendered to their country and have believed that they must continue to do their duty in circumstances which to us and even to themselves, when they realized the extent of resulting disaster, appear inconceivable. Not only soldiers such as Raeder, Dönitz, and Jodl, but Paulus as well, kept their positions and remained at their posts, and we have

heard the same from other defendants. The statements of the Defendants Speer and Jodl in this connection were deeply moving.

The question of whether these facts relieve the Defendant Keitel of guilty responsibility requires investigation. Keitel does not deny that he bears a heavy moral responsibility. He realizes that no one who played even the smallest part in this terrible drama can feel himself devoid of the moral guilt in which he was entangled.

If I nevertheless emphasize the legal point of view, I am doing so because Justice Jackson, in his speech on behalf of the Prosecution, expressly referred to the law as being the basis of your verdict—to international law, the law of individual states, and the law which the victorious powers have embodied in the Charter.

I assume that the Defendant Keitel has recognized that some of Hitler's orders violated international law. The Charter says that a soldier cannot clear himself by referring to orders given by his superiors or by his government. At the beginning of my argument I asked you to determine whether, independently of the terms of the Charter, the principle is unimpeachable that the standard determining right or wrong cannot but depend on a national concept.

THE PRESIDENT: Dr. Nelte, I see that in the next few pages you pass into the realm of metaphysics. Don't you think that part you might leave for the Tribunal to read?

You must remember that you began your speech yesterday before the morning adjournment, and you have got over seventy pages left of your speech to read.

DR. NELTE: I have limited it and shall be through by noon.

THE PRESIDENT: Very well. Do you think it is necessary to read these passages about metaphysics?

DR. NELTE: I want to show in these pages that they are not metaphysical forces, and that the individual is not in a position to free himself through metaphysical forces. I shall—well, I think I shall continue on Page 121, immediately following my reference to Hitler's character.

Perhaps I may just read from Page 120 at the bottom.

THE PRESIDENT: Very well, if you tell the Tribunal that you have limited your presentation. I think you began yesterday at a quarter past 12. Go on then. Take your own course, but do your best to limit it, and go to Page 120 now.

DR. NELTE: The French prosecutor, M. De Menthon, has pointed to the "demoniacal" undertaking of Hitler and therewith pronounced a word which had necessarily to be brought up in a

discussion which is dedicated to the investigation of events forming the background of these Trials. It is the natural endeavor of intelligent people to analyze the reasons for events which have deeply touched the fate of mankind in these days. If these events deviate from the regular happenings and the natural course of things so much that they sharpen our imagination, we take our refuge in metaphysical powers. I ask you not to consider the pointing to such metaphysical forces as an attempt to evade responsibility. We are all still under the impression of the attempt by a single man to lead the world from its course. I should not care to be misunderstood: The "demoniacal" is an incomprehensible yet extremely real power. Many call it "fate." If I speak of fateful, metaphysical powers, I do not mean the fate of antiquity and of pre-Christian Germanism to which even the gods are necessarily subject.

I should like to make this quite clear: The demoniacal about which I am talking in this connection does not exclude the capacity of man to discern evil; of course, I believe that the demoniacal, should it become effective, does limit the capacity for perception. Principiis obsta. The old German maxim says: "Resist from the very start, the remedy will be prepared too late."

Fate and guilt are not phenomena excluding one another, but rather circles which overlap, so that there are sections of life when both power groups are operative. I can only indicate here in a few words what things may be considered as being governed by fate: nationality, historical and traditional conditions of existence, individual origin, professional surroundings.

Mankind today cannot yet recognize the difference between the fateful, that is, the metaphysical powers which have become operative, and the persons who have appeared as tools of these powers; therefore the people who made their appearance as actors on the stage of this terrible drama are "guilty people" to them. The further removed mankind is from the events, the less it sees or feels the consequences, the more objective does judgment—divested of actuality and subjective instincts—become within the framework of the history of human development. In this way the active figures and their share in the events will be better recognized. But as long as we are under the recent impression of the events, we do, it is true, realize the border line between guilt and fate, but we cannot yet recognize it clearly.

No less a person than Marshal Stalin has pointed out in February 1946 that the second World War was not so much the result of mistakes of individual statesmen, but rather the consequence of a development of economic and political tension on the basis of the existing capitalist economic system.

I am now beginning Paragraph 3 on Page 120.

Hitler was the exponent of an idea. He was not only the representative of a Party political program, but also of a philosophy which separated him and the German people from the ideology of the rest of the world. As a convinced enemy of parliamentary democracy, and obsessed with the conviction that this was the true ideology, he was devoid of tolerance and the spirit of compromise. This produced an egocentric ideology which recognized as right only his own ideas and his own decisions. It led to the "Führer State," in which he was enthroned on a lonely height as the incarnation of this faith, blind and deaf to all misgivings and objections,

suspicious of all those who he thought might constitute a threat to his power, and brutal to everything that crossed his ideological path.

This outline of his character, which has been verified by the evidence, is incompatible with the Prosecution's assumption that a partnership of interests might have existed between Hitler and the defendant. There was no partnership of interests and no common planning between Hitler and the men who were supposed to be his advisers. The hierarchy of the Führer State, in connection with the Führer Order Number 1, which gives the crudest expression to the separation of work, can only admit of the conclusion that the so-called co-workers were merely mouthpieces or tools of an overwhelming will, and not men who translated their own will into deeds. The only question, therefore, which can be raised is whether these men were guilty in putting themselves at the disposal of such a system and in submitting to the will of a man like Hitler.

This problem requires special examination in the case of soldiers, because this submission to the will of some person, which is contrary to the nature of a free man, is for the soldier the basic element of his profession, and of the duties of obedience and allegiance which exist for the soldier in all political systems.

The legal problem of conspiracy in the sense of the Indictment has been dealt with by my colleague Dr. Stahmer and by Dr. Horn. In the specific case of the Defendant Keitel I should only like to refer to two sentences of the speech as the starting point of my statements:

> (1) "It is not sufficient that the plan be common to them all; they must know that it is common to all of them, and each one of them must of his own accord accept the plan as his own.
>
> (2) "That is why a conspiracy with a dictator at the head is a contradiction in itself. The dictator does not enter into a conspiracy with his followers; he concludes no agreement with them; he dictates."

Dr. Stahmer has pointed out that no one acting under or on account of pressure can therefore be a conspirator. I should like to modify this for the circle to which the Defendant Keitel belonged. To say that the defendants belonging to the military branch acted on account of or under pressure, does not accurately represent the real circumstances. It is correct to say that soldiers do not act voluntarily, that is, of their own free will. They must do what they are ordered, regardless of whether or not they approve of it. Accordingly, when soldiers engage in any action, their will is disregarded, or at least not taken into consideration; it will in fact always be disregarded

because of the nature of the military profession, and in applying the Leadership Principle in the Armed Forces it cannot appear as a causal factor in the initiation and execution of orders. In this military sphere, therefore, we are not dealing with an abstract and thus theoretical deduction, but with a conclusion which is bound to result from the nature and practice of the military profession, when we maintain that the function of the Defendant Keitel was based on military orders. The activity of the Defendant Keitel with regard to the initiation of orders, decrees, and other measures by Hitler, even insofar as they are criminal, cannot therefore be considered as common work, that is, as the result of a common plan within the meaning of the term "conspiracy." Keitel's activity in regard to the execution of orders consists in the proper transmission of orders in the operations sector and in the proper execution of orders concerning the administration of the war, that is, in the so-called ministerial sector.

No matter how this activity in itself might be qualified in terms of the penal code, the Prosecution have not, I think, so far submitted anything which could refute this train of thought as to the conspiracy.

This is a soldierly principle, and is valid wherever the military command system exists. The significance of this statement is particularly important in the case of the Defendant Keitel. For the validity of such evidence might be questioned by saying that Keitel's functions were not those of a soldier, or at least not only those of a soldier; and that he is therefore not entitled to claim consideration purely on the grounds of the existing system of command. The unfortunate nature of his position and the many and varied assignments, not all of which can be fitted into the framework of a system, which fell to him as Chief of the OKW, tend to obscure for us the primary factor with regard to the Defendant Keitel, namely, that no matter what Keitel did, or with what authority or organization he negotiated or was in contact, he was always motivated by his function as a soldier and by some general or particular order issued by Hitler.

The existence of a conspiracy seems to me incompatible with the theory of a soldier's functions and with Keitel's position as head of the OKW, and cannot logically be derived therefrom. In all cases in which the Prosecution has claimed conspiracy to be prejudice, the purpose of this conspiracy is an activity indulged in by the members in perpetrating acts which differ from their normal private activity. The *ex contrario* proposition is that the activity which a man must practice because it belongs to his profession or office cannot be termed a conspiracy. It may be added that the soldier does not act on his own initiative, but on orders received. A soldier

may therefore take part in a conspiracy aimed against the duties he has undertaken as a soldier; but his activity within the scope of his military functions can on no account be termed a conspiracy.

The OKW, including the Armed Forces Operations Staff, was relatively little affected by the conduct of the war in the East. By the OKW I mean the staff of the OKW. It is well known that Hitler himself as Supreme Commander of the Armed Forces, dealt with all matters concerning the conduct of this—his own—ideological war and took a hand in it. The Army was in command; but Hitler was in close and constant collaboration with the Commander-in-Chief of the Army and his Chief of General Staff up to December 1941 when, after taking over the supreme command of the Army, he also took over its direct leadership.

This union in one person of the Supreme Commander of the Armed Forces and Commander-in-Chief of the Army was evidently the cause of the numerous mistakes which led to the severe incrimination of the OKW as staff OKW, and of its Chief of Staff, Keitel.

Keitel feels himself to be gravely incriminated by the frank statements he made in the witness box on the whole question of the Russian war. It is, therefore, not only an understandable proceeding on the part of the defense, but in fact its duty, to clarify the extent to which Keitel bears the responsibility for these entire conditions of most frightful atrocity and unimaginable degeneration.

To make these matters of competency, which are frequently extremely complicated, easier of understanding, I refer to the Defendant Keitel's affidavit Number K-10, which was submitted to the Tribunal. It seems to me essential just to emphasize the fact that the war against the Soviet Union was from the first subject to three effective factors: (1) Operations and command: High Command of the Army; (2) Economics: The Four Year Plan; (3) Ideological: The SS Organizations.

These three factors were outside the competency of the OKW, which was not empowered to issue orders affecting them. It is true, nevertheless, that as a result of Hitler's practically anarchic methods, by which he himself retained entire control of the Government in his own hands, the OKW and Keitel were sometimes used to transmit Hitler's orders; but this fact cannot in itself deflect the basic responsibility.

In view of the mass of material presented by the Soviet Prosecution, I can refer within the scope of my statement to only a comparatively small number of the documents. I shall give a brief summary of the documents which have been dealt with separately, Pages 126 to 136.

To begin with, I referred to Documents USSR-90, 386, 364, 366, 106, and 407, and tried to prove in detail that the charges made against the OKW and Keitel as the guilty parties have no value as evidence as far as these documents are concerned.

Then, on Page 130, I referred to a category of documents with which I have dealt earlier in Part 2 of my presentation on the subject of official documents. If I refer in this connection to the official reports of the Investigation Commission, I do so not because of their actual contents, but because, although they were submitted in order to implicate Keitel, they are in themselves proof that the charges made against Keitel and the OKW are not justified as far as these grave indictments are concerned.

Out of the large number of documents in this connection I have dealt with USSR-40, 35, and 38. These official reports, which implicate the High Command of the Armed Forces, do not contain a single concrete fact referring to the Staff of the OKW—that is, Keitel—as the perpetrator or instigator of these atrocities.

I make no comment on the contents of the documents; I merely point out that Keitel in his official position, had neither the authority nor the opportunity to give orders which resulted in the crimes alleged.

First of all I shall deal with the Documents USSR-90, 386, 364, 366, 106, 407, submitted by the Prosecution for the specific purpose of establishing Keitel's responsibility.

They will show that not in a single case are they orders, decrees, or regulations issued by the German High Command of the Armed Forces and that it has not been proved that the latter was even informed thereof.

(1) The document Exhibit USSR-90 is a court-martial sentence against the German Generals Bernhardt and Hamann, and includes the following sentence:

> "During the temporary occupation of the Orlova area ... German Fascist intruders committed bestial crimes in huge numbers against the peaceful populations and prisoners of war on direct orders of the rapacious Hitler Government and the command of the Armed Forces, thus violating the rules of warfare established by international law...."

The argumentation leading up to the verdict does not reveal proof of the claim that the "German Armed Forces command"—if this means the OKW and the Defendant Keitel—ordered the crimes with which the court-martial verdict is dealing. This is another of the frequent confusions as to the status of the High Command of the Army and the High Command of the Armed Forces. Statements on Page 2 of the verdict seem to indicate this; it is said there:

> "The defendant, Lieutenant General Bernhardt ... acted according to plans and instructions of the Commander-in-Chief of the Army ..."

This document, therefore, cannot furnish proof for the Prosecution's contention that the Defendant Keitel is connected with the crime which is described in Document USSR-90.

(2) In connection with the facts in the case dealing with "compulsory labor," the Prosecution submitted in proof of its charge against Keitel Document USSR-36, a letter by Reich Marshal Göring, in whom Hitler had vested general powers within the framework of the Four Year Plan for this essential project—Plan Barbarossa-Oldenburg—as shown in the Green File.

(3) Nor does the report or discussion of the Economic Staff East (Wirtschaftsstab Ost) of 7 November 1941 (USSR-386) touch upon the competency and responsibility of OKW, because the Economic Staff East had nothing to do with the OKW and the Defendant Keitel.

This is also proved by the Green File, the Thomas Document 2353-PS, and Keitel's affidavit, Keitel Document Book 2, Exhibit Number Keitel-11.

The conclusion drawn by the Soviet Russian Prosecution that "Proof is established of the OKW commander having been primarily responsible for the mobilization of labor in the Reich" is erroneous, if the argument is to establish responsibility on the part of the Defendant Keitel. If, on the other hand, reference as commander of the OKW is made to Hitler, this cannot be contradicted.

(4) Document USSR-364 is a document from the OKH (High Command of the Army), signed by the Quartermaster General of the Army, Wagner. It can be seen from the distribution of the document that the OKW was not even informed through the usual channels.

(5) Document USSR-366 mentions the name of the defendant as having complained because: "OT (Organization Todt) units operating in the vicinity of Lvov paid local laborers a daily wage of 25 rubles and because OT availed itself of the services of local factories."

The Prosecution's argument runs that "Keitel writes to Minister Todt ..." The document which was submitted does not reveal this, because it does not make any mention of such a letter. Inasmuch as the entire economic administration and the exploitation of the Eastern Territories had been transferred to the Four Year Plan, OKW had no relevant office for this problem.

This becomes evident from the Green File just referred to, and from the Führer order for the "Barbarossa-Oldenburg Plan." Presumably, after discussion of the basic question during the conference on the situation, Keitel once again received orders from Hitler to get into touch with Reich Minister Todt. This would then be one of the instances where the defendant merely served as an instrument for the transmission of a Hitler order to the competent office without the matter being in any way within the competency of the OKW. In any case, the information conveyed by the document does not show in how far this problem should be a charge on Keitel.

(6) Document USSR-106 is a Führer Order of 8 September 1942, dealing with the employment of prisoners of war and the construction of field fortifications behind the front. The heading of the Führer order reads:

"The Führer.

"OKH: General Staff of the Army Operations Section 1."

The order was sighed by the Army General Staff and issued by Halder. This proves conclusively that the Defendant Keitel or the OKW was not involved.

(7) Nor is it possible to refer to Document USSR-407 for the establishment of the defendant's participation. This document deals with the order given by a local commander, who refers to alleged OKW instructions.

It has already been emphasized on several occasions that the OKW does not mean Keitel. It may however be quite possible, as no date of the alleged OKW order is mentioned in Document USSR-407, that this is one of the numerous cases of confusion, especially since even in Armed Forces circles the exact conception of the OKW was not known.

In any case the conclusion by the Soviet Russian Prosecution, after submission of this document, that "OKW and Keitel have not only ordered the mobilization of labor from the occupied part of Russia, but have worked directly in the execution of this order" is incorrect and has not been proved.

Now there is still a category of documentary evidence which contains official communiqués of the Extraordinary Commission for the determination and investigation of War Crimes and Crimes against Humanity. I already some time ago dealt with the importance of official documents in the presentation of evidence, and pointed out their limited value as evidence.

If in this connection I discuss the official reports of the investigating commissions, then I do so because ostensibly they have been presented in order to incriminate Keitel, while in actual fact they furnish proof that the accusations against Keitel and the OKW Staff are not based on any reasoning in these very weighty Prosecution charges.

From the large number of documents concerning this I would refer to the following:

Document USSR-4 has been submitted to show that the Soviet-Russian population was exterminated through intentional infection with typhus, and that this was a case of a planned spreading of typhus-epidemics among the Soviet population. For this the following, among others, are named as the culprits (Page 10 of the document); "The Hitler Government and the Supreme Command of the Armed Forces."

Once again it cannot be seen from the document itself on what concrete facts the commission supports the guilt of the "Supreme Command of the German Armed Forces" and what military agency is thereby described. There is no mention made of an order of the "Supreme Command of the German Armed Forces" in any part of this lengthy document. However, since the Prosecution have presented this document as proof of the guilt of the Defendant Keitel and the OKW, I establish that this document cannot be valid as evidence for an accusation against Keitel in this horrible charge.

Document USSR-9 bears the heading:

> "Report of the Extraordinary State Commission for the determination and investigation of the atrocities of the Fascist German invaders and the damage caused to citizens, collective enterprises, social organizations, State plants and institutions of the Soviet Union.

"Regarding the demolitions and bestialities which the German Fascist invaders have committed in Kiev."

On Page 4 it is stated: By order of the German High Command German Army units looted, blew up, and destroyed the old cultural monument, the Lavra of Kiev. The following are described as responsible: "The German Government and the German High Command and all officers and officials listed by name." From the speech of the representative of the Prosecution and from the term, "the German Government and the German High Command" it can be seen that the High Command of the Armed Forces and Keitel are to be accused as having been responsible. This document lacks any positive statement on which the Investigating Commission supports this judgment.

It is also shown here that the judgment of the investigating commission—in any case with reference to the Defendant Keitel—is not basically supported.

Document USSR-35 is a report "regarding the material damage which the Fascist German invaders inflicted on State plants and institutions, collective industries, and citizens of the Soviet Union."

This document states:

"The German armies and occupation authorities which carried out the directives of the criminal Hitler Government and the High Command of the Armed Forces, destroyed and looted the Soviet cities occupied by them...."

To this it must be stated:

(1) The contents of this document do not show one single concrete "directive" issued by the OKW or Keitel.

(2) The OKW had no authority to give orders, and therefore could not issue directives.

(3) Therefore the findings of the State investigation commission, which for formal reasons would not be binding for the Tribunal, cannot be considered as justified insofar as the OKW and Keitel are concerned.

(4) No opinion is going to be expressed as to the remaining contents of the reports.

Document USSR-38 is entitled:

"Communication of the Extraordinary State Commission for the Determination and Investigation of the Atrocities of the Fascist German invaders and their Accomplices. Regarding atrocities of the Fascist German invaders in the city of Minsk."

In this document it is stated on Page 1:

"Following instructions, which were issued directly by the German Government, the Hitlerite military authorities destroyed without any limitation scientific research institutes, et cetera ... they exterminated thousands of peace-loving Soviet citizens and also prisoners of war."

Page 13 states:

"Responsible for the crimes committed by the Germans at Minsk ... are the Hitler Government and the High Command of the Armed Forces."

Nowhere in this document have either concrete or verifiable instructions or orders by the Defendant Keitel or from the OKW been given.

Then, on Page 134, Paragraph 1:

In the documents previously quoted, either Keitel or the OKW is named as the responsible party. However, during the Prosecution's presentation many such official reports were quoted as evidence for Keitel's guilt, which do not even mention either the name of the defendant or the OKW. In this connection, I draw your attention to Documents USSR-8, 39, 45, 46, and 63. I only ask the Tribunal to examine the remaining documents with equal care in order to ascertain whether, if submitted in connection with Keitel and the OKW, they allow Keitel's guilt to be concluded or whether that is not the case. In this connection I should like to add that I am not going to read, and am not referring to, the remarks at the bottom of Page 134 (USSR-3).

I beg the Tribunal to take note of my statements on the economic exploitation of the occupied territories—Pages 137 to 142—without my reading them. Since Reich Marshal Göring's defense counsel has already dealt with this problem and has clarified the spheres of competency and responsibility, it would mainly be repetition for me to speak on it. However, I wish to draw attention to this part of my presentation and beg the Tribunal to take judicial notice of it.

In the war against Poland as well as later in the West, extended on the basis of experiences in Poland, expert personnel trained in military economy were detached from the Armed Forces Economic Office in the form of small staffs and units to the Army Groups and Army High Commands as expert advisers and assistants in all military economic questions which resulted from the conquest and occupation of economically and industrially valuable territories. The Economic Armament Office, together with the OKW, prepared the organization of these groups of experts and technical detachments.

By and large, they consisted of: (a) Expert advisers with the unit staffs (at first known as liaison officers of the OKH Economic Armament Office); (b) Reconnaissance Staffs for factories and raw materials important to war economy: (c) technical detachments and formations for security, repairs, and protection from destruction of essential and vital plants and supply installations.

This organization was prepared by the OKW (Economic Armament Office) because it relied on expert research personnel from all three branches of the Armed Forces and civilian economy with the "technical emergency aid" (Technische Nothilfe). The Army completed the set-up itself.

The organization was subordinated to the senior troop commanders in charge. Their employment took place exclusively on the orders of the troop command, for which each adviser

submitted suggestions from time to time to the unit staffs (the General Staff Ib or the Chief Quartermaster).

The missions of these technical detachments were: (a) Advising the command concerning the importance and significance of industrial plants and supply installations (fuel, water, electric current, repair plants, mines, et cetera); (b) Protection of these installations from destruction by the enemy and our own forces and the civilian population; (c) Utilization for the purpose of Germany's conduct of the war for troops and population; (d) Examination of essential and vital plants and establishment of their productive capacity for German use; (e) Establishment of raw material supplies of metals, ore, coal, fuel, et cetera, for reindustrialization or Germany's conduct of the war.

All functions, with the exception of those mentioned under (d) and (e), served exclusively to supply the fighting troops, the occupational troops, and the native population. The statistical collections (d) and (e) were reported, through military channels to the competent offices at home (Plenipotentiary for Economy, Four Year Plan, Minister of Armaments) who had to make disposition concerning use and utilization. The Armed Forces itself had no independent right of action.

It is correct that (according to the Thomas book, 2353-PS) raw materials and also machines were removed to Germany for the production of implements of war as the Prosecution charges, since both had served the enemy's conduct of the war and had necessarily gone out of production. No military agency could order the removal to Germany, because it had no right at all to dispose of "booty" of this sort. Only the three highest Reich authorities mentioned could effect such a removal on the basis of a general authority by the Führer or a special order by him to the Commander-in-Chief of the Army. The OKW and the Chief of the OKW, as well as the Economic Armament Office, had no right of disposition and command outside of their own fields, nor did any separate chain of command exist from the OKW Economic Armament Office to these detachments, et cetera. The communications and report chain ran via the unit staffs to the OKH Quartermaster General, with whom the highest Reich authorities (Food, Economy, Armament Ministry, Four Year Plan) had representatives who reported to their departmental chiefs. Orders by the Defendant Keitel as Chief of the OKW concerning utilization, use, or seizure of economic goods have not been given; this follows from Document 2353-PS.

The unified leadership of the entire war economy in France and Belgium was then centered in Reich Marshal Göring as Delegate of the Four Year Plan by the Führer Decree of 16 June 1940.

For determining the responsibility it is of significance that the staff of the Economic Armament Office examined the problems which concerned the armament economy and utilization of economy in the occupied territories. Their appraisals, which in this respect were regarded as decisive, are collected in Document EC-344, coming from the Foreign Department in the OKW (headed by Admiral Canaris).

With reference to Articles 52, 53, 54, and 56 of the Hague Convention of Land Warfare, it is explained therein in connection with total warfare that "economic rearmament" must be regarded as forming part of the "belligerent enterprise," and accordingly all industrial supplies of raw materials, semifinished and manufactured goods as well as machinery, et cetera, are to be regarded as serving the war effort. Therefore, according to the viewpoint of the author of this opinion, all these goods are

liable to be seized and used against compensation after the conclusion of peace. Furthermore, the problem of the need for war is examined and Germany's state of economic difficulty at that time is already affirmed. For the judgment of the Defendant Keitel this opinion is of significance insofar as the well-known Foreign Department under the responsible leadership of Admiral Canaris as late as November 1941 gave vent to an opinion which justified the economic utilization of the occupied countries. That was the office which concerned itself with problems of international law and on which the Defendant Keitel based his confidence.

An organization for all economic requirements and intended to supersede the former organization was created for Russia on the basis of experiences in the West by Reich Marshal Göring by virtue of a general delegation of authority by the Führer.

The chief of the Economic Armament Office together with State Secretary Körner drew up this organization for Reich Marshal Göring without participation by the Chief of the OKW. The Chief of the OKW for this purpose put General Thomas at the disposal of Reich Marshal Göring. The Chief of the OKW did not acquire any influence at all on this organization, and severed his own and the OKW's connection with it after Reich Marshal Göring had received full powers and the OKW had put General Thomas at his disposal. General Thomas thus acted solely on instructions by Reich Marshal Göring. The OKW and the Defendant Keitel were never under Reich Marshal Göring's orders nor were they bound by his instructions. The Defendant Keitel was not represented in Göring's Economic Staff and had nothing to do with the Eastern Economic Staff (See Thomas book, Page 366).

The execution of the work was centrally directed by the Economic Operations Staff in Berlin as part of the Four Year Plan. The local higher command in the Eastern district was under the Eastern Economic Staff. To this organization was also attached the troops' supply department. The OKW, and the Defendant Keitel as Chief of the OKW, never issued orders concerning the exploitation, administration, or confiscation of economic property in occupied territory. This is revealed in the book submitted by the Prosecution, Document 2353-PS. On Page 386 of this document, Thomas, in summarizing, correctly stated as follows:

> "The Eastern Economic Operations Staff under the Reich Marshal or State Secretary Körner was responsible for the whole economic direction of the Eastern area; the state secretaries were responsible for departmental instructions; the Economic Armament Office was responsible for the reconstruction of the economic organization; the Eastern Economic Operations Staff was responsible for the execution of all measures."

The same is shown by Document USSR-10:

> "Directives (of Reich Marshal Göring) for the unified conduct of economic management in the zone of operations and in political administrative areas to be subsequently established."

This ought to prove that the OKW and Keitel are clear of any responsibility for the consequences attendant upon carrying out the measures within the scope of the Barbarossa-Oldenburg operation.

I now come to Page 143 and following pages, where I refer to the assertion made by the French Prosecution regarding the participation of the OKW and Keitel in the cases of Oradour and Tulle.

The French Prosecution have charged the Defendant Keitel in person with the commission of war crimes and crimes against humanity. The accusation concerns in particular the execution of French civilians without a trial. In this connection the cases of Oradour and Tulle received special emphasis. They are recorded in a report made by the French Government—Document F-236. The French Prosecution stated: "Keitel's guilt in all these things is certain."

In this connection it is not my task to discuss the frightful events of Oradour and Tulle. As defense counsel for the Defendant Keitel I have to examine whether the Prosecution's assertion that the Defendant Keitel bears any guilt or responsibility for these atrocious happenings has any foundation.

You will understand that the Defendant Keitel attaches particular importance to the production of evidence to the effect that he is not responsible for these terrible occurrences, and, further, that when such things came to his knowledge he took steps to have them cleared up in order that the actual offenders might be brought to account. It is an indisputable fact that Keitel had no direct part in these crimes. Any responsibility and guilt attaching to the defendant can therefore be derived only from his official position. No orders of any kind bearing Keitel's signature have been submitted by the Prosecution, so that, whoever is guilty, Keitel is not, at any rate, among those directly responsible.

The terrible sufferings inflicted on a large number of French villages are recorded in the notes of General Bérard dated 6 July and 3 August 1944. I pointed out, when this document was submitted, that the submission of these complaints alone—that is, unaccompanied by the replies, which are also in the hands of the Prosecution—cannot convey an objective picture of the actual facts, on which to base a pronouncement on the guilt of the Defendant Keitel. As the Defendant Keitel, not being empowered to issue orders in the matter, cannot possibly be taken into consideration as the originator of the orders which led to the complaint, any responsibility and guilt on Keitel's part can therefore be based only on the fact that he did not cause the necessary steps to be taken on receiving information from the German Armistice Commission. What Keitel did or did not do can be gathered only from the reply notes and from the directives issued by the OKW to the German Armistice Commission.

Here, too, the Defendant Keitel would have been unable to provide proof to the contrary, had not the French Prosecution themselves submitted a document, F-673, which was intended to furnish proof of Keitel's individual guilt. This document was already read by the French Prosecution at the session of 31 January 1946:

"High Command of the Armed Forces; F. H. Qu., 5 March 1945; Secret.

"WFST./Qu. 2 (I) No. 01487/45 g.

"Subject: Alleged Killing of French Nationals without Trial.

"German Armistice Commission; Group Wa/Ib No. 5/45 g.

"1) German Armistice Commission; 2) Commander-in-chief West.

"Received: 17 March 1945.

"In August 1944 the French delegation of the German Armistice Commission addressed a memorandum to D. W. St. K. (German Armistice Commission) describing in detail incidents leading to the alleged shooting without justification of Frenchmen during the period of 9 to 23 June 1944. Statements made in the French note were almost entirely made in such detail that an examination by Germany was possible without any difficulty.

"On 26 September 1944 the High Command of the Armed Forces charged the German Armistice Commission with the handling of the case. Thereupon, the German Armistice Commission asked the Commander-in-Chief West to investigate the incidents and to take action with regard to the representation of facts given in the French memorandum.

"On 12 February 1945 the German Armistice Commission was informed by the Judge of Army Group B that since November 1944 the case was in the hands of Army Judge of Pz. AOK/6 (6th Armored Army Command) and that Pz. AOK/6 and 2. SS Pz. Division 'Das Reich' (2nd Armored SS Division 'Das Reich') had in the meantime separated from the Army Group.

"Handling of this matter calls for the following remarks:

"The Frenchmen, and the delegation of the Vichy Government, have made the grave charge against the German Armed Forces of numerous cases of unjustified killing of French nationals, in other words, of murder. Germany's interest demanded a reply to this charge at the earliest possible moment. Considering the length of time which has elapsed since receipt of the French memorandum, it should have been possible to take up at least some of the charges and to refute them through actual investigation, irrespective of subsequent development in military matters and the transfer of troops incidental thereto. If even a portion of the charges made had been refuted at once, the French people would have been shown that their whole subject matter is based on doubtful material; but

because nothing was undertaken by the Germans, the opponents' impression must be that we are not in a position to answer these charges.

"The manner in which this case was handled indicates that there possibly still exists a great deal of ignorance as to the importance to be attached to all reproaches against the German Armed Forces, to counteract any enemy propaganda, and to refute immediately any purported German acts of atrocity.

"The German Armistice Commission is hereby instructed to continue to devote to this matter all possible energy. It is requested to render any assistance possible, and particularly to take all steps for expediting matters within its own sphere of action. The fact that Pz. AOK/6 (6th Armored Army Command) no longer forms part of the forces of the Commander-in-Chief West is no reason to hold up the necessary investigations in order to clarify and refute the French charges.

"For information: Army General Staff (Gen. St. d. H.); Headquarters Gen./Qu.

"(signed) Keitel."

This document of the OKW, signed by Keitel, shows that:

1. On receiving the French complaint of 26 September 1944, the OKW issued orders to the German Armistice Commission to investigate and deal with the matter.

2. The German Armistice Commission thereupon instructed Commander-in-Chief West to investigate the incidents.

3. On receiving a letter from Army Group B, the OKW expressed itself as follows:

"It was in the German interest to answer these charges at the earliest possible moment.

"This case shows that there is still widespread ignorance as to the importance of combating all imputations made against the German Armed Forces and all enemy propaganda, and of refuting immediately any alleged acts of atrocity on the part of the Germans.

"The German Armistice Commission is hereby instructed to continue to pursue their investigations as energetically as possible. It is requested that every possible assistance be rendered to the commission and that all possible steps be taken to expedite matters in your own sphere of action. The fact that Pz. AOK/6 is no longer under the jurisdiction of Commander-in-Chief West is no reason for discontinuing the necessary investigation in order to clarify and refute the French charges."

It may therefore be considered as proved that in this case the Defendant Keitel, on receiving information, took energetic steps in accordance with the range of his competency as Chief of the OKW, and as far as he was in a position to do so. This eliminates the charge made by the Prosecution insofar as the Defendant Keitel is concerned. At the same time, however, the way in which the Defendant Keitel handled this case suggests that he acted in similar manner in other cases.

Mr. President, before dealing with the problem of hostages which I may discuss later, I should like to discuss the grave evidence on the Night and Fog Decree on Page 154.

War, which is frightful even under orderly international law, becomes atrocious when the last restraints are removed. Many terrible things have happened during this war and it is impossible to tell which chapter of this book of sorrows and tears is the saddest; but, in any case, one of the most lamentable chapters is that of the treatment of hostages. In international law the question of treatment of hostages is controversial. The taking of hostages is almost generally admitted. Doubtless, although taking hostages is assumed to be admissible under international law, that has as yet no bearing on their treatment. The treatment, even more than the seizure, of hostages must be subject on the one hand to the law of absolute military necessity which cannot otherwise be met, and, on the other, to the application of all possible guarantees to prevent the indiscriminate shooting of hostages as a principle. Any primitive and brutal handling of this very institution, which is doubtful under international law and is apt to affect the absolutely innocent, must be rejected.

Unfortunately, this problem which seldom arose in previous wars between civilized people, acquired considerable importance during World Wars I and II. The cases previously taken into consideration and also explained in the Army Manual 2g (H. Dv. 2g) (Document Book 1, Exhibit Number Keitel-7) resulted from military necessity of troops in operation. As happened with so many things in this war, but especially due to the change-over from theater of operations to rear area, there finally developed a broadening and degeneration in the application of a principle which originally was indisputable according to international law.

The immediate connection with military necessity was absent, that is to say, with military action; its place was taken by interests which naturally included military safeguards, particularly of lines of communications between the front zone and home.

It must be said that this fundamental change ought to have been recognized, and ought to have been taken into consideration in the handling of the existing rules governing hostages. The degeneration in the treatment of hostages was decisively influenced by the fact that civil administrative and police organizations claimed for themselves one of the extreme means of soldierly warfare and often made use of it arbitrarily, wherever they wanted to break resistance, by arresting people without concrete individual or even presumptive guilt and by treating them from the viewpoint of reprisals. Collective arrests for individual offenses come into this category.

All these cases have nothing to do with the original facts in the cases of hostages; but since the word “hostage” is used for all these cases, the Prosecution in many cases has placed on the Armed

Forces a responsibility which they should not bear.

I request the Tribunal, when judging this complex and when examining the responsibility of the Defendant Keitel, to take into consideration:

(1) The concept of hostages, the basic conditions governing the taking of hostages end their treatment had become known to all authorities in command and their offices in the Armed Forces by the Army manual regulations (H. Dv. 2g) before the war, especially before the campaign in the West. The Documents 1585-PS, submitted by the Prosecution itself (discussions of the hostage question with the Luftwaffe), and 877-PS (operation orders of the Army for "Case Yellow" and the attack in the West, dated 29 October 1939) reveal that special regulations had originally been issued for the seizure of hostages. Their application was justifiably transferred to the Army offices and later to the military commanders who were subordinate to the Army, never to the Armed Forces High Command (OKW).

(2) Nobody could be in doubt, according to existing regulations (H. Dv. 2g), as to what authority Army commanders had and as to who had to make a decision on a possible shooting of hostages. No supplementary order or supplementary regulation was ever issued by the Armed Forces High Command (OKW). The letter from Falkenhausen (Military Commander in Belgium), dated 16 September 1942 (Document 1594-PS), mentioned by the Prosecution, and the report of this military commander (1587-PS) are not addressed to Keitel, but quite correctly to his superior office, the Army High Command (OKH) Quartermaster General; Keitel received neither the letter nor the report. Whether Hitler received them in his capacity of Supreme Commander of the Army and military superior of the military commanders, Keitel does not know.

(3) The OKW was not informed of the cases in which inhabitants of the occupied territories were mistakenly and falsely described as hostages and treated without legal procedures.

(4) Whenever hostages, without being connected with the plots and terror acts against the occupying power, were held responsible for them without local or material connection, such practice is contrary to service regulations.

(5) Insofar as the OKW or the Defendant Keitel was approached by military agencies in individual cases referring to hostage problems, for example by the Military Commanders in France and Belgium, the evidence has shown that the "hostages" to be shot were to be selected from the circle of persons already sentenced to death by virtue of the law. However, so that this should not be outwardly recognized—for producing the desired deterrent effect—it was to be announced that hostages had been shot.

The French Prosecution has cited the OKW and Keitel in connection with this complex by means of Document 389-PS, which is the same as UK-25, a Führer order of 16 September 1941 drawn up by Keitel. This document, whose contents are monstrous, does not, however, have anything to do with the question of taking hostages and the treatment of hostages. The word "hostages" does not appear in the text. From the subject and from the contents it can be seen that this is an order designed to combat the resistance movement in the eastern and southeastern war theaters, and therefore is related to the basic principles of the so-called ideological war against the Soviet Union, which has been already dealt with at another place, and condemned. When the communication of 16

September 1941 was addressed to the Military Commander in France by the High Command of the Army for information purposes the latter had already decreed the so-called "Hostages Law" (Document Number 1588-PS). Accordingly no causal connection existed, as the French Prosecution has assumed, between the directives signed by Keitel and ordered by Hitler in Document 389-PS, and the hostage legislation in the West. The latter had been decreed without collaboration or consultation of the OKW. The agency to which the Military Commanders in France and in Belgium were subordinated was the High Command of the Army (OKH), and not the OKW; the agency which specialized in this matter was the Quartermaster General (in the OKH). With regard to this it must also be considered that at this period of time Hitler himself was the Commander-in-Chief of the Army, which explains the above-mentioned references to the OKW. In reality, they were not references to the OKW, but to Hitler as Supreme Commander of the Armed Forces and Commander-in-Chief of the Army, which were partially routed through Hitler's working staff (the OKW). This however establishes no competence and thereby no responsibility of the OKW and the Defendant Keitel as Chief of the OKW.

In conclusion I request permission to hand in some literature to the Tribunal demonstrating present-day opinions pertaining to international law with regard to the question of hostages for consideration in the examination of these facts in the case. I limit myself to reading the summarization of expert opinions and military practices:

> "In summarizing it must be said, concerning the question of taking hostages and the execution of hostages, that according to existing practices and probably also according to existing rules of international law, the taking of hostages in occupied territory is permissible under international law insofar as hostages are taken in order to guarantee the proper legal behavior of the enemy civilian population. According to the commentary by Waltzog, which is standard for the German conduct of warfare, it is also a formal requirement, whenever hostages are taken according to unwritten international law (common law), that such taking of hostages, the reasons therefor, and in particular the threat of their execution must be brought to the knowledge of those for whose lawful behavior the hostages are to go bail. The question as to whether it is permissible to execute hostages cannot be interpreted unequivocally. The German jurisprudents of international law, like Meurer, the Englishman, Spaight, and the Frenchmen, Sorel and Funck, consider this permissible in the extremes of emergency, and therefore not contrary to international law."

During the whole course of this Trial, no order made such a deep impression on the mind of the public as did the Night and Fog Decree. This was an order which originated during the fight waged against acts of sabotage and against the resistance movement in France. As a result of the withdrawal of troops in connection with the campaign against the Soviet Union, the number of plots aimed against the security of German troops stationed in France, and in particular the acts of sabotage aimed at the destruction of all means of communication increased daily. This necessitated

increased activity on the part of the counterintelligence offices, which in its turn led to proceedings being taken and sentences being passed by military courts against members of the resistance movement and their accomplices. These sentences were very severe. In addition to a large proportion of death sentences, sentences of imprisonment were also passed. The reports made almost daily during the situation conferences led to violent disputes in which Hitler, in accordance with his usual habit, tried to find someone on whom to put the blame; in this instance he fixed upon the far too cumbersome handling of military justice. In his spontaneous and explosive way, he ordered directives to be worked out for a rapid, effective, and lasting intimidation of the population. He declared that imprisonment could not be considered an effective means of intimidation. To Keitel's objection that it was impossible to sentence everyone to death and that military courts would, in any case, refuse to co-operate, he replied that he did not care. Offenses found sufficiently grave to necessitate the imposition of capital punishment without very lengthy court proceedings would continue to be dealt with as before—that is, by the courts—but where this was not the case, he would order the suspected persons to be brought secretly to Germany and all news of their fate to be withheld, since the publication of prison sentences in occupied territory was robbed of its intimidating effect by the prospect of the amnesty to be expected at the end of the war.

The Defendant Keitel thereupon consulted the chief of the Judge Advocate's Office of the Armed Forces and the chief of the counterintelligence office (Canaris), who is also the originator of the letter of 2 February 1942, Document UK-35, on the procedure to be followed. When repeated applications made to Hitler to refrain from this procedure, or at least not to insist upon complete secrecy, had no effect, they finally submitted a draft which we have before us in the well-known decree of 7 December 1941.

The staff of experts and the Defendant Keitel had succeeded in establishing the competency of the Reich Administration of Justice for the persons removed to Germany (see last paragraph of directives of 7 December 1941). Keitel had guaranteed this stipulation by means of the first Enactment Decree governing the directives, in which he specified (last sentence in Paragraph I, IV) that unless orders to the contrary were issued by the OKW, the case would be turned over to the civil authorities in accordance with Section 3, Paragraph 2, second sentence, of the Articles of War. The defendant believed that in this way he had at least made certain that the persons concerned would have the benefit of regular court proceedings and that in accordance with the German regulations for the

accommodation and treatment of prisoners on trial and prisoners serving a sentence, there would be no danger to life and limb. Keitel and his staff of experts reassured themselves by the fact that however cruel the suffering and suspense endured by those concerned might be, the lives of the deported persons had at least been saved.

In this connection, allusion is also made to the text of the covering letter of 12 December 1941. As the Codefendant General Jodl stated during his examination, a certain wording was regularly adopted to indicate that the signatory did not agree with the order submitted. The covering letter begins with the words: "It is the carefully considered desire of the Führer ..."

The closing sentence runs: "The attached directives ... represent the Führer's views."

Persons who received such letters knew from that wording that here was another order of the Führer which could not be evaded, and concluded that the order should be applied as leniently as possible.

The letter of 2 February 1942 originated with the counterintelligence office (Amt Ausland Abwehr), and the original which is before you must have been signed by Canaris. At that time the defendant was not in Berlin where, after promulgation of the decree of 7 December 1941, the matter was dealt with further. Keitel, at the Führer's headquarters, was not informed of the contents of the letter. In connection with the above remarks, the possibility of leniency in application, which might be deduced from the wording of the letter, resided in the fact that counterintelligence offices were directed "to insure as far as possible before making the arrest that they were in possession of sufficient evidence to justify a conviction of the offender." The competent military court had also to be approached before the arrest took place with a view to ascertaining whether the evidence was adequate.

In Germany the persons concerned were to be handed over to the Reich Administration of Justice. The correctness of the Defendant Keitel's assumption in this respect is borne out by the fact that Canaris, in view of his attitude with which the Tribunal is familiar, would never have ordered a prisoner to be handed over to the Gestapo. As already stated, the Defendant Keitel did not know of the letter of 2 February 1942.

Although the Defendant Keitel believed that he had succeeded as far as possible in safeguarding those in question, the Night and Fog Decree, as it was later called, weighed heavily on his mind. Keitel does not deny that this decree is incompatible with international law and that he knew that.

What Keitel denies, however, is that he knew—or that prior to the Nuremberg Trial he knew—that on arrival in the Reich the persons involved

were imprisoned by the Police and then transferred to concentration camps. This was contrary to the meaning and purpose of the decree. The Defendant Keitel could not know of this because in cases which did not involve proceedings by a military court, the competency of the Armed Forces only extended to turning over the persons concerned through the competent military court officials to the Police to be transferred to Germany and there turned over to the Administration of Justice. The Defendant Keitel is unable to say from his own knowledge why so many persons were brought into concentration camps and there subjected to the treatment known as "Night and Fog," as described by witnesses who have appeared here. The evidence presented to this Tribunal must lead to the conclusion that all political suspects who, as a result of political measures, were removed from the occupied territories to Germany for detention in concentration camps were without the knowledge of the military authorities designated "NN" prisoners by the Police, for according to the testimonies we have heard the majority of persons in "NN" camps had not been formally sentenced by military courts in occupied territories for transfer to Germany.

It is evident therefore that Police authorities in the occupied territories made use of this decree as a universal and unrestricted *carte blanche* for deportations, exceeding every conceivable limit and disregarding the exclusive rights exercised by the military authorities and the rules of procedure imposed upon them.

Such a state of affairs in the occupied territories without the knowledge of the Armed Forces authorities can only be explained by the fact that as a result of the appointment of Higher SS and Police leaders the military commanders of the occupied territories no longer had executive powers in Police affairs and that these Higher SS and Police leaders received their orders from the Reichsführer SS.

The Reichsführer SS and the Higher SS and Police leaders were never authorized by the OKW to apply this decree, which was intended as a police executive measure to be used only by the Armed Forces. The decree affected only those offices of the Armed Forces exercising judicial authority; and it is clear from the wording that it was restricted to these and drafted to apply to them.

The German Armistice Commission's letter of 10 August 1944 (Document 843-PS) proves that the OKW really had no knowledge of this improper application of the decree of 7 December 1941. It says there:

> "... that the basis for arrests seems to have undergone a change, since in the early stages they were only made in individual cases

of attacks on the Reich or the occupation forces; in other words, those elements were apprehended who had played an active part in definite cases"—and who were liable to punishment under those articles of the Hague Convention which refer to land warfare —"whereas at present ... numerous persons are also being deported to Germany who, on account of their anti-German sentiments, are being removed from France as a precautionary measure ..."

Paragraph 4 of that letter contains the following passage:

"The above-mentioned decree is based on the condition that the persons arrested will be made the subject of judicial proceedings. There is reason to believe that on account of the number of cases —especially those coming within the scope of precautionary measures—such proceedings are now frequently dispensed with and prisoners are no longer confined in the detention or penal institutions of the German legal authorities, but in concentration camps. In this respect, too, there has been a considerable change as compared with the original provisions of the decree ..."

The OKW's reply of 2 September 1944, which is signed by Dr. Lehmann, refers expressly to the directives of the Führer decree of 7 December 1941, the so-called Night and Fog Decree. It contains no statement to the effect that the original conditions for deportation to Germany were changed by the OKW.

This reply, however, was sent from Berlin without the knowledge of the Defendant Keitel; and the Armistice Commission's letter was obviously also sent to Berlin, where the legal department of the Armed Forces was situated. Keitel himself was at the Führer's headquarters and did not hear of the correspondence.

It must be admitted that failure to reply immediately to the German Armistice Commission's letter of 10 August 1944, with the explanation that this constituted an abuse of the decree of 7 December 1941 and the directives issued in connection with it, was a grave omission. An investigation should have been initiated at once in order to find and punish those responsible for this abuse. Insofar as the Tribunal should regard Hitler's military staff as guilty, the Defendant Keitel accepts responsibility within the scope of his general responsibility as Chief of the OKW.

THE PRESIDENT: Perhaps this will be a convenient time to take a recess.

[*A recess was taken.*]

DR. NELTE: Mr. President, the Prosecution have charged the Defendant Keitel with participating in the deportations for the purpose of obtaining forced labor. In this connection Keitel declares that his competency did not cover the procurement, recruiting, and conscription of people in the occupied territories nor did it cover allocation of the labor forces procured in this way for the armament industry. The Codefendant Sauckel confirmed this in his testimony of 27 May 1946.

Mr. President, I should like to have official notice taken of the following statements without my reading them. My colleague Dr. Servatius, according to our agreement, will explain the connection between the Armed Forces replacement and the procurement of manpower through the Plenipotentiary General for the Allocation of Labor.

The Codefendant Sauckel gave the following testimony:

"Question: You mean by that that the OKW and the Defendant Keitel had no functions whatsoever appertaining to the matter of procurement, recruiting, and conscription of labor in the occupied territories?

"Answer: He had no function whatsoever appertaining to this matter. I got in touch with Field Marshal Keitel, because the Führer frequently charged me to ask Field Marshal Keitel to transmit his orders by phone or by instructions to the army groups.

"Question: Did the OKW, and in particular Keitel as Chief of the OKW, have any function appertaining to the question of labor allocation in the homeland?

"Answer: No; because the commitment of workers took place in the economic branches for which they had been requested. They had nothing to do with the OKW."

During the cross-examination by General Alexandrov documents were presented which, according to the opinion of the Prosecution, should prove the participation of Keitel and the OKW. In this connection it must be examined whether and in what way the OKW and Keitel had participated in the sphere of duty of Defendant Sauckel as Plenipotentiary General for the Allocation of Labor (GBA). Document USSR-365, presented by the Prosecution, contains the basic provisions concerning spheres of tasks and powers of the GBA, the decree of 21 March 1942 about the appointment of Sauckel as GBA, the order of Göring as Delegate for the Four Year Plan dated 27 March 1942, the program for labor allocation, and the task and solution as conceived by Sauckel.

These documents give expression to the relationships and contacts of the GBA with many offices. These relationships and contacts vary in their nature.

The jurisdiction and the official channels in the sphere of tasks of the GBA are clear: He is the spokesman for the Four Year Plan (Order Number 3 of 27 March 1942) and he was therefore subordinate to Reich Marshal Göring and Hitler, who was identified with the Four Year Plan. The

relationships and contacts of the OKW or Keitel with the GBA and his sphere of tasks, according to the outcome of the evidence (testimony of Keitel, Sauckel, and the documents) were as follows:

The replacement system for the whole Armed Forces was under the jurisdiction of the Defendant Keitel in his capacity as Chief of Staff of the High Command of the Armed Forces (OKW). Losses at the front were reported to the OKW by each individual branch of the Armed Forces and at the same time replacements were requested.

On the basis of these requests, Keitel submitted a report to the Führer, according to which replacements had to be procured for the troops of the various branches of the Armed Forces at certain designated times by the service commands through their replacement inspectorates.

The replacement inspectorates consequently called up the recruit year group, besides those draftees who had been deferred up to that time. With the war progressing, the result was almost invariable that, for instance, the Armament Ministry (for the deferred employees of the armament industry), the Ministry for Agriculture (for the deferred employees of agriculture), the Transportation Ministry (for the deferred employees working for the railroad), et cetera, made the greatest difficulties with regard to the demands of the replacement authorities, and protested against them.

They pointed out that the tasks of the various departments would suffer dangerously if the deferred employees were removed without further ado. The competent ministers requested that before the release of deferred employees new workers should be procured to make up for those released.

Therefore, the matter was referred by way of the labor offices to the Plenipotentiary General for the Allocation of Labor (GBA), whose task it was to procure the necessary manpower for the domestic labor allocation required. The Defendant Sauckel as the GBA, who as a special deputy personally did not have at his disposal an independent organization of his own for the recruiting, procurement, and possible conscription of labor, was therefore forced to get in touch with the competent authorities in the occupied territories for the execution of his task.

(a) In the occupied territories under civil administration (Holland, Norway, East), it was the Reich Commissioner who had to assist Sauckel.

(b) In the territories under military commanders (France, Belgium and the Balkans) it was the Quartermaster General of the Army.

(c) In Italy, in the highest instance, it was the Ambassador, Rahn.

This is obvious from the decree of 27 March 1942.

Before Sauckel became active in the execution of his task in the various territories, he invariably turned to Hitler, whose subordinate he was with respect to the Four Year Plan, in order to obtain through his instructions the necessary backing by the local authorities. This was done in such a way that the order was issued to the local authorities to give Sauckel the assistance which he considered necessary for the execution of his task. The Defendant Keitel was not present at such discussions between Hitler and Sauckel, nor did he have any jurisdiction or competence in these questions. However, somebody had to inform the local authorities about Hitler's orders, and the result was that Hitler, who did not recognize any difficulties of jurisdiction, told the next best man to inform

the local authorities about Sauckel and to point out Hitler's wish to grant him all the necessary assistance.

These "next best" were Keitel, for the military administration of the occupied territories, or Dr. Lammers, for the territories under civilian administration.

Such was the contact which existed between Keitel and Sauckel in this matter. How the details of recruiting or otherwise procuring labor were carried out was not within the competence of the OKW, nor did they receive any reports on the matter. The interest of the OKW was limited to the fact that the required number of soldiers were placed at its disposal through induction by the replacement authorities. In particular, the OKW and the Defendant Keitel had nothing to do with the allocation of the labor procured by the Plenipotentiary General for the Allocation of Labor within war economy; this was solely the business of the labor offices, where firms requiring labor requested the workers deemed necessary.

(1) The name of Keitel stands at the beginning of Sauckel's activity, as submitted by the Prosecution, because Keitel was cosignatory to the Führer decree concerning the Plenipotentiary General for the Allocation of Labor (Document USSR-365). From repeated references of the Prosecution to this fact the conclusion must be drawn that apparently it sees in this cosignatory act of the Defendant Keitel the beginning of a chain of developments, at the end of which stood such frightful happenings as were presented here.

In this connection I would refer to the significance, expounded elsewhere, of the cosignature by Keitel as Chief of the OKW on such decrees of the Führer. This fact, which penally cannot be considered as determinative, does not constitute guilt for the reason that all conception of the events occurring during the further course of developments was lacking.

(2) If the Führer's decree of March 1942 provides the legal origin of the Plenipotentiary General for the Allocation of Labor (GBA), the first step in the participation of this official is also connected with the name of Keitel as head of the OKW, as the personnel replacements matters were subordinated to him and he made his requests for replacement of losses at the front to the subordinate military replacement offices. Here also the same applies as in (1), as neither an appreciable determinative effect nor criminal guilt was involved.

(3) Owing to the situation, as characterized by the shortage of manpower, there came into being a purely factual connection between the military personnel requirements and the requirements of the economic replacement of workers, without Keitel thereby coming in contact with the GBA either as regards competence or orders.

Sauckel confirmed the statement of Keitel that the OKW had nothing to do with the recruiting, levying, or any other mobilization of labor, nor with the allocation of the labor procured for German economy.

I have to refer to some documents which the French Prosecution have submitted to incriminate the OKW and Keitel on account of active participation in deportation. These are Documents 1292-PS, 3819-PS, 814-PS, and 824-PS.

The first document is a marginal note by the Chief of the Reich Chancellery, Dr. Lammers, on a conference with Hitler, at which the question of procuring labor for 1944 was discussed. The Defendant Keitel took part in this discussion. Annexed to this report is a copy of a letter from the Defendant Sauckel dated 5 January 1944, in which he sums up the results of the conference of 4 January and proposes a Führer decree. I quote the following passages:

> "5. The Führer pointed out that all German offices in occupied territories and countries within the Tripartite Agreement must become convinced of the necessity of taking in foreign labor, in order to be able to give uniform support to the Plenipotentiary General for the Allocation of Labor in carrying out the required organization, propaganda, and police measures."

I quote from the penultimate paragraph:

> "In my opinion the decree should in the first place be sent to the following offices ...
>
> "3. The Chief of the OKW, Field Marshal Keitel, for the information of the Military Commanders in France and Belgium, the Military Commander Southeast, the General accredited to the Fascist Republican Government of Italy, the chiefs of the army groups in the East."

The document therefore proves that Field Marshal Keitel took part in a conference, without, however, stating his point of view on the problem of labor procurement; and that he was to be informed of the Führer decree so that the military commanders might be informed. This confirms what the Defendant Keitel stated in the passages which I have not read as to how he came to be concerned with this question. The second and third documents refer to a conference in the Reich Chancellery on 11 July 1944, in which Field Marshal Keitel did not take part.

Now the French prosecutor has made the statement that the teletype is an order issued by Field Marshal Keitel to the military commanders to carry out the decisions of the conference of 11 July. M. Herzog has said in this connection that Keitel's order was dated 15 July 1944. A brief examination of the document, a photostat, shows it to be a teletype dated 9 July, containing an invitation from the Chief of the Reich Chancellery, Dr. Lammers, to a conference on 11 July, which invitation Keitel transmitted to the military commanders.

This was, therefore, an error. The conclusions based by the Prosecution on this document are therefore also invalid, but the document is interesting from another point of view as well. It contains the following statement:

> "The following directives will govern the attitude of military commanders or their representatives:
>
> "... I refer to my directives for the collaboration of the Armed Forces in the procurement of labor from France (OKW/West/ku (Verw. 1 u. 2 West) Nr. 05210/44 geh.)."

The Defendant Keitel requested me to call the attention of the Court to this method of expression for the following reasons: Numerous documents bearing the signature "Keitel" have been submitted here. In accordance with his position, which has already been described and which excluded all powers of command, Keitel never used the first person in communications or transmissions of orders. Apart from this document, only one other teletype was submitted by the Prosecution in which the first person is used. In consideration of the large number of documents which bear out Keitel's statement, his claim that he was transmitting an order from the Führer must be believed; and, indeed, the whole style of wording is that of a Führer order.

General Warlimont (Document 3819-PS) also expressly refers during the conference of 11 July to a "recently issued Führer order," the contents of which as reproduced by him are exactly as contained in the teletype directive bearing the signature "Keitel."

The newly-submitted Document F-824 (RF-1515) is also significant and confirms the evidence given by the Defendant Keitel. This is a letter written on 25 July 1944 by the Commander-in-Chief West, Von Rundstedt, who in the meantime had become the Chief of the Military Commanders in France and Belgium. It states that "by order of the Führer the demands of the GBA and of Speer are to be fulfilled"; further, that in the event of evacuation of the battle area measures must be taken to secure refugees for labor and finally, that reports on the measures taken must be sent to the OKW.

This reference to the Führer's order shortly after 11 July 1944 shows, as does Warlimont's statement, that no directives from Keitel or the OKW existed. It may therefore be considered proved that neither Keitel himself nor the OKW had any part in measures for the recruitment or conscription of labor. The OKW was the office responsible for transmitting the orders which Hitler as Sauckel's superior wished to forward to the military commanders; it had no competence and no legal responsibility.

Nor is this complex in line with subjects within the ministerial scope of the OKW, where at least there functioned a team of experts providing an opportunity for voicing objections.

In the sphere of labor procurement and labor commitment Keitel was in contact with Sauckel's activities at the following points:

(a) He was cosignatory of the Führer's decree of 21 March 1942 concerning the appointment of the GBA;

(b) He transmitted Hitler's orders to support the activities of the GBA by special instructions to the local military authorities in the occupied territories.

Now, the French Prosecution, at the session of 2 February 1946, made the following statement in regard to the deportation of the Jews, within the scope of the Defendant Keitel's responsibility:

> "I shall discuss the order for the deportation of the Jews later; and I shall prove that in the case of France this order was the result of joint action on the part of the military government, the diplomatic authorities, and the Security Police. This leads to the conclusion that: (1) the Chief of the High Command, *et cetera*; (2) the Reich Foreign Minister, and (3) the Chief of the Security Police and Reich Security Main Office (RSHA) must necessarily have been informed of and have agreed to this action, for it is clear that through their official functions they must have learned that such measures concerning important matters were taken, and also that the decisions were invariably made jointly by the staffs of three different administrations. These three persons are therefore responsible and guilty."

If you examine the very detailed treatment of this point of the Indictment you will find that the High Command of the Armed Forces is not mentioned and that no document is produced which originates either with the OKW or with the Defendant Keitel. It appears from the Keitel affidavit, Document Book 2, that the military commander for France, who is mentioned several times, was not subordinated to the OKW. In handling this question the Prosecution have attempted to prove that the "Army" as M. Faure says, co-operated with the Foreign Office and the Police, and is endeavoring to place responsibility for this co-operation upon the highest authorities, that is, in the case of the Army, on the OKW, and therefore on Keitel. This deduction is erroneous. In order to make that clear, I must point out that there was a military commander in France. This military commander was invested with civil and military authority and represented

the defunct state authority, so that in addition to military tasks he had police and political functions. The military commanders were appointed by the OKH and received their orders from the latter. It follows that on this question they had no direct relations with the OKW. Since the Defendant Keitel as Chief of the OKW was not superior to the OKH, there is likewise no direct relation either of subordination or seniority.

M. Faure's statement in this connection is unfortunately true. In France there existed a large number of authorities who worked along different lines, contradicted each other, and frequently encroached upon each other's spheres of competency. The OKW and the Defendant Keitel had actually nothing to do with the Jewish question in France or with the deportations to Auschwitz and other camps; they had no powers of command or control, and therefore no responsibility.

The fact that the letter K in the telegram of 13 May 1942 (Document RF-1215) was interpreted to mean Keitel is characteristic of the attitude adopted by the prosecuting authorities, all of whom assumed that the Defendant Keitel was implicated. The French Prosecutor has fortunately cleared up the error.

The Prisoner-of-War Question.

The fate of prisoners of war has always aroused considerable feeling. All civilized nations have tried to alleviate the fate of soldiers who fell into the hands of the enemy as far as was possible without prejudicing the conduct of the war. The reaching of an agreement to be adhered to even when the nations were engaged in a life and death struggle has been considered one of the most important advances of civilization. The torturing uncertainty with regard to the fate of these soldiers seemed to be ended; their humane treatment guaranteed; the dignity of the disarmed opponent assured.

Our belief in this achievement of human society has begun to waver, as in the case of so many other instances. Although the agreement was formally adhered to originally owing to the determined resistance of the general officers, we must nevertheless admit that a brutal policy oblivious of the nation's own sons and of anything but its own striving after power, has in many cases disregarded the sanctity of the Red Cross and the unwritten laws of humanity.

The treatment of the responsibility of the Defendant Keitel in the general complex of the prisoner-of-war system comprises the following separate problems:

(1) The general organization of the treatment of prisoners of war, that is, the German legislation on the prisoner-of-war system; (2) the power of command over prisoner-of-war camps, which are classified under Oflag, Stalag, and Dulag; (3) the supervision and control of this legislation and its application; (4) the individual cases which have been brought before the Court in the course of the indictment.

Since the organization of the prisoner-of-war system has been set forth as part of the presentation of evidence, I can restrict myself to stating that Keitel was, by order of Hitler and within the scope of his assignments as War Minister, in accordance with the decree of 4 February 1938 competent and to that extent responsible: (a) for the material right to issue ordinances within the entire local and pertinent sphere, restricted in part by co-operation and co-responsibility regarding the utilization of prisoner-of-war labor; (b) for the general allocation of prisoners of war arriving in Germany to the corps area commander, without having powers of command over prisoner-of-war camps and prisoners of war themselves; (c) for the general supervision of the camps in the OKW area not including those within the zone of operations, the rear Army area, or the area of the military commanders, nor the Navy and Air Force prisoner-of-war camps.

The competent office in the OKW was the "Chief of the Prisoner-of-War Organization," who was several times made personally responsible by the Prosecution. The Defendant Keitel attaches importance to the fact that the Chief of the Prisoners of War Organization was his subordinate through the Armed Forces Department. Hence the responsibility of the Defendant Keitel in this domain is self-evident, even in those cases in which he did not personally sign orders and decrees.

The basic regulations for the treatment of prisoners of war were: (1) The service regulations issued by the Chief of the OKW within the scope of normal preparations for mobilization, and laid down in a series of Army, Navy, and Air Force publications; (2) the stipulations of the Geneva Convention, to which special reference was made in the service regulations; (3) the general decrees and orders which became necessary from time to time in the course of events.

Apart from the treatment of Soviet Russian prisoners of war who were subject to regulations on an entirely different basis, to which I shall later make particular reference, the provisions of the service regulations in accordance with international law, that is the Geneva Convention, held good. The OKW exercised supervision over the strict observance of these Army service regulations through an Inspector of the Prisoners of War

Organization and, from 1943 on, through a further control agency, the Inspector General of the Prisoners of War Organization.

The representatives of the protecting powers and the International Red Cross may be considered as constituting an additional control agency, which no doubt submitted to the various governments reports on inspections and visits to the camps, in accordance with the provisions of the Geneva Convention. No such reports have been submitted here by the Prosecution; I shall come back to the charges made here by the French prosecutor. But the fact that the British and American prosecutors, for instance, have not submitted such reports may well permit the conclusion that the protecting powers did not discover any serious violations with regard to the treatment of inmates of prisoner-of-war camps.

The treatment of prisoners of war, which led to no serious complaints during the first few years of the war with the Western Powers—I except isolated cases like that of Dieppe—became more and more difficult for the OKW from year to year, because political and economic considerations gained a very strong influence in this sector. The Reichsführer SS tried to get the Prisoners of War Organization into his own hands. The resulting struggles for power caused Hitler to turn over the Prisoners of War Organization to Himmler from October 1944 on, the alleged reason being that the Armed Forces had shown itself to be too weak and allowed itself to be influenced by doubts based on international law. Another important factor was the influence exerted on Hitler, and through him on the OKW, by the labor authorities and the armament sector. This influence grew stronger as the labor shortage increased.

The Party Chancellery, the German Labor Front, and the Propaganda Ministry also played a part in this question, which was in itself purely a military one. The OKW was engaged in a constant struggle with all these agencies, most of which had more influence than the OKW.

All these circumstances must be taken into consideration in order properly to understand and evaluate the responsibility of the Defendant Keitel. As he himself had to carry out the functions "by order," and since Hitler always kept the problem of the Prisoners of War Organization under his personal control for reasons previously described, the Defendant Keitel was scarcely ever in a position to voice his own, that is, military, objections against instructions and orders.

The Treatment of French Prisoners of War.

As a result of the agreement of Montoire, the keynote to apply to relations with French prisoners of war became "collaboration." Their treatment moved in the direction indicated by this; and discussions with

Ambassador Scapini brought about a considerable improvement for them. In this connection I refer to the affidavit of Ambassador Scapini, who states among other things:

> "It is correct that General Reinecke examined the questions at hand objectively and without hostility, and that he attempted to regulate them reasonably when this depended on his authority alone. He took a different attitude when the pressure exercised on the OKW by the Labor Service—that is by the Allocation of Labor —and sometimes by the Party made itself felt."

The prisoners of war used for labor were scarcely guarded, and those employed in the country had almost complete freedom of movement. By virtue of the direct understanding with the Vichy Government there were considerable alleviations in comparison with the rules of the Geneva Convention, after repatriation under the armistice provisions had very considerably lessened the number of the original prisoners of war.

To mention just a few ...

THE PRESIDENT: Dr. Nelte, is there anything very important in these next few pages, until you get to Page 183?

DR. NELTE: It is the treatment of the French ...

THE PRESIDENT: If you would only deal with it in a very general way. I should have thought there was nothing very important until you get to Page 183 where you begin to deal with the accusation in reference to the Sagan case. You see, it is 12 o'clock now.

DR. NELTE: I believe that by 1 o'clock I shall be through. Or am I to understand your remark to mean that you are limiting my speech to a certain time? I asked you to grant me 7 hours for my speech, and my request ...

THE PRESIDENT: That is what the Tribunal's order was.

DR. NELTE: I submitted my request to the Tribunal, and believed I could assume that in this particular case my request was granted, but if that is not the case ...

THE PRESIDENT: Well, the Tribunal will give you until 12:30 on account of any interruptions which I may have made. But I again suggest to you that there is really nothing between 178 and 183 which is of any real importance.

DR. NELTE: I hope, Mr. President, that that does not mean that these statements are to be considered irrelevant. I think my subjective opinions ...

THE PRESIDENT: I said "of real importance."

DR. NELTE: (1) Release of all prisoners of war born in or before 1900; (2) release of fathers of families with numerous children and widowers with children; (3) considerable alleviation of the mail and parcel facilities; increased German support for officers' and enlisted personnel camps by establishing institutions for entertainment and physical welfare of the prisoners of war; (4) for officer candidates, facilitation of their further training in their civilian occupation and care by a French General, Didelet.

As Ambassador Scapini himself has testified, he and the members of his delegation had complete freedom of correspondence with and access to all camps and labor detachments, except for special military reasons in isolated cases. The members of the delegation were able to speak to their prisoner comrades privately, like every representative of a protecting power, and they were particularly able to make detailed inquiries about conditions with the French camp leader or the trustees, who were elected by the prisoners of war themselves. In addition to this, officers who had been selected by him personally were placed at his disposal as his assistants.

The subsequent regrettable occurrences, as presented by the French Prosecution here, resulted from the deterioration of the political and military situation. One of these occurrences was the escape of General Giraud, which Hitler, in spite of all arguments brought by the OKW, used to have measures against the French generals and officers increased in severity. The second decisive incident was the Allied invasion of Africa, which led to general unrest and to numerous attempts at escape. Finally, at the time of the last stage of the war, measures were applied which can only be explained by the—I would call it catastrophic—morale.

In examining the responsibility of the Defendant Keitel it must be considered that he did not possess any direct influence on the occurrences in the camps and workshops. His responsibility can only be determined if it is proven that he had caused a lack of necessary supervision, or that no intervention had taken place after learning of such occurrences. In this respect, however, there is no proof of guilt of the OKW.

The French Prosecution, in the charges against the Defendant Keitel, have presented a note from Ambassador Scapini to the German Ambassador, Abetz, of 4 April 1941 under a collective number, F-668. This refers to the retaining of French civilians in Germany as prisoners of war. This document states on Page 5:

> "In order to facilitate the examination of the categories to be released, I am transmitting enclosed a summarized chart. I am also enclosing a copy of the note of the German Armistice Commission Number 178/41 of 20 January 1941, which refers to the decision of the OKW to liberate all French civilians who are being treated as prisoners of war.
>
> "I hope that the execution of this decision will be expedited through this report, which I have the honor to submit to you."

I have asked the French Prosecution to pass on to me the note of the German Armistice Commission Number 178/41 of 20 January 1941, in which this decision of the OKW is mentioned. I believe that the copy of this note, which was attached to the communication of 4 April 1941

(Document F-668) should have been handed over with this document, because it was part of this document. Unfortunately this has not been done.

From the reference it can be seen that the OKW, and thereby the Defendant Keitel, held the view that things would have to be dealt with in a correct manner in accordance with the agreements with France, and that the OKW, which was the proper authority for these fundamental orders with regard to the prisoners of war, had decided to release all French civilians who were being treated as prisoners of war.

It is difficult to recognize how this document can serve as evidence of guilt of the Defendant Keitel. Rather will this document have to be regarded as symptomatic of the fact that the Defendant Keitel, when violations against existing agreements came to his knowledge, saw to it that they were stopped.

The Treatment of Soviet Russian Prisoners of War.

Hitler already regarded the prisoner-of-war problem as a personal domain of his legislation, and the more time passed, the less he regarded it from the points of view of international law and military needs, but rather from a political and economic angle. The problem in the treatment of Soviet Russian prisoners of war from the very beginning was also subject to ideological considerations which for him was the primary motive in the war against the Soviet Union. The fact that the Soviet Union was not a member of the Geneva Convention was exploited by Hitler, in order to obtain a free hand in the treatment of Soviet Russian prisoners of war.

He stated to the generals that the Soviet Union felt equally free from all stipulations which had been created by the Geneva Convention for the protection of prisoners of war. One must read the decrees of 8 September 1941 (Document Number EC-338, Exhibit Number USSR-356) in order to understand clearly Hitler's attitude. In the official document of the counterintelligence office (Amt Ausland Abwehr) of 15 September 1941, rules were laid down, which were to be observed according to international law, concerning the treatment of prisoners of war where the Geneva Convention did not apply between belligerents.

The Defendant Keitel has testified on the witness stand that he had accepted the viewpoints laid down in this document and had presented them to Hitler. The latter strictly refused to rescind the decree of 8 September 1941. He told Keitel:

> "Your doubts originate from the soldierly conception of a chivalrous war. Here we are concerned with the destruction of an ideology."

Keitel noted this passage down word for word and added to his written statement of 15 September 1941: "I therefore approve and countenance these measures."

It was a typical example of Keitel expressing his doubts and Hitler taking his final decision. Keitel stood up for these decisions and did not let his subordinate offices know that he was of a different opinion. Such was his attitude. For this also he is, within the limits of his official position, taking responsibility.

What Keitel actually thought is revealed in the excerpt submitted as Document Keitel-6, Document Book 1, from the book Employment Conditions for Eastern Workers and Soviet Russian Prisoners of War. The Codefendant Speer has testified in cross-examination that he over and over again told the Defendant Keitel that any employment of prisoners of war of any enemy country in enterprises prohibited by the Geneva Convention was out of the question. Speer further testified that Keitel several times rejected any attempt to employ prisoners of war of any western nation in actual war plants.

The defense counsel for the Defendant Speer will also deal with this question in detail.

In addition, I just want to submit certain individual cases charged against the Defendant Keitel personally by the Prosecution, that is to say, cases where, in the opinion of the Prosecution, he is supposed to have exceeded the limits of the general responsibility inherent in his position.

I should not like to omit that case which was repeatedly mentioned—and rightly so—in the course of the evidence, the case of the 50 Royal Air Force officers, the shameful case of Sagan.

It particularly affects us as Germans, because it shows the utter lack of all restraint and proportion in the orders and the character of Hitler, who did not allow himself to be influenced for an instant in his explosive decisions by any thought of the honor of the German Armed Forces.

The cross-examination of the Defendant Keitel by the representative of the British Prosecution has determined how far his name too has been implicated in these abominable facts. Although the evidence clearly establishes the fact that Keitel neither heard nor transmitted Hitler's murderous order, that he and the Armed Forces had nothing to do with the execution of this order and, finally, that he did everything in his power to prevent the escaped officers from being handed over to Himmler and did at least succeed in saving the officers who were taken back to the camp, he is painfully conscious of his guilt in not realizing at the time the terrible blow which such a measure must inflict on German military prestige throughout the world. In connection with the treatment of the Sagan case the French Prosecution confronted the Defendant Keitel with Document 1650-PS, which deals with the treatment of escaped prisoners of war.

This, Mr. President, is the so-called "Bullet Decree." Considering the lack of time, I should like to deal shortly with this case, but I must deal with it because it is one of the most significant and gravest accusations against my client; I shall only summarize.

During his cross-examination, Keitel made the following statement:

> "This Document 1650-PS emanates from a police agency and contains a reference to the OKW by the words: 'The OKW has decreed the following ...'"

Keitel says:

> "I have certainly neither signed this order of the OKW nor seen it; there is no doubt about that."

He cannot explain it; he can only assume how this order came to be issued by the Reich Security Main Office.

In his examination he mentions the various possibilities whereby such an order could have reached the office which issued it. Then he refers to another document, 1544-PS, which contains all the orders and directives concerning prisoners of war, but not this order referring to the escaped officers and noncommissioned officers.

The witness Westhoff has confirmed that the concept "Stufe III" and its meaning were unknown to him and to the office of the OKW Prisoners of War Organization. He also stated that on assuming office on 1 April 1944 he found no order of this nature, not even a file note.

The meaning of that Bullet Decree was completely obscure. I believe this obscurity has been cleared up by the evidence given by the Codefendant Kaltenbrunner, who on his part had never before spoken to the Defendant Keitel on the matter.

I pass on to Page 187, where Kaltenbrunner said:

> "I had never heard of the Bullet Decree before I assumed the office. It was an entirely new concept for me. Therefore I asked what it meant. He answered that it was a Führer order; that was all he knew. I was not satisfied with this information, and on the same day I sent a teletype message to Himmler asking for permission to look up a Führer order known as the Bullet Decree.... A few days later, Müller came to see me on Himmler's orders and submitted to me a decree which, however, did not originate with Hitler but with Himmler, and in which Himmler stated that he was transmitting to me a verbal Führer order."

From this it is safe to assume that, without consulting Keitel and without the latter's knowledge, Hitler must have given a verbal order to Himmler, as stated in Document 1650-PS which was submitted here.

Now I come to Page 190 of my final plea:

This confirms the assumption which Keitel expressed in his interrogation, although Kaltenbrunner had not previously informed him that he knew of verbal orders given by the Führer.

3) In another case also, the one dealing with the branding of Soviet prisoners, Keitel's statement in the witness box has proved to be the simple truth.

The witness Roemer has confirmed in her supplementary affidavit that the order to mark Soviet prisoners of war by branding was cancelled immediately after being issued. A further statement of the Defendant Keitel is therefore also credible, according to which this order had been issued without his knowledge, although naturally Keitel's responsibility for the acts of the party concerned is not thereby contested.

4) In this connection I refer finally to Document 744-PS dated 8 July 1943, submitted in support of the charge against Keitel. It deals with the increased iron and steel program, for the execution of which the allocation of the necessary miners from among the prisoners of war was ordered. The first two paragraphs of the document read:

> "For the extension of the iron and steel program the Führer on 7 July ordered the unqualified promotion of the necessary coal production and the employment of prisoners of war to cover the labor requirements. The Führer ordered the following measures to be taken with all possible dispatch for the ultimate purpose of assigning 300,000 additional workers to the coal mining industry."

The last paragraph reads:

> "In connection with the report to the Führer, the Chief of Prisoner of War Affairs will advise every 10 days concerning the progress of the drive. First report on 25 July 1943, reference date: 20 July 1943."

I submit this document, not because of its actual content, which will be taken up by the defense of the Defendant Speer, but because of its symptomatic evidential value for the answer of the Defendant Keitel, when he stated that Hitler was particularly interested in prisoner of war affairs and himself personally issued the principal orders and those he considered important.

5) The cases also connected with this complex such as: Terror-fliers, lynch law, Commando tasks, combat against partisans, will be dealt with by other defense counsels. The Defendant Keitel has made his statement regarding these individual facts during his interrogation and cross-examination.

For the subjective facts of the alleged crimes one element is of special importance: the knowledge of them. Not only from the point of view of guilt, but also in view of the conclusions which the Prosecution have drawn, namely, acquiescence, toleration, and omission to take any counteraction. The fact of knowledge comprises: (1) Knowledge of the facts; (2) recognition of the aim; (3) recognition of the methods; (4) conception of, or possibility of conceiving the consequences.

During the discussion of the question of how far the Defendant Keitel could possibly have drawn any conclusion as to the intention of realization by force from knowledge of the text of the National Socialist Party Program and from Hitler's book, *Mein Kampf*, I have already demonstrated why Keitel did not have this recognition of a realization by force.

Keitel denied any knowledge of the intended wars of aggression up to the time of the war against Poland, and his statement is confirmed by Grossadmiral Raeder. This comment is certainly a subjective truth inasmuch as Keitel did not seriously believe in a war with Poland, not to mention one involving intervention by France and England. This belief, held by Keitel and other high-ranking officers, was based on the fact that the military potential was insufficient, according to past experiences, to wage a war with any chance of victory, especially if it developed into a war on two fronts. This belief was strengthened by the nonaggression pact signed on 23 August 1939 with the U.S.S.R.

However, that is not the core of the problem. The speeches which Hitler delivered before the generals, beginning with the conference of 5 November 1937, at which Keitel was not present, made it increasingly clear that Hitler was determined to attain his goal by any means, that is, if peaceful negotiations did not succeed, he was prepared to fight, or at least to use the Armed Forces as an agent of pressure. There is no doubt about that. It is a debatable point whether the text of Hitler's speeches, of which no official record is available, is altogether accurately reproduced. There is, however, no doubt at all that they allow Hitler's intentions to be clearly recognized.

A distinction must be made as to whether it was possible for his hearers merely to gather that a definite plan was to be carried out, or whether they could not but recognize the existence of a general aim of aggression. If they did not recognize this, the only explanation lies in the fact that the generals on principle did not include the question of war or peace in their considerations. From their point of view this was a political question which they did not consider themselves competent to judge since, as has been stated here, they were not acquainted with the reasons for such a decision and, as the Defendant Keitel has testified, the generals were bound to have confidence in the leadership of the State to the extent of believing that the latter would only undertake war for reasons of pressing emergency. That is a consequence of the traditional principle that although the Armed Forces was an instrument of the politicians it should not itself take part in politics—a principle which Hitler adopted in its full stringency. The Court must decide whether this may be accepted as an excuse. Keitel stated on the witness stand that he recognized the orders, directives, and instructions which had such terrible consequences, and that he drew them up and signed them without allowing himself to be deflected by any consequences which they might entail.

This testimony leaves three questions undecided: (1) The question of the methods used to carry out the orders; (2) the question of the conception

of the consequences which actually followed; (3) the question of the *dolus eventualis*.

The Defendant Keitel, in his affidavit (Document Book Number 12), showed with reference to the so-called ideological orders how the SS and Police organizations influenced the conduct of the war, and how the Wehrmacht was drawn into events. The evidence has shown that on their own responsibility numerous Wehrmacht commanders failed to apply such terrible orders, or applied them in a milder form. Keitel, brought up in a certain military tradition, was unfamiliar with SS methods which made the effects of these orders so terrible, and they were therefore inconceivable to him. According to his testimony he did not learn of these effects in their full and terrible extent.

The same is true of the Führer's Night and Fog Decree which I have just discussed. If he did not allow himself to be deflected by the "possible" results when he transmitted the orders, the *dolus eventualis* cannot be affirmed in regard to the results which took place. It must be assumed rather that if he had been able to recognize the horrible effects, he would, in spite of the ban on resignations, have drawn a conclusion which would have freed him from the pangs of conscience and would not have drawn him from month to month further and further into the whirlpool of events.

This may be an hypothesis; but there are certain indications in the evidence which confirm it. The five attempts made by Keitel to leave his position, and the fact that he resolved to commit suicide, which General Jodl confirmed in his testimony, enable you to recognize the sincerity of Keitel's wish.

The fact that he did not succeed must be attributed to the circumstances which I have already presented: The unequivocal and, as Keitel says, unconditional duty of the soldier to do his duty obediently to the bitter end, true to his military oath.

This concept is false when it is exaggerated to the extent of leading to crime. It must be remembered, however, that a soldier is accustomed to measure by other standards in war. When all high-ranking officers, including Field Marshal Paulus, represent the same point of view, the honesty of their convictions cannot be denied, although it may not be understood.

In reply to the questions asked so often during this Trial—why he did not revolt against Hitler or refuse to obey his orders—the Defendant Keitel stated that he did not consider these questions even for a moment. His words and behavior show him to be unconditionally a soldier.

Did he incriminate himself by such conduct? In general terms: May or must a general commit high treason if he realizes that by carrying out an order or measure he will be violating international law or the laws of humanity?

The solution of this problem depends on whether the preliminary question is answered as to who is the "authority" which "permits or orders" such criminal high treason. This question seems to me important because the source of the authority must be established—the authority which can permit or order the general to commit high treason; which can "bind and absolve."

Since the existing state power, which in this case was represented by the Chief of State, who was identical with the Supreme Commander of the Armed Forces, can certainly not be this authority, we merely have to decide whether an authority exists above or beyond the authority of the particular state, which could "bind or absolve." Since the struggle for power between Pope and Emperor, which dominated the Middle Ages, has no longer any significance in regard to constitutional law, such a power can only be impersonal and moral. The German poet Schiller expresses the supreme commandment of the unwritten eternal law in the words: "The tyrant's power yet one limit hath ..." That is only one of the manifold poetical revelations in world literature, which express the deep yearning for freedom felt by all peoples.

If there is an unwritten law which indisputably expresses the conviction of all men, it is this, that with due consideration for the necessity of maintaining order in the state, there is a limit to the restriction of freedom. Where this is transgressed, a state of war will arise between the national order and the international power of world conscience.

It is important to state that no such statute of international law has hitherto existed. This is understandable, since freedom is a relative conception, and the different conceptions existing in various states and the anxiety of all states for their sovereignty are irreconcilable with recognition of an international authority. The authority which "binds and absolves"—which absolves us of guilt before God and the people—is the universal conscience which becomes alive in every individual. He must act accordingly. The Defendant Keitel did not hear the warning voice of the universal conscience. The principles of his soldierly life were so deeply rooted, and governed his thoughts and actions so exclusively, that he was deaf to all considerations which might deflect him from the path of obedience and faithfulness, as he understood them. This is the really tragic role played by the Defendant Keitel in this most terrible drama of all times.

THE PRESIDENT: Dr. Kauffmann—yes, go on, Dr. Kauffmann.

DR. KURT KAUFFMANN (Counsel for Defendant Kaltenbrunner): Mr. President, may I first say that I have a few changes which I will announce when I come to them. I shall take about two hours altogether, Mr. President.

May it please the Tribunal: The present Trial is world history—world history full of revolutionary tensions. The spirits conjured up by mankind are stronger than the cries of the tortured peoples for justice and peace. Since man was deified and God humiliated, chaos, as an inevitable consequence and punishment, has afflicted mankind with wars, revolutions, famine, and despair. Whatever the guilt borne by my country, it is now enduring—and permanently enduring—the greatest penance ever endured by any people.

The means adopted to restore longed-for prosperity are wrong, because they are second-rate. And none of my listeners can question the truth of my assertion that the present Trial was not begun at the end of a period of wrong, and in order to end it, but is surrounded by the surging waves of a furious torrent bearing on its surface the hopeless wreckage of a civilization guarded through the centuries, and in the demoniacal depths of which lurk those who hate the true God, who are the enemies of the Christian religion, and therefore opposed to all forms of justice.

The European commonwealth of peoples, of which my country, if only because of its geographical position, was the very heart, is seriously afflicted. It suffers from the spirit of negation and humiliation of human dignity. Rousseau would have cursed his own maxims had he lived to see the radical refutation of his theories in this twentieth century. The peoples proclaimed the "liberty" of the great revolution, but in the course of a mere 150 years they have in the name of that same liberty created a monster of bondage, cruel slavery, and ungodliness, which contrived to elude earthly justice, but did not escape the living God.

This Tribunal, conscious of its task and its mission, will some day have to submit to the searching eye of history. I do not doubt that the judges selected are striving to serve justice as they see it. But is not this task indeed impossible of solution? The American chief prosecutor stated that in his country important trials seldom begin until one or two years have elapsed. I do not need to elucidate the profound core of truth contained in this practice. Could human beings, torn between love and hate, justice and revenge, conduct a trial immediately after the greatest catastrophe humanity has ever known—and constantly harassed by the statutory demands for rapid and time-saving proceedings—in such a way as to earn the thanks of mankind when the waters of this second deluge have withdrawn into their old bed?

Would it not have been better to allow for that very lapse of time between crime and atonement with regard to the present proceedings?

Justice can be administered only when the Court possesses that inner liberty and independence which owes allegiance only to conscience and to God himself. Such a sacred activity had largely been forgotten in my country, above all, by the governing class of the nation; Hitler had prostituted the law. But this Tribunal intends to prove to the world that the welfare of the peoples is based on law alone. And no conception could arouse more joy and hope within the heart of people of good will than that of unselfish justice.

I am not criticizing the provisions of the Charter; but I do ask whether any justice has ever been, or ever could be, found on earth if might submitted to reason so far as to grant its enemies regular trial, but could not see fit to crown this tribute to reason by appointing a genuinely international tribunal; for even though 19 nations have approved of the legal basis of the Charter it is far more difficult to administer the laws laid down.

The American chief prosecutor has emphatically declared that he did not propose to hold the entire German nation guilty; but the records of this Tribunal, which history will some day scrutinize attentively, nevertheless contain many things which, to us Germans, appear to be false and, therefore, painful. Unfortunately they also contain numerous explicit questions on the part of the French Prosecution as to the extent to which, for instance, certain Crimes against Humanity committed both inside and outside Germany were known to the German people. Indeed, the French Prosecution have asked explicitly: "Could these atrocities remain, on the whole, unknown to the entire German nation, or were they aware of them?" These and similar questions are not conducive to the solution of such a difficult and tragic problem with even the slightest approach to the truth. Insofar as evil, which always grows and manifests itself organically, reigns supreme in a nation, every individual who has reached the age of reason will bear some guilt for his country's disasters. Yet even this guilt, which is on the metaphysical plane, could never become the collective guilt of a nation unless every individual member of this nation has incurred a separate guilt. But who would be entitled to establish the existence of such a guilt without examining thousands of individual circumstances?

The problem, however, becomes even more difficult if one should try—and this is the final aim—to establish the so-called national guilt for any past crimes against peace, humanity, and so forth, committed on the part of the omnipotent State, no matter through what agencies. One must bear in mind

most carefully the condition of the Reich before 1933. This has been done sufficiently here and I shall not discuss it.

Hitler claimed for himself alone such far-reaching concepts as the powerful German diligence, austerity, family affection, willingness to make sacrifices, aristocracy of labor, and a hundred more. Millions believed in this; millions of others did not. The best of them did not lose hope of being able to avert the tragedy which they foresaw. They flung themselves into the stream of events, assembled the good, and fought, visibly or invisibly, against the evil. Can the man in the street be blamed for not immediately refusing to believe in Hitler, considering the latter's ability to pass as a seeker after the truth, and the fact that he constantly raised the palm of peace for the benefit of the peace lovers? Who knows whether he himself was not convinced at the outset that he could strengthen the Reich without going to war? After the assumption of power large sectors of the German people probably felt themselves to be at unison with many other peoples on earth. Therefore, it is not astonishing that gradually, and with the approval or tolerance of other countries, Hitler acquired the nimbus of a man unique in his century. Only a German who lived in Germany during the past few years and did not view Germany through a telescope from abroad, is competent to report on the historical facts of an almost impenetrable method of secrecy, the psychosis of fear, and the actual impossibility of changing the regime, and thus to comply with Ranke's demand of historians to establish "how it was."

Ought the artisans, peasants, merchants, or housewives categorically to have asked Hitler or Himmler for a change? I would be quite willing to let the Prosecution answer this, as I am of the opinion that there are living in my country no fewer idealistic and heroic people than in any other country.

It will never be possible to ascertain how large a number of Germans knew and approved of concentration camps, their terror and such like. Only if one could establish knowledge and approval in the soul of every individual German, considering general and particular conditions prevailing in the Germany of the last 12 years, which it is not now the moment to discuss, these, and only these, could be considered guilty.

Therefore I do not think it just to put, to a larger or smaller extent, the principle of collective guilt in the place of individual responsibility, as it is held valid in all civilized nations; it was unfortunately similarly applied by the National Socialist regime to a whole people, and almost led to its complete extermination. May there be no repetition of Article 231 of the Treaty of Versailles, that portentous document of the twentieth century.

Let me say a few words about that secrecy. This Trial has shown clearly that the State itself managed to suppress such facts as would lower its prestige and betray its real intentions. Even the men indicted here, who have

been termed conspirators, have been the victims of that carefully devised system of secrecy, or most of them at least.

A special place in that system of secrecy is reserved to the plan—ordered by Hitler and executed by Himmler, Eichmann, and a circle of the initiated—for the biological destruction of the Jewish people, the ghastly aim of which was for years concealed by the term "final solution"—a term not immediately self-explicable. The problem of the Jewish question ...

THE PRESIDENT: Dr. Kauffmann, it seems to the Tribunal a very long preamble to the defense of the Defendant Kaltenbrunner, who has not been named at all yet in what you have said. Is it not time that you came to the case of the defendant whom you represent? We are not trying a charge against the German people. We are trying the charges against the defendant. That is all we are trying.

DR. KAUFFMANN: Mr. President, in the next few sentences I would have concluded that; but I ask you to appreciate that the important word "humanity" forms the core of my case. I believe that I am the only defense counsel who intends to go more deeply into that subject; and I request permission to make these few statements. I shall come to the case of Kaltenbrunner very soon.

THE PRESIDENT: On Page 8 you have a headline which is, "The Development of the History of the Intellectual Pursuit in Europe." That seems rather far from the matters which the Tribunal have got to consider.

DR. KAUFFMANN: Mr. President, may I remind you that this question was discussed by the Prosecution, and especially by M. de Menthon. I do not believe that I can carry out my task if I take these tremendous crimes only as facts. Some German must have an opportunity of giving a short description of the development—and it is very short. At the end of a few pages I return to the case of Kaltenbrunner; and my plea will in any case be the shortest one presented here.

THE PRESIDENT: Dr. Kauffmann, the Tribunal proposes, as far as it can, to decide the cases which it has got to decide in accordance with law and not with the sort of very general, very vague and misty philosophical doctrine with which you appear to be dealing in the first 12 pages of your speech, and, therefore, they would very much prefer that you should not read these passages. If you insist upon doing so, there it is; but the Tribunal, as I say, do not think that they are relevant to the case of the Defendant Kaltenbrunner. They would much prefer that you would begin at Page 13, where you really come to the defendant's case.

DR. KAUFFMANN: Mr. President, it is, of course, extremely difficult for me to present a plea which is already very much condensed, and now to disrupt it even more. It is really difficult. I hope that the Tribunal will appreciate that.

THE PRESIDENT: Well, Dr. Kauffmann; there has been nothing condensed in what you have read up to the present. It has been all of the most general type.

DR. KAUFFMANN: In that case may I at least read a few sentences below the headline with regard to the defense? It starts ...

THE PRESIDENT: Can you not summarize the general nature of what you wish to say before you come to the Defendant Kaltenbrunner?

DR. KAUFFMANN: Yes, I shall try. I shall read only a few sentences, for the sake of better understanding, from the short chapter dealing with the task of the Defense. I say there that the defense has been established by the Charter and ask how in the face of such excesses a defense can still identify its task. I then go on to say:

In this Trial, error and truth are mysteriously mixed, probably more so than ever before in any great trial. To try to find the truth raises the counsel for the defense to the dignity of an assistant of the Court. Not only does it entitle the Defense to doubt the credibility of the witnesses but also that of the documents, in particular of the Government reports. It entitles the counsel for the defense to state that such reports, although they may be admitted by the Charter in evidence, can only be accepted under protest, because none of the defendants, defendants' counsel, or neutral observers could have any influence on the way in which they originated.

These testimonies were certainly made within the framework of the law, but also within the framework of power.

The people, or a large part of the people, in their aspirations toward peace and happiness elevated the representative of a heretical doctrine to the position of their Führer, and this Führer abused the faith of his followers so that the people, no longer possessing the strength to offer a timely and open resistance, were engulfed in the gigantic abyss of the annihilation of their entire racial, political, spiritual, and economic existence. All of this is tragic in the truest sense of the word. Had the individual man in the street, the mother at home, and her sons and daughters, been asked to choose between peace or war, they would never voluntarily have chosen war. The unsatisfactory element in this Trial is the absence of the man ...

THE PRESIDENT: Are you reading now from some part of your document?

DR. KAUFFMANN: I am reading a few sentences, Mr. President. This is at Page 7 of the German text.

THE PRESIDENT: Can you not summarize the argument you are presenting?

DR. KAUFFMANN: Mr. President, I would appreciate it if I could be told once more whether the Tribunal does not wish me to throw any light at all on the ideological background in the interests of an understanding of these crimes against humanity and peace. If the Tribunal states that it does not desire me to make any such statements, then of course I shall follow the wishes of the Tribunal. But such a phenomenon ...

THE PRESIDENT: Well, Dr. Kauffmann, if you think it is necessary for you to read this passage you can do so; but, as I have indicated to you, the Tribunal think it is very remote indeed from any question which they have to consider.

DR. KAUFFMANN: Thank you very much. Then I shall skip a few pages and shall present only 4 or 5 pages, which will be very condensed, on the subject which I have just mentioned. That begins with the heading, "Outline of Intellectual Development."

The rise of Hitler, and his downfall, unique in its extent and consequences, may be viewed from any side—from the perspective of the historical spectacle afforded by the course of German history, the course of economic forces supposedly governed by irresistible laws, the sociological divisions of the nation, the peculiarities of race and character of the German people, or the mistakes committed in the political sphere by the other brothers and sisters of the family of nations living in the same house.

All this certainly completes the picture of the analysis, but it brings to light only partial knowledge and partial truth. The deepest, and the fatal, reason for the Hitler phenomenon lies in the metaphysical domain.

In the final analysis the second World War was unavoidable. Anyone, however, who regards the world and its phenomena only from the standpoint of economics may arrive at the conclusion that both world wars could have been avoided if the resources of the earth had been reasonably distributed. Economic factors alone can never change the face of the earth; therefore, the change in the German people's standard of living, and the demoralization of the national soul by the Treaty of Versailles, inflation, serious unemployment, and other factors formed a foundation for the advent of Hitler. It is possible that catastrophes may be delayed for years or decades, if certain external living conditions make the relationship between different nations and peoples ostensibly happier. At no time, however, can a

misguided idea be destroyed through economic measures alone, and deprived of its power to injure the individual and the nation, unless mankind can overcome such ideas and replace them by better ones.

"In the way in which the name of God is used by the peoples and nations," says the famous Donoso Cortes, "lies the solution of the most-feared problems." Here we have the explanation of the providential mission of the separate nations and races, the great changes in history, the rise and fall of empires, conquests and wars, the different characteristics of the nations, and even their changing fortunes.

M. de Menthon has tried to make an intellectual analysis of National Socialism. He speaks of the "sin against the spirit," and sees the deeper causes of this system in estrangement from Christianity.

I wish to add a few words. Hitler was not a meteor, the fall of which was incalculable and unpredictable. He was the exponent of an ideology which was in the last resort atheistic and materialistic.

There is every reason to reflect that, although National Socialism is eliminated through the complete defeat of Germany, and although the world is now free of the German threat as proclaimed by all nations, there has been no decisive change for the better. No peace has filled our hearts, no rest has come to any corner of human existence. It is true that the collapse of a powerful state with all its physical and spiritual forces will be felt for a long time, just as the sea is stirred into motion when a rock is thrown into calm water. But something much more is happening at present in Europe and in the world—something quite different from the mere ebbing away of such a wave of events.

To retain the comparison, the waves rise anew from the deep; they are fed by mysterious forces which constantly emerge anew. They are those restless ideas, aiming at the disaster of nations, of which I spoke. And nothing can disprove the truth of my words when I maintain that victor and vanquished alike live in the midst of a crisis which disturbs the conscience of individuals and of nations like a monstrous and apparently inevitable nightmare, and which causes us to look beyond the punishment of guilty individuals toward those ways and means which can spare humanity an even greater catastrophe.

In the *Confessions of a Revolutionary* the clear-sighted socialist Proudhon wrote the memorable words: "Every great political problem contains within itself a theological one." He coined this phrase one hundred years ago. It is most timely that the American General MacArthur, at the signing of the Japanese capitulation, is said to have repeated the essential meaning of these profound words by saying: "If we do not create a better

and greater system, death will be at our door. The problem is, fundamentally speaking, a religious one."

History is made by changes in religious values. They constitute the strongest motive power in the cultural progress of humanity. Permit me to show you in a few bold outlines the intellectual and historical forebears of National Socialism.

THE PRESIDENT: Dr. Kauffmann, it is 1 o'clock, and I must say that the last two pages which you have read seem to me to have absolutely nothing to do with Crimes against Humanity, or with any case with which we have got to deal. I suggest to you that the next pages, headed "Renaissance, Subjectivism, French Revolution, Liberalism, National Socialism" are equally completely unlikely to have any influence at all upon the minds of the Tribunal.

The Tribunal will now adjourn.

[*The Tribunal recessed until 1400 hours.*]

DR. KAUFFMANN: Mr. President, I am going to leave out the section headed "Renaissance, Subjectivism, French Revolution, Liberalism, National Socialism." The gist of those remarks can be summarized in two or three sentences and I merely beg you to take cognizance of them. I have pointed out that the course of all these disastrous movements is the spiritual attitude which Jacques Maritain described as anthropocentric humanism.

The clamor of the great struggle between the Middle Ages and modern times has filled the last centuries until this very hour. Its victims include since 1914, for the first time, the women; since 1939, for the first time, the children. The apocalyptic battle is in full progress for the 2,000-year-old meaning of the Occident, the motherland of the material as well as the personal culture of humanity. Its object is the steadily growing anthropocentric humanism which makes the human being the measure of all things, the secularization of religion. It announces itself in the Renaissance, becomes completely clear in the enlightenment of the seventeenth and eighteenth centuries and in the intellectual movements of the nineteenth century. However good the reasons and motives were, the way over the Renaissance and the schism of the sixteenth century proved to be wrong. At its very end stands, for the present, the ideology of National Socialism. In the heads of its most extreme champions National Socialism culminated in the radical demand for the fight unto death against Christianity. Therefore this ideology was in its last analysis a philosophy without love; and because of this, it extinguished the light of reason in those addicted to it. To that extent the head himself of this heresy proclaimed a truth.

Goethe expressed this problem by saying: "World history is the struggle between belief and unbelief." And I maintain, based on the declarations of the greatest minds in all camps of religious faiths, that the history of the nations, just as previously it was a struggle for the natural divine right of man, for 2,000 years has been a striving of human intellect for the Christian soul in man. These precepts are in fact such that one may not doubt them even for a short moment without the mind beginning to reel and vacillate helplessly between truth and error. It is cause for reflection that Hitler rejected the wonderful characteristic of a truly kind man that we call humility because he had decided in favor of Machiavelli and Nietzsche and that now the fate of the Germans is humiliation without precedent. One may also reflect upon the fact that Hitler denied the virtues of pity and mercy and that now millions of women and children wail with sorrow, while the law, seemingly extinct, again assumes enormous proportions, whereas Hitler surrounded himself with lawlessness. The real and last root of these calamitous modern movements which threaten state, society, and Christianity, is rootless liberalism in the meaning of that anthropocentric humanism, as Maritain calls it. Man and his autonomous reason become the criterion of everything. The question should impose itself upon every thinking person, why from the turn of the nineteenth century until the present such catastrophes of humanity have occurred which in history, I should almost like to say, find their parallel only in cosmic catastrophes. Two world wars, with revolutions in their wake, are never an accidental development but rather a predetermined evolution of the human race founded on some intellectual-religious error.

Coming from England, rationalism found its way to France and on arrival there changed its physiognomy. I believe that the paganism of the ancient times knew hardly anything like Voltaire. No sooner had rationalism become the state religion of France, when the French Revolution burst into flames and wrote the idea of the emancipated human rights with flaming letters into the sky of Europe. In spite of the proclamation of the human rights, mankind waded through blood as if this was the way to freedom. Sarcastic and scornful laughter at everything sacred went through the raving masses. When the French Revolution had put into practice its state founded on reason, the new institutions did not prove quite so reasonable. The "brotherhood" was, compared with the glamorous promises of the rationalists, a bitterly disappointing caricature. Soon these ideas also conquered Germany; for Germany looked with amazement and awe toward France in this century. The manifestation of religion became a religion of pure humanity. The last step was taken by Kant; he drew the last consequence from the principle of free science. Hegel abolished the personal God and replaced him by the absolute reason. The state is everything; it is God, its will is God's will, in all relations to it there are no natural rights; it creates religion, law, and morality by virtue of its own sovereignty. Hitler once more placed the sovereignty in the people as a race. Hegel's disciples destroyed the last vestige of the moral fundaments of society, state, and law. Only the genius of a man like Leibnitz, in whom the intellect of the German nation seemed to concentrate for the last time, stood alone in a sea of the rational ideology. Voltaire ridiculed the German thinker, not only in France, but also in Berlin. The last stages are connected with the names of Nietzsche and others. Nietzsche has, as no other modern man, reasoned modern ideologies out to the end and proclaimed with dauntless logic whither the present development would inevitably lead. Thus the road leads from Caligula and Julian Apostate through many a genius, glorified by the whole world but truly destructive in their effects, directly to Hitler.

Ancient paganism or modern paganism, which of them is worse? As Donoso Cortes so wisely puts it, there will be no more hope for a society which has exchanged the stern cult of Christian quest of truth for the idolatry of reason. After the sophisms come the revolutions, and behind the sophist walk the executioners.

When Hitler, returning from the first World War, decided, as he said, to become a politician, he declared that he had found the powers which could free Germany with its national and social elements from its misery. But fundamentally his ideology was only another step along the well-worn road to complete autonomy of so-called natural common sense, to which he so often referred. Naturally he had his teachers. The apotheosis of his own people traces back to Fichte, the ideal of the master-man to Nietzsche, the relativity of morals and right to Machiavelli, the cult of race to Darwin. We have witnessed their practical effect; for this road leads straight into the concentration camps, to the destruction of other races, to the persecution of Christians. But the outside enemies of National Socialism succumbed to the same ominous idea of "natural common sense" by killing with their bombs millions of noncombatant women and children and destroying so many dwellings in German villages and cities. The victor, even in a defensive war, must not try to excuse these events with "military necessities" in the meaning of the Charter. The cultural values of this very city in which this Tribunal is sitting, or of Dresden, Frankfurt, and many other cities, were the cultural property of the entire Occident. All this, and the terrible misery of the flood of refugees from the East, and the fate of

the prisoners of war, is part of the theme of the intellectual and cultural analysis of National Socialism.

In the midst of this whole spiritual situation stands the figure of the Defendant Dr. Kaltenbrunner. The fatherland was already bleeding from a thousand wounds dealt at its sensitive soul and its gigantic power. Is this man guilty? He has denied his guilt and yet admitted it. Let us see what the truth is.

As I have already emphasized, up to the year 1943 Kaltenbrunner was, by comparison with the other defendants at this Trial, hardly known in Germany; at any rate, he had hardly any associations with either the German public or the high officials of the regime. In those days, when the military, economic, and political fate of the German people was already swinging with great velocity toward the abyss, hate and abhorrence of the executive powers were at their peak, the more so as the paralyzing sensation of the hopelessness of any resistance against the terror of the regime began to disappear, for people had by then finally turned away from the legend of invincibility preached by propaganda. Up to that point Kaltenbrunner had led a retired life and, in spite of the Austrian Anschluss, his record was clear of offenses against international law. I should like to say here that he was an Austrian—I might almost say, a bona fide Austrian. Suddenly, so to speak, and not on account of any special aptitude, much less through any efforts of his own, he was drawn into the net of the greatest accomplices of the greatest murderer. Not of his own free will; on the contrary, he repeatedly attempted to resist and to have himself transferred to the fighting front.

I can well understand that I might be told that I should, in view of the sea of blood and tears, refrain from illuminating the physiognomy of this man's soul and character. But deep in my heart—and I beg you not to misunderstand me—while exercising my profession as counsel, even of such a man, I am moved by the universal thesis of the great Augustine, which is hardly intelligible to the present generation: "Hate error, but love man." Love? Indeed, insofar as it should pervade justice; because justice without this virtue becomes simple revenge, which the Prosecution explicitly disavows. Therefore, for the sake of justice, I must show you that Kaltenbrunner is not the type of man repeatedly described by the Prosecution, namely, the "little Himmler," his "confidant," the "second Heydrich."

I do not believe that he is the cold-hearted being which the witness Gisevius described in such unfavorable terms, although only from hearsay. The Defendant Jodl has testified before you that Kaltenbrunner was not among those of Hitler's confidants who always gathered around him after

the daily situation conferences in the Führer's headquarters. The witness Dr. Mildner, on the basis of direct observation, made the following statement, which was not shaken by the Prosecution:

> "From my own observation I can confirm this: I know the Defendant Kaltenbrunner personally. His private life was irreproachable. In my opinion he was promoted from Higher SS and Police Leader to Chief of the Security Police and of the SD because Himmler, after the death of his principal rival Heydrich in June 1942, did not want any man near him or under him who might have endangered his own position. The Defendant Kaltenbrunner was no doubt the least dangerous man for Himmler. Kaltenbrunner had no ambition to bring his influence to bear through special deeds and ultimately to push Himmler aside. He was not hungry for power. It is wrong to call him the 'little Himmler.'"

The witnesses Von Eberstein, Wanneck, and Dr. Hoettl have expressed themselves in a similar manner.

And yet this man took over the Reich Security Main Office; indeed, he took it over to the fullest extent, despite his agreement with Himmler. I know that today this man is suffering a great deal in thinking of the catastrophe that has overtaken his people and from the uneasiness of his conscience; nothing is more understandable than that Dr. Kaltenbrunner, knowingly, can no longer face the fact that he actually was in charge of an office under the burden of which the very stones would have cried out if that had been possible. The personality and character of this man must be judged differently from the way the Prosecution has judged it.

For the psychologist the question arises how a man, with, let us say, a normal citizen's virtues, could take under his control an office which became the very symbol of human enslavement in the twentieth century, as far as Germany is concerned. Yet there may have been two reasons for taking over this office, nevertheless. One is based on the fact that Dr. Kaltenbrunner, although closely connected with the political and cultural interests of his Austrian homeland, supported National Socialism in its larger sense. For before he turned into the side path with its secrets, he marched with thousands and hundreds of thousands of other Germans, who desired nothing else than delivery from the unstable conditions prevailing at that time, on that wide road into which the eyes of the entire world had insight. Therefore, for example, he was without a doubt a disciple of anti-Semitism, however, only in the sense of the necessity of putting an end to the flooding

of the German race with alien elements; but he condemned just as emphatically the mad crime of the physical annihilation of the Jewish race, as Dr. Hoettl definitely assures us.

Certainly Kaltenbrunner also admired Hitler's personality as long as it did not, little by little, give expression to its absolutely misanthropic and therefore un-German nature. Also, he approved in principle, as he himself admitted during his interrogation, of measures which implied more or less severe compulsion, for example, the organization of labor training camps. For this reason no sensible person will want to question the fact that he deemed the establishment of concentration camps fundamentally quite proper, at least as a provisional measure during the war, as had been the case for a long time beyond the German borders. *Sine ira et studio*.

The establishment of concentration camps, or whatever one wishes to call those places at the mention of which the listener involuntarily is reminded of the words of Dante, is unfortunately not unknown in many states. History knows of their existence in South Africa some decades ago, in Russia, England, and America during this war, for the admission, among others, of persons who for reasons of conscience do not want to serve with arms. In Bavaria, in the land in which the Tribunal at present sits, this sort of camp is also known; also known is the so-called "automatic arrest" category for certain groups of Germans. Under the heading "Political Principles," in Point B-5 of the text of the mutual declaration of the three leading statesmen on the Potsdam Conference of 17 July 1945, the statement is contained that, among others, all persons who are a threat to the occupation or its aims shall be arrested or interned.

The apparent necessity for camps of this sort is thereby recognized. I myself detest those institutions of human slavery; but I state openly that these institutions also lie on the road which, when followed to the end, can and does bring suffering to persons holding different views to those desired by the state. By this the crimes against humanity in the German concentration camps are not in the least to be minimized.

As far as Kaltenbrunner is concerned, this man, in view of his character and attitude as apparent since 1943, according to my conviction and as can be affirmed by many witnesses, is basically a National Socialist leader who noted only with repugnance the general trend of the continually growing wave of terror and enslavement in Germany. For this reason I deem it important to point to the statement of the witness Eigruber to the effect that the claim of the Prosecution that Kaltenbrunner established Mauthausen is wrong.

The second reason lies in the subject of the two conversations with Himmler, about which Kaltenbrunner testified. According to that Kaltenbrunner was prepared to take over the offices of the Domestic and Foreign Intelligence Service in the Reich Security Main Office with the promise of Himmler that he would be allowed to expand this service into a central agency, with the aim of absorbing the Political Intelligence Service and joining it with the hitherto military one of Admiral Canaris. No doubt it is true, as the witnesses Wanneck, Dr. Hoettl, Dr. Mildner, and Ohlendorf, and also the defendant himself have testified, that Himmler, with Kaltenbrunner's wish in mind, after the murder of Heydrich, intervened in the executive realm so that nothing of any importance took place in any executive field in Germany without Himmler having the final word and thus issuing the decisive order.

The witness Wanneck confirmed the subject of those two conversations of Kaltenbrunner with Himmler in the following words, which I shall quote because of their importance:

> "When material problems arose Kaltenbrunner frequently remarked that he had come to an understanding with Himmler to work rather in the field of the Foreign Political Intelligence Service and that Himmler himself wanted to exert more influence in executive functions. To my knowledge Himmler agreed to these adjustments all the more since he believed that he could depend on Kaltenbrunner's political instinct in foreign affairs, as was apparent from various remarks made by Himmler."

Various witnesses have testified that Kaltenbrunner, predominantly and from inner conviction, did dedicate himself to the Domestic and Foreign Intelligence Service and more and more approached the influence on domestic and foreign politics he was hoping for. I call attention again to Wanneck and Dr. Hoettl, and then also to the Defendants Jodl, Seyss-Inquart, and Fritzsche. Dr. Hoettl testified:

> "In my opinion Kaltenbrunner never was completely master of the large Reich Security Main Office and, from lack of interest in police and executive problems, occupied himself far more with the Intelligence Service and with exerting influence on politics as a whole. This he considered his real domain."

From the testimony by General Jodl I stress the following sentences:

> "Before Kaltenbrunner took over the Intelligence Service from Canaris he already sent to me, from time to time, very good

> reports from the southeastern territory, through which I first noticed his experience in the Intelligence Service ... I had the impression that this man knew his business; I now received constant reports from Kaltenbrunner, just as earlier from Canaris; not only the actual reports from agents, but from time to time he sent to me, I might almost say, a political survey on the basis of his individual reports from agents. I noticed these condensed reports on the entire political situation abroad especially, because they revealed, with a frankness and sobriety never possible under Canaris, the seriousness of our entire military position."

The results therefore, which I must deduce from the evidence, are as follows: Kaltenbrunner, on the basis of the separation of the Intelligence Service from the executive police function in the Reich Security Main Office as desired by him, actually held a position, the main interest of which was the Intelligence Service and its continuous development. I should add that this Intelligence Service covered more than Europe; it went from the North Cape to Crete and Africa, from Stalingrad and Leningrad to the Pyrenees. Kaltenbrunner was the most zealous of all those in Germany who wished to feel the pulse of the enemy nations.

That was the lifework of this man as he himself wished it to be for the duration of the war. Personally he lived in modest circumstances, and it is the truth when I say that he leaves the stage of political life just as poor as when he first entered it. The witness Wanneck once quoted a statement by Kaltenbrunner which is characteristic of him: That he, Kaltenbrunner, would retire completely from office after the war and return to the land as a farmer.

Only with deep regret will the spectator see that under the pressure of political and military events this man did not observe the limitations desired by himself. His obedience to Hitler, and therefore also Himmler, submitted to the apparent necessity, in the years 1943-45, of guaranteeing the stability of conditions inside Germany through police compulsion. Thereby he became involved in guilt; for it is clear that he might count on a milder judgment on his guilt before the conscience of the world only if he could produce evidence that he actually effected a sharp separation from the unholy Amt IV of the Secret Police, if he had in no way participated in the ideas and methods, which I believe, eventually led to the institution of this whole Trial. I cannot deny that he did not undertake this separation. Nothing is clearly proved in this direction; even his own testimony speaks against him. Thus his statement at the beginning of his examination before the Tribunal may be explained, which I should like to define as the thesis of his guilt:

"Question: 'You realize that a very special accusation has been brought against you. The Prosecution accuses you of Crimes against Peace as well as of your role of an intellectual principal or of a participant in committing Crimes against Humanity and against the rules of war. Finally the Prosecution has connected your name with the terrorism of the Gestapo and with the cruelties in the concentration camps. I now ask you: Do you assume responsibility for these points of accusation as they are outlined and familiar to you?'"

And Kaltenbrunner answers:

"First of all I should like to state to the Court that I am fully aware of the serious nature of the accusations brought against me. I know that the hatred of the world is directed against me, since I am the only one here to answer to the world and to the Court, because a Himmler, a Müller, a Pohl are no longer alive ... I want to state at the very beginning that I assume responsibility for every wrong which from the time of my appointment as Chief of the Reich Security Main Office was committed within the jurisdiction of that office as far as it occurred under my actual command, and I thus knew or should have known of these occurrences."

Thus the duty of the Defense is automatically delineated by asking the questions:

(1) What did Kaltenbrunner do, good and evil, after his appointment as Chief of the Reich Security Main Office on 1 February 1943?

(2) To what extent is the statement justified that in the essential points he did not have sufficient knowledge of all the Crimes against Humanity and against the rules of war?

(3) In how far can his guilt be established from the viewpoint that he should have known about the serious crimes against international law in which Amt IV of the Reich Security Main Office (Secret State Police) was directly or indirectly involved?

What has Kaltenbrunner done? In this connection I am passing over the accusation brought against him by the Prosecution for his participation in the events surrounding the occupation of Austria and Czechoslovakia, for no matter with what energy he followed his goal of seeing his Austrian homeland incorporated into the German Reich and used the SS forces under his command for the realization of this end, this aim cannot have been a criminal one according to the world's conscience. Just as little could one reach a verdict of criminal guilt because of the forcible means employed at

that time to accomplish the annexation of Austria, which was the outcome of history and desired by millions. Kaltenbrunner was still much too insignificant a man for that. Economic distress—Anschluss movement—National Socialism: That was the path followed by the majority of the Austrian people, not the National Socialist ideology; for Hitler himself was, from the standpoint of Austrianism, a spiritual and political renegade. Yet the Austrian Anschluss movement was a people's movement before National Socialism had reached any importance in Germany. Austria wanted to protect herself against the Versailles and St. Germain ruling, which forbade the Anschluss, by holding a plebiscite in each province. After 90 percent had voted in Tyrol and Salzburg, the victorious powers threatened to discontinue the shipment of food supplies. Hitler's seizure of power paralyzed the desire for Anschluss among those not sympathizing with the Party, but the distress in Austria became still more acute and isolated the Dollfuss-Schuschnigg regime. Incorporation into the economic sphere of Greater Germany, where the removal of mass unemployment seemed to be the source of hope, appeared to the greatly distressed Austrian people as the only way out. The wave of enthusiasm which on 12 and 13 March 1938 went through all Austria was real. To try to deny this today would be to falsify history. The Anschluss, not the Dollfuss-Schuschnigg Government, was based on democracy.

Just as little can one, I believe, according to the reasons mentioned above, reach a verdict of guilt for Kaltenbrunner because of his alleged activity in the question of Czechoslovakia. In my opinion, the question of guilt and expiation arises only for the time after 1 February 1943. The indignation of the German people over one of the most infamous terroristic measures, the imposition of protective custody, had already become immense before this date. Is it correct to say that Kaltenbrunner himself, of whom many orders for protective custody bearing his signature are in evidence before the Court, inwardly abhorred this type of suppression of human liberties?

May I refer to just a few sentences from his interrogations:

"Question: 'Did you know that protective custody was at all permissible and was used frequently?'

"Answer: 'As I have stated, I discussed the idea of "protective custody" with Himmler already in 1942. But I believe that already before this time I had corresponded quite extensively on this subject with him, as well as once also with Thierack. I consider protective custody as applied in Germany only in a smaller

number of cases to be a necessity of state, or better, a measure such as is justified by war. For the rest I often voiced my opinion, well founded in legal history, against this conception and against the application of protective custody in principle. I had several discussions about it with Himmler and with Hitler also. I publicly took my stand against it at a meeting of public prosecutors, I think in 1944, because I have always been of the opinion that a man's freedom is one of his highest possessions and only the lawful sentence of a regular court of justice founded on the Constitution may limit or take away this freedom.'"

Here the same man expresses the right principles, the observance of which would have spared the German people and the world untold suffering, and the nonobservance of which constitutes the guilt of this man who in spite of his right views, suited his actions to the so-called necessity of state. He thereby, against his own will and knowledge, became subject to the principle of hatred, which sooner or later will always shake or shatter the foundations of the strongest state. "Right is what benefits the people," Hitler had proclaimed. I well know that Kaltenbrunner today deeply regrets having adhered too long to that false maxim without putting up sufficient resistance ...

Although the Prosecution has not been able to produce even one single original signature of Kaltenbrunner in connection with orders for protective custody, and I do not think it incredible when Kaltenbrunner deposes that he himself never put into effect such an order for protective custody by his signature, nevertheless, in view of the tragic results due to so many of these orders, I do not need to say even one word as to whether he is entirely blameless or is much less to blame because these orders had perhaps been signed without his knowledge; although of course the question arises immediately how this was possible in an office however large. Be that as it may; in affairs of such depth and such tragic outcome one's feelings are inclined to make hardly any distinction between knowledge and ignorance due to negligence, because one wants to hold everyone occupying a post in an office responsible for what happens there. This recognition is also the meaning of Kaltenbrunner's statement, cited above, regarding his fundamental responsibility. Where the happiness and fate of living men are involved, it is impossible to retreat under the pretext of ignorance in order to avoid punishment; at best mitigation of sentence can be asked for. The defendant knows this too. Orders for protective custody were the ominous harbingers of the concentration camp. And I am not revealing a secret when I say that the responsibility for issuing orders for protective custody includes

the beginning of responsibility for the fate of those held in the concentration camps. I could never admit that Dr. Kaltenbrunner may have known of the excesses suffered by the thousands who languished in the camps; for, as soon as the gates of the concentration camps were closed, there began the exclusive influence of that other office, the frequently mentioned Central Office for Economy and Administration. Instead of referring to many statements of witnesses regarding this point, I refer only to the one of the witness Dr. Hoettl who, when asked about subordination in rank replied:

> "The concentration camps were exclusively under the command of the SS Central Office for Economy and Administration, hence not under the Reich Security Main Office, and therefore not under Kaltenbrunner. In this sphere he had no authority of command and no competency."

Other witnesses have said that of necessity Kaltenbrunner should have had knowledge of the sad conditions in the concentration camps, but there is no doubt that the commandants of the concentration camps themselves deliberately concealed criminal excesses of the guards even from their superiors. It is furthermore a fact that the conditions found by the Allies upon their arrival were almost exclusively the results of the catastrophic military and economic situation during the last weeks of the war, which the world mistakenly identified with general conditions in former times as well. The above statement is fully verified by the statements of the camp commandant of Auschwitz, Hoess, who because of his later activity in the Concentration Camp Department of the Central Office for Economy and Administration, had an accurate over-all picture. Hoess has no ulterior motive whatsoever to give false testimony. A person like him, who sent millions of men to their deaths, no longer comes under the authority of human judges and considerations. Hoess stated:

> "The so-called ill-treatment and tortures in the concentration camps were not, as assumed, a policy. They were rather excesses of individual leaders, subleaders, and men who laid violent hands upon the inmates."

These people themselves were, according to the statement of Hoess, taken to task for that. I believe I need not go into any more details of how, according to various witnesses, visitors to concentration camps were impressed and surprised by the good condition, cleanliness, and order in the camps; and therefore no suspicion was aroused as to special sufferings of the inmates. But it would be in the worst taste if I contested the fact that a chief of the Intelligence Service, if only on the basis of foreign news of atrocities,

should not have felt a responsibility, in the interest of humanity, to clear up any doubts arising in that sphere.

The lack of knowledge seems to be confirmed by the statement of Dr. Meyer of the International Red Cross, since the permission to allow the International Red Cross to visit the Jewish Camp at Theresienstadt and to allow food and medical supplies to be sent in, coming from Kaltenbrunner, seems to be proof of the bad conditions in the camps during the last months of the war; nobody, however, would allow neutral or foreign observers to have insight into the camps if it had been known that crimes against humanity were, so to speak, scheduled daily in the camps, as is asserted by the Prosecution.

In no case, therefore, do I come to the conclusion that Kaltenbrunner had full knowledge of the so-called "conditions" in the concentration camps, yet I do conclude that it was his duty to investigate the fate of those who were imprisoned. Kaltenbrunner might have found out then that a considerable number of the inmates were sent to the camps because they were criminals and that a much smaller portion was there because of their political or ideological viewpoints or because of their race but that he would then have found out about those primitive offenses against humanity, about those excesses and all the distress of these people—that I contest, in agreement with Kaltenbrunner.

The way to arrive at the truth was immensely complicated in Germany, and even the Chief of the Reich Security Main Office found nearly insurmountable obstacles in the hierarchy of jurisdiction and authority of other offices and persons. The alleviation of the sad lot of the internees was, after 1943, a problem which could have been solved only through the dissolution of such camps. A Germany of the last 12 years without any concentration camps would, however, have been a utopia. On the whole, Kaltenbrunner was but a small cog in this machinery.

Earlier I spoke about the orders for protective custody and of their effect. Dr. Kaltenbrunner has affirmed the necessity for work education camps, owing to—as stated by him during his examination—the conditions then prevailing in the Reich, to the shortcomings of the labor market, and to other reasons. And if I am not mistaken, no convincing proof was submitted of ill-treatment and cruelties in such camps. The reason may well lie in the fact that these camps were in some respects only related to, but not on equal footing with, concentration camps.

With all available means of evidence, Kaltenbrunner has opposed the accusation of having confirmed orders of execution with his signature. The witnesses Hoess and Zutter stated that they saw such orders in isolated

cases. The Prosecution, however, does not seem to me to have proved that any such orders were issued without judicial sentence or without reasons justifying death, with the exception of a particularly serious case reported from hearsay by the witness Zutter, adjutant of the camp commandant of Mauthausen. According to him, a teletype signed by Kaltenbrunner is said to have authorized the execution of parachutists in the spring of 1945. An original signature by Kaltenbrunner is entirely lacking. I add that Kaltenbrunner has contested having any knowledge or information about this matter. I think I may safely claim that he did not sign any such orders concerning life and death, because he was not authorized to do so. Dr. Hoettl as a witness stated:

> "No, Kaltenbrunner did not issue such orders and could not, in my opinion, give such orders"—for killing Jews—"on his own initiative."

And Wanneck explicitly asserted the following:

> "It is known to me that Himmler personally decided over life and death and other punishment of inmates of concentration camps."

Thus the exclusive authority of Himmler in this sad sphere may be considered proved. I am not seriously disposed to deny the guilt of Kaltenbrunner completely on this point. If such orders were carried out against members of foreign powers, for example, based on the so-called "Commando Order" of Hitler of 18 October 1942, then there arises the question of the responsibility of that person whose signature was affixed to these orders, because misuse of his name by subordinates was possible. It is certain that Kaltenbrunner never exerted the least influence in originating the "Commando Order." It can, however, hardly be doubted that this decree constituted a violation of international law. The development of the second World War into a total war inevitably created an abundance of new stratagems. Insofar as genuine soldiers were employed in their execution, even a motive of bitterness, humanly quite understandable—and I am now speaking about the conduct of the Commando troops concerned in violation of the laws of warfare and other things—could not justify the order. Fortunately but very few people fell victims to this order of Hitler, as the Defendant Jodl has testified.

Perhaps one might ask me whether it is my duty, or whether I am permitted, to reiterate such points of incrimination as I have just done, since this seems to be the task of the Prosecution. To this I reply: If the Defense is so liberal as to admit the negative side of a personality, it surely is apt to be heard more readily when it approaches the Tribunal with the request to

appraise the positive side in its full significance. However, is there a positive side at all in the case before us? I believe that I may answer that question in the affirmative. I already pointed out several facts which are connected with the time of the assumption of office by Kaltenbrunner. During his short 2 years of activity this man has made himself a bearer of decidedly fortunate and humane ideas. I wish to remind you of his attitude toward the lynch order of Hitler with respect to enemy aviators who were shot down. The witness, General of the Air Force Koller, described the decent conduct of Kaltenbrunner, which led to a total sabotage of this order. After first describing the contents of Hitler's order and Hitler's threat, pronounced during the situation conference at that time, namely, that any saboteur of this order should himself be shot, Koller goes on to repeat the statements of Kaltenbrunner. Permit me to quote a few sentences of the deposition of Koller. Koller says that Kaltenbrunner said:

> "The tasks of the SD are always given a wrong interpretation. Such matters are not the concern of the SD. Moreover, no German soldier will do what the Führer commands. He does not kill prisoners; and if a few fanatic partisans of Herr Bormann try to do so, the German soldier will interfere ... Furthermore, I myself, too, will do nothing in this matter ..."

Koller and Kaltenbrunner, therefore, were fully agreed on that matter. This positive action of Kaltenbrunner, important for the judgment of the actual nature of his personality, does not stand alone. Dr. Hoettl confirmed the fact that, in questions of the future fate of Germany, Kaltenbrunner went, if not beyond, at least up to the borderline of high treason. This witness, for example, confirms that Kaltenbrunner in March 1944 caused Hitler to moderate the plans concerning the Hungarian question and succeeded in preventing the entry of Romanian units into Hungary, that with his support also the planned Hungarian National Socialist Government was not set up for a long time.

Dr. Hoettl then says literally:

> "Since 1943 I told Kaltenbrunner that Germany must attempt to end the war by a peace at any price. I informed him of my connections with an American authority in Lisbon. I also informed him that I had taken up new contacts with an American authority abroad by way of the Austrian resistance movement. He declared that he was prepared to go to Switzerland with me and there to take up personally negotiations with the American representative, in order to prevent further useless bloodshed."

The depositions of the witness Dr. Neubacher run along the same lines. But over and beyond that, this witness testified to a significant humane deed of Kaltenbrunner. Upon being questioned whether Kaltenbrunner had assisted the witness in moderating, as much as possible, the terror policies in Serbia, Dr. Neubacher answered; and I quote:

> "Yes, in this field I owe much to the assistance of Kaltenbrunner. The German Police agencies in Serbia knew from me and from Kaltenbrunner that in his capacity as Chief of the Foreign Intelligence Service he uncompromisingly supported my policies in the southeastern territory. Thereby I succeeded in exerting influence on the police offices. Kaltenbrunner's assistance was of value in my efforts to abolish the then prevailing system of collective responsibility and reprisals with the aid of intelligence officers."

I further mention the relief work of the Geneva Red Cross, which is due to the initiative of Kaltenbrunner. The activity of the defendant with respect to this was portrayed by the witnesses Professor Burckhardt, Dr. Bachmann, and Dr. Meyer. As a consequence many thousands were able to exchange their captivity for liberty.

I should like to draw your attention to a few words stated by the Defendant Seyss-Inquart on two points. He mentioned that Kaltenbrunner advocated the complete autonomy of the Polish state as well as the reintroduction of the independence of both Christian Churches, and I might add that Dr. Hoettl testified that Kaltenbrunner defended his activity very energetically and met with most bitter resistance by Bormann. Kaltenbrunner tried to realize his humane intentions not only in this field. Therefore, it seems to me to be of significance also to point out his efforts to make the Austrian Gauleiter understand that any resistance against the troops of the Western powers would be senseless and that in view of this, irresponsible orders for resistance were not to be issued. This was confirmed by the witness Wanneck. The Prosecution held Kaltenbrunner responsible for the evacuation and planned destruction of certain concentration camps. I believe this evidence may not only be considered as inconclusive, but that the contrary has in fact been proved. Upon the question, addressed to Dr. Hoettl, whether Kaltenbrunner had instructed the commandant of the concentration camp Mauthausen to surrender the camp to the advancing troops, Dr. Hoettl answered:

> "It is correct that Kaltenbrunner issued such an order. He dictated it in my presence for transmission to the camp commandant."

As a supplement Kaltenbrunner, during his personal examination, declared very logically: If the camp of Mauthausen, filled with criminals, could not be evacuated by his orders, an order to evacuate Dachau would have been devoid of any basis by reason of its—compared with Mauthausen—harmless inmates. According to the testimony of Freiherr Von Eberstein, the destruction of the concentration camp Dachau with its two secondary camps was the goal of the then Gauleiter of Munich, Giesler.

Finally the witness Wanneck confirmed the fact that such an order of Kaltenbrunner had not become known to him; that, however, due to his position with Kaltenbrunner, he would have known if such an order had been issued by the latter or even the issuance of such an order considered. Who actually issued these orders can no longer be established with certainty. The witness Hoess, in his examination, mentioned an order of evacuation by Himmler, as well as one directly by Hitler.

In this connection it seems appropriate to me to refer to Kaltenbrunner's participation in the sad case of Sagan as charged by the Prosecution. With reference to Kaltenbrunner's statement, confirmed by the examination of the witness Wielen, it appears to me to be a proven fact that this matter came to Kaltenbrunner's attention for the first time only several weeks later, after the conclusion of this tragedy.

It also appears doubtful to me whether the so-called Einsatzgruppen, introduced on the basis of Hitler's "Commissar Order" of 1941, were still in existence and functioning after the appointment of Kaltenbrunner. Some facts speak for it, others against it. Kaltenbrunner denied the existence of these groups during his term as Chief of the Reich Security Main Office. I do not want to lose myself in details, but I should like to draw the attention of the Tribunal to these doubts. The same applies, for example, to the so-called "Bullet Decree." Document 1650-PS confirms that it was not Kaltenbrunner but Müller, the infamous Chief of Amt IV, who issued the instructions involved, while Document 3844-PS mentions personal signatures of the defendant. It appears to me that the first document deserves preference. May I finally draw your attention to those documents which are of less value as evidence because they are based upon indirect observation. I believe that the Tribunal possesses sufficient experience in evaluating evidence so that I need not argue this any further.

I have thus far openly conceded the negative, so that I may be the more justified in emphasizing the positive in Kaltenbrunner's personality. How far, however, shall I be justified in stating that Kaltenbrunner had actually insufficient knowledge of many War Crimes and Crimes against Humanity which were committed with some kind of participation of Amt IV in the

course of the last 2 years of the war? Would such a defense offer the prospect of essentially exculpating the Chief of the Reich Security Main Office?

Dr. Kaltenbrunner admitted during his examination that it was only very late, in some cases as late as 1944 or 1945, that he obtained knowledge of orders, instructions, and directives, despite the fact that they originated much earlier—in some instances several years before he took office. And here I add—and I wish to emphasize this particularly at this point—that these orders, which are contrary to international ethics and humanity, all go back to a time during which Dr. Kaltenbrunner was still in Austria.

I will not at this moment try to prove in detail all these statements of Kaltenbrunner's. The Prosecution is interested exclusively in whether such orders, decrees, directives, and so forth, were also executed during the period of time in which the defendant was in office as Chief of the Reich Security Main Office. It is also often very difficult for a defense counsel to follow a defendant along the secret channels of his knowledge or his ignorance. Perhaps the defense counsel also sometimes lacks the necessary distance for a free and just judgment, in view of the hecatombs of victims spread out across a whole continent, and he is unfair to his client. Thus he leaves the nature of the defendant's character to the later judgment of history, for even the defense counsel is not infallible when it comes to drawing a picture of the soul of his own client.

During his examination before the Tribunal Kaltenbrunner once explained the difficult position he was in when he took over his office on 1 February 1943, and I hope that nobody will misjudge this situation. The Reich was still fighting, and even in 1943 was still dangerous for any adversary colliding with it. But it was already a fight for a goal obviously remote and out of reach. Whoever tries to hold back the spokes of the wheels on a vehicle rolling into an abyss at top speed will perish all too easily. Coupled with these conditions, from which there was no way of escaping, there was an uncreative officiousness, caused by nervous insecurity, in all areas of private and public life. Kaltenbrunner said with regard to this situation:

> "I beg you to put yourself into my situation. I came to Berlin in the beginning of February 1943. I began my work in May 1943, except for a few complimentary calls. In the fourth year of the war the orders and decrees of the Reich also in the execution sector had piled up by the thousands on the tables and in the filing cabinets of the civil service. It was quite impossible for a human being to read through all that, even in the course of a year. Even if

I had felt it to be my duty, I could never possibly have made myself acquainted with all these orders."

In connection with this I remind you respectfully that, according to the evidence given by the witness Dr. Hoettl and others, the Reich Security Main Office in Berlin had 3,000 employees of all categories when Kaltenbrunner was in office and that according to the statement of the same witness Kaltenbrunner never controlled this office completely.

Nobody will be able to deny that the question is justified whether it was not Kaltenbrunner's duty to have himself informed in the shortest possible time at least about the most essential proceedings in all the departments of the Reich Security Main Office and whether he would not then very soon have obtained knowledge of, for example, Himmler's and Eichmann's anti-Jewish operation and many other serious terrorist measures. I may remind you that Kaltenbrunner declared repeatedly and emphatically, in answering my questions before this Tribunal, that he protested regularly every time he heard of such occurrences, addressing himself to Himmler and even to Hitler, but that he had but little success, and this only after a long while. The defendant, for example, traces back the cessation of the extermination of Jews, by an order of Hitler in October 1944, to his personal initiative. However difficult it may be to judge whether the power and influence of a single person would have been sufficient to bring about the suspension of a program of the extermination of a race, already in its final phase, I believe I may say without being open to correction that many tens of thousands of Jews owe it to this man that they escaped the hell of Auschwitz and can still see the light of the sun. From the statements of Dr. Bachmann and Dr. Meyer of the International Red Cross it appears that Kaltenbrunner asked the International Red Cross to organize relief shipments to a large Jewish nonpolitical camp at Unskirchen near Wels.

Wanneck has characterized Kaltenbrunner's attitude toward the question of Himmler's Jewish policy as follows. He says:

"In the daily haste of our joint labors and discussions on foreign policy, we no longer dwelt upon the problem of Jewish policy. At the time Kaltenbrunner came into office this question was already so far advanced that Kaltenbrunner could not have had any more influence on it. If Kaltenbrunner expressed himself at all on the subject, it was to the effect that mistakes had been made here that could never be made good."

This witness then finally confirmed the fact that this operation was conducted independently through a direct channel of command from

Himmler to Eichmann and said that the position of Eichmann, which already had been a dominating one when Heydrich was still alive, had increased steadily, so that eventually he had acted completely independently in the entire Jewish sphere.

And here I add that, according to the statement of Hoess, the only man left alive who is familiar with this question, it is established that only about 200 or 300 people knew of that dreadful order of Himmler's which was given during a conference which lasted for 10 or 15 minutes, on the basis of which more than four million people were exterminated. And I add that a large nation of 80 million had learned little or probably nothing about these things which happened in the Southeast of the Reich during the war. Professor Burckhardt states that Kaltenbrunner, when discussing the Jewish question, declared:

> "It is the greatest nonsense; all the Jews should be released, that is my personal opinion."

But in spite of all this, the fundamental question is raised for the problem of guilt: May a high official and the director of an influential office, whose subordinates in a far-reaching hierarchy continually commit crimes against humanity and against the rules of international law, assume such an office at all or remain in such an office, although he condemns these crimes? Or is it perhaps a different case if this man has the intention of doing all that is humanly possible to break the chain of crimes and thereby finally to become a benefactor of humanity? The last question is generally to be answered in the affirmative. It is to be appraised solely from the standpoint of the highest ethical principles.

My further thought in this connection is the following: He who invokes such a philanthropic intention is free of guilt if from the first day of his taking over such an office he refuses to take any active part in the actual commitment of the crime, and, beyond this, avails himself of every conceivable possibility, even seeks it out, to achieve the elimination of evil orders and their execution through his never-ending resistance and every form of human cunning.

The defendant himself has also sensed and clearly recognized all these things. On account of the importance of the question I should like to refer to his interrogation:

> "Question: 'I ask you whether there was a possibility that you might have brought about a change after having gradually learned the conditions in the Secret State Police and in the concentration camps, *et cetera*. If this possibility existed, will you then say that

an alleviation, that is, an improvement, was brought about in the conditions in these fields due to your remaining in office?'"

Kaltenbrunner says:

"I repeatedly applied for service at the front. But the most burning question which I had to decide for myself was whether the conditions would be thereby improved, alleviated, or changed. Or was it my duty to do everything possible in this position to change all the conditions that have been so severely criticized here? Since my repeated demands to be sent to the front were refused, all I could do was to make a personal attempt to change a system, the ideological and legal foundations of which I could no longer change, as has been illustrated by all the orders presented here from the period before I was in office; I could only try to moderate these methods in order to help eliminate them for good.

"Question: 'And so, did you consider it consistent with your conscience to remain in spite of this?'

"Answer: 'In view of the possibility of constantly using my influence on Hitler, Himmler, and other people, I could not in my opinion reconcile it with my conscience to give up this position. I considered it my duty to take a personal stand against injustice.'"

As you see, the defendant refers to his conscience and you have to decide whether this conscience, taking into consideration duty toward one's own country but also toward the community of mankind, has failed or not. The duty which I have just mentioned, to resist the orders of evil, exists in itself for every human being, regardless of his position. This duty is expressly affirmed by Kaltenbrunner also. He who holds a state office must in the first place be able to prove that he contributed toward abolishing the gigantic injustice which occurred in Europe as soon as he learned of it, if he does not want to become guilty. Has Dr. Kaltenbrunner presented sufficient proofs? The answer to this question I leave to your judgment. But one thing I should like to express as my opinion: This man was no conspirator; rather was he exclusively a person acting under orders and under compulsion. Himmler's order was, despite all previous agreement, for him to take over the Reich Security Main Office. Is it right that an order should change the fundamental aspect of the problem? This question is of the highest importance. According to the Charter of this Tribunal one cannot plead higher orders for the purposes of avoiding punishment. The reasons given for this by the American chief prosecutor proceeded from the presumed

knowledge of the crimes or their background in the minds of the higher leaders which, therefore, precluded them from pleading the existence of orders. Like a red thread the fact runs through this Trial that hardly one high official, in whatever position of public life he may have been, was put into office without the order of the highest representative of official authority; for in the last 3 years of the war the already clearly discernible inevitable destiny of the Reich meant for the holder of a high office the renunciation of that part of life which many people say makes life worth living. For the duration of the war, orders tied the office holder to his position. Also there is no doubt that he who refused to obey an order, especially in the last years of the war, risked his own death, and possibly the extinction of his family.

From whatever side we approach the problem of orders in Germany after 1933, the invocation of the above-mentioned state of duress ought not to be denied to a defendant, because that principle of duress which exists in the German criminal code, as no doubt it does in the criminal codes of all civilized nations, is based on that freedom of the individual being which is necessary for the affirmation of any guilt.

If the perpetrator is no longer free to act, because another person deprives him of this liberty through direct immediate danger to his life, then, on principle, he is not guilty. I do not want at this instant to examine whether in the German world of reality of the last years such a direct immediate danger for one's own life always existed; but an encroachment upon the freedom of the man receiving orders did exist to a smaller or larger extent without any doubt. It seems certain to me that Himmler would have interpreted a refusal of Kaltenbrunner to take over the direction of the Reich Security Main Office as sabotage and would, as a necessary conclusion, have eliminated him.

Hitler, according to the revelations at this Trial, was one of the greatest lawbreakers that world history has ever known. Many even admit it to be a duty to kill such a monster, so as to guarantee to millions of human beings the right of freedom and life. At this Trial the most varied points of view with regard to the "Putsch," especially the killing of the tyrant, have been proffered by witnesses and defendants. I cannot recognize the duty, but the right is certainly not contestable. If the oppression of human freedom occurs by means of a clearly unjust order based on misanthropy, the scales in the now ensuing conflict between obedience and freedom of conscience will be weighted on the side of the latter. Even the so-called oath of allegiance could not justify a different point of view because, as everybody feels, the obligation to allegiance presupposes duties of both partners, so that he who treads under foot the obligation to respect human conscience in the person of

his subordinates loses at the same moment the right to expect obedience. The tortured conscience is freed and breaks the ties which the oath had created. Perhaps some people will not agree with my point of view on this problem and will point out the necessity of orderliness in the community, and the salutary effects of obedience in the very interest of this orderly state, or they will point to the wisdom of those in command and at the impossibility of understanding and evaluating all such orders as well as the person in command does; they will point to patriotism and other aspects. And though all that may be correct, there yet remains an absolute obligation to resist an order the purport of which, clearly recognizable to a subordinate, amounts to the materialization of evil and obviously violates the healthy sentiments which aim at humanity and peace among people and individuals. The phrase "in a life-and-death struggle of a nation there can be no legality" is an untrue thesis not thought out to the end, no matter who expresses it. Even immediate danger to the life of the person receiving the order could not induce me to change my conviction. Dr. Kaltenbrunner would not deny that he who stands at the head of an office of great importance to the community is obliged to sacrifice his life under the above-mentioned conditions.

Whereas even direct and imminent danger to his own life and that of his family cannot excuse him, it does diminish his guilt, and Kaltenbrunner only means to point to this moral and legal evaluation of his position. Thus he emphasizes a fact, historically proven, which was one of the deeper reasons for the collapse of the Reich; for no living man can bring to a community liberty, peace, and welfare, who himself bears his chains reluctantly and has lost that freedom which is the decisive characteristic of all human beings.

I believe Kaltenbrunner would like to be reborn, and I know that he would fight for that freedom with his life's blood. Kaltenbrunner is guilty; but he is less guilty than he appears in the eyes of the Prosecution. As the last representative of an ominous power of the darkest and most anguish-laden period of the Reich's history he will await your judgment, and yet he was a man whom one could not meet without a feeling of tragedy.

THE PRESIDENT: The Tribunal will adjourn now.

[*A recess was taken*.]

THE PRESIDENT: Yes, Dr. Thoma.

DR. ALFRED THOMA (Counsel for the Defendant Rosenberg): May it please the Tribunal, Mr. President, the documentary film which was shown

in this room and which was to illustrate the "Rise and Fall of National Socialism," begins with a speech delivered by Rosenberg concerning the development of the Party up to the assumption of power. He also describes the Munich insurrection and says that on the morning of 9 November 1923 he saw police cars with machine-guns assembling in the Ludwigstrasse in Munich and he knew what the march to the Feldherrnhalle implied. Nevertheless he marched in the first lines. Today also, my client takes the same position in face of the Indictment formulated by the prosecutors of the United Nations. He does not want to be pictured as though nobody paid any attention to his books, his speeches, and his publications. Even today he does not want to appear as a person other than what he was once before, a fighter for Germany's strong position in the world, namely, a German Reich in which national freedom should be linked to social justice.

Rosenberg is a German, born in the Baltic provinces, who learned to speak Russian as a young boy, passed his examination in Moscow after the Technical College in Riga moved to Moscow during the first World War, took an interest in Russian literature and art, had Russian friends, and was puzzled by the fact that the Russian nation, defined by Dostoievsky as "the nation with God in its heart," was overcome by the spirit of materialistic Marxism. He considered it inconceivable and unjust that the right of self-determination had indeed often been promised but never voluntarily granted to many nations of Eastern Europe which had been conquered by Czarism even in the nineteenth century.

Rosenberg became convinced that the Bolshevik revolution was not directed against certain temporary political phenomena only but against the whole national tradition, against the religious faith, against the old rural foundations of the Eastern European nations, and generally against the idea of personal property. At the end of 1918 he came to Germany and saw the danger of a Bolshevistic revolution in Germany too; he saw the whole spiritual and material civilization of the Occident endangered and believed to have found his lifework in the struggle against this danger as a follower of Hitler.

It was a political struggle against fanatical and well-organized opponents who had at their disposal international resources and international backing and who acted according to the principle: "Strike the Fascists wherever you can." But as little as one can deduce from that slogan that the Soviets entertained intentions of military aggression against Fascist Italy, just as little can one say that the struggle of the National Socialists against Bolshevism meant a preparation for a war of aggression against the U.S.S.R.

To the Defendant Rosenberg a military conflict with the Soviet Union, especially a war of aggression against the latter, seemed as likely or as unlikely as to any German or foreign politician who had read the book *Mein Kampf*. It is not correct to maintain that he was initiated in any way into plans of aggression against the Soviet Union; on the contrary, he publicly advocated proper relations with Moscow (Document Rosenberg-7b, Page 147). Rosenberg never spoke in favor of military intervention against the Soviet Union. However, he did fear the entry of the Red Army into the border states and then into Germany.

When, in August 1939, Rosenberg learned about the conclusion of the Non-Aggression Pact between the Reich and the Soviet Union—he was as little informed about the preliminary discussions as he was about the other foreign political measures taken by the Führer—he might have gone to see the Führer and protested against it. He did not do it, and he did not object to it with a single word, which the witness Göring confirmed as being a statement of Hitler's.

In the witness box Rosenberg himself described (session of 16 April 1946) how he was then suddenly called to Hitler, at the beginning of April 1941, who told him that he considered a military clash with the Soviet Union inevitable. Hitler offered two reasons for it:

(1) The military occupation of Romanian territory, namely, Bessarabia and North Bukovina.

(2) The tremendous increase of the Red Army, along the line of demarcation and on Soviet Russian territory in general, which had been going on for a long time.

These facts were so striking, he said, that he had already issued the appropriate military and other orders, and he said that he would appoint Rosenberg in some form as a political adviser. As he further stated in the witness box, he thus found himself confronted with an accomplished fact, and the very attempt to discuss it was cut short by the Führer with the remark that the orders had been issued and that hardly anything could be changed in this matter. Thereupon Rosenberg called some of his closest collaborators together, because he did not know whether the military events would take place very soon or later on; and he made, or had made, some plans concerning the treatment of political problems. On 20 April 1941 Rosenberg received from Hitler a preliminary order to establish a central office to deal with questions concerning the East and to contact the competent highest Reich authorities with respect to these matters (Document Number 865-PS, USA-143).

If this statement made by Rosenberg is not in itself sufficient to refute the assertion made by the Prosecution, according to which Rosenberg is "personally responsible for the planning and execution of the war of aggression against Russia" (Brudno, in the session of 9 January 1946) and was aware of the "aggressive predatory character of the imminent war" (Rudenko, in the session of 17 April 1946)—if, above all, it is not accepted that Rosenberg was convinced of an imminent aggressive war to be waged by the Soviet Union against Germany, then I would like to bring up four more points in order to prove the correctness of the statements made by the defendant.

(1) Rosenberg was not called to the well-known conference at the Reich Chancellery on 5 November 1937 ("Hossbach Document," Document Number 386-PS, USA-25), when Hitler disclosed for the first time his intentions of waging war. This was at the time when Rosenberg still had political influence, or at least seemed to have it. If ever, he should have played the part of the intimate political "inspirator" then.

(2) Lammers, as a witness, stated before this Tribunal that Hitler made all important decisions quite alone; thus also the decision concerning war against Russia.

(3) To my question about Rosenberg's influence on Hitler's decisions concerning foreign policy, Göring replied before this Tribunal on 16 March 1946:

> "I think that after the accession to power, the Führer did not consult the Party Office of Foreign Affairs a single time about questions concerning foreign policy and that it was created only as a center for dealing with certain questions concerning foreign policy which came up within the Party. As far as I know, Rosenberg was certainly not consulted about political decisions after the accession to power."

This was also confirmed by the witness Von Neurath on 26 June 1946 in this courtroom.

(4) Finally, I would further like to refer to the "brief report concerning the activity of the Office of Foreign Affairs of the NSDAP" (Document Number 003-PS, USA-603). Brief mention is made in it of the "Near East" in such a harmless manner that no word need be said about it. In the confidential reports 004-PS and 007-PS nothing is said either about any preparations against the Soviet Union.

Administration in the East.

It would be an easy, too superficial, and therefore, unjust procedure if one were to say that firstly the Eastern Territories were occupied in a war of aggression, and therefore anything the German administration did there was criminal; and secondly, that as Reich Minister for the Occupied Eastern Territories, Rosenberg was the responsible minister, and therefore he must be punished for all crimes which have occurred there, at least for what happened within the scope of the jurisdiction and authority of the administrative bodies. I will have to demonstrate that this conception is not correct for legal and factual reasons.

Rosenberg was the organizer and the highest authority of the administration in the East. On 17 July 1941 he was appointed Reich Minister for the Occupied Eastern Territories. Acting on instructions, he had performed preparatory work before that time on questions concerning Eastern Europe by contacting the Reich agencies concerned (Document Number 1039-PS; US-146). He planned and set up his office for dealing centrally with questions concerning Eastern Europe (Document Number 1024-PS; US-278). He had provisional instructions for the Reich Commissioners drawn up (Document Number 1030-PS; US-144); he delivered the programmatical speech of 20 June 1941 (Document Number 1068-PS; US-143); above all, he took part in the Führer conference of 16 July 1941 (Document Number L-221; US-317).

In the presence of Rosenberg, Lammers, Keitel, and Bormann, Hitler said at that time that the real aims of the war against Russia should not be made known to the whole world, that those present should understand clearly that "we will never withdraw from the new Eastern Territories; whatever opposition appears will be exterminated; never again must a military power develop west of the Urals; nobody but a German shall ever bear a weapon." Hitler proclaimed the subjection and the exploitation of the Eastern Territories, and in making these statements he placed himself in opposition to what Rosenberg had told him before—without being contradicted by Hitler—concerning his own plans for the East.

Thus Hitler probably had a program of enslavement and exploitation. Nothing is so natural, and nothing easier than to say: Even before Rosenberg took over his ministry he knew Hitler's aims for the East; namely, to rule it, to administer it, to exploit it. Therefore he is not only an accomplice in a crime of conspiracy against peace; he is also jointly responsible for the Crimes against Humanity perpetrated in the Eastern Territories, since Rosenberg held the complete power, the highest authority in the East.

I shall deal later, *de jure* and *de facto*, with the question of Rosenberg's automatic responsibility in his capacity as supreme chief of the Eastern

Territories. First I would like to consider the question of his individual responsibility. One might deduce it from two reasons:

First, because he allegedly participated in the preparation of the war of aggression against the Soviet Union; I have already stated that this assertion is not correct; Rosenberg has neither ideologically nor actually participated in the preparations of the war of aggression.

Secondly, because he supported Hitler's plan of conquest by making plans, delivering speeches, and organizing the administration. When a minister or general, following the instructions of the head of the State, elaborates plans or takes preparatory measures of an organizational nature, for later eventualities, this activity cannot be considered as criminal even when the interests of other countries are affected thereby and even when the plans, preparations, and measures are intended for war. Only when the minister or general in question directs his activity toward things which have to be considered as criminal according to sound common sense and an international sense of decency and justice can he be held individually responsible. Rosenberg has consistently proved by word and deed that the traditional conceptions of right are his conceptions also and that he desired to enforce them. But his position was particularly difficult since his supreme chief finally exceeded all limits in his ideas, aims, and intentions and since other strong forces like Bormann, Himmler, and Gauleiter Erich Koch were also involved, who frustrated and sabotaged Rosenberg's good and fair intentions.

Thus we witness the strange spectacle of a minister in office who partly cannot understand or approve, partly is totally unaware of the intentions of the head of the State; and on the other hand that of the head of a state who appoints a minister to take office, who is certainly an old and loyal political fellow combatant, but with whom he has no longer any spiritual contact whatsoever. It would be wrong to judge such a situation simply according to democratic conceptions of the responsibility of a minister. Rosenberg could not simply resign, yet he felt inwardly the duty of fighting for the point of view which appeared to him right and decent.

In his speech of 20 June 1941 Rosenberg said that it was the duty of the Germans to consider that Germany should not have to fight every 25 years for her existence in the East. He by no means, however, desired the extermination of the Slavs, but the advancement of all the nations of Eastern Europe and the advancement, not the annihilation, of their national independence. He demanded (Document Number 1058-PS; Exhibit USA-147) "friendly sentiments" toward the Ukrainians, a guarantee of "national and cultural existence" for the Caucasians; he emphasized that, even with a

war on, we were "not enemies of the Russian people, whose great achievements we fully recognize." He advocated "the right of self-determination of people"—one of the first points of the whole Soviet revolution. This was his idea, tenaciously defended till the end. The speech in question also contains the passage which the Prosecution holds against him in particular, that the feeding of the German people during these years will be placed at the top of German demands in the East and that the southern territories and the North Caucasus would have to make up the balance in feeding the German people. Then, Rosenberg continues literally:

> "We do not see at all why we should be compelled to feed the Russian people also from these regions of surplus. We know that this is a bitter necessity which lies beyond any sentiment. Without a doubt extensive evacuation will be necessary, and there are very hard years ahead for the Russians. To what extent industries are to be kept up there is a question reserved for future decision."

This passage comes quite suddenly and all by itself in the long speech. One feels distinctly that it has been squeezed in; it is not Rosenberg's voice; Rosenberg does not proclaim here a program of his own but only states facts which lie beyond his will. In the directives of the eastern ministry (Document Number 1056-PS) the feeding of the population, as well as supplying it with medical necessities, is described as being especially urgent.

On the contrary, the true Rosenberg emerges in the conference of 16 July 1941 when, regarding Hitler's plans, he called attention to the University of Kiev and to the independence and cultural advancement of the Ukraine and when he took a stand against the intended full power of the Police and above all against the appointment of Gauleiter Erich Koch in the Ukraine (Document Number L-221).

One will contend: What is the use of opposition and protests, what is the use of secret reservations and of feigned agreement with Hitler's intentions—Rosenberg did co-operate all the same. Therefore he is responsible too. Later on I will outline in detail how and to what extent Rosenberg took part in the policy in the East, what things he did not do and how he opposed them, what he planned and desired himself in order to defend himself against the grave charge of being responsible for the alleged exploitation and enslavement of the East. Here I would only like to point out the following: It was in no way a hopeless task to begin by accepting even Hitler's most passionate statements without contradiction in the hope and with the intention of nevertheless attaining a different result later on. In

opposition to Hitler's statement: "No other than a German may ever bear weapons in the East," it was not long, for example, before, on Rosenberg's recommendation, legions of volunteers were formed from the peoples of the East; and in opposition to Hitler's wish, an edict of tolerance was issued at the end of 1941 for the churches of the East (Document Number 1517-PS).

If, at first, Rosenberg could achieve nothing for the autonomy of the eastern nations, he still adhered to his plans for the future in this respect too. First he took care of the urgent agrarian question. An agrarian program was drawn up, which it was possible to present to the Führer on 15 February 1942, and which was authorized by him in unchanged form. It was not an instrument of exploitation, but an act of liberal formation of the agrarian constitution in the midst of the most terrible of wars. Right in the middle of the war the eastern countries not only received a new agrarian constitution but also agricultural machinery. The witness Professor Dencker, in his affidavit, has borne witness to the following deliveries to the occupied Soviet territories, including the former border states:

Tractors, 40-50 HP	about	7,000
Threshing machines	about	5,000
Agricultural implements	about	200,000
Gas generators for German and Russian tractors	about	24,000
Harvesters	about	35,000
Total Cost: about 180,000,000 marks.		

I do not think one can say that these deliveries were made with a view to exploitation. So in this, too, Rosenberg accomplished a piece of constructive work that was really a blessing. In the following I will first treat the question of Rosenberg's automatic responsibility as minister for the Eastern Territories; that is, the question of his criminal liability on the grounds of his official position.

On 17 July 1941, Rosenberg was appointed Reich Minister for the Occupied Eastern Territories. Two Reich Commissariats were set up as supreme territorial authorities: "Ostland" (Esthonia, Latvia, Lithuania, and White Ruthenia) under Reich Commissioner Lohse, and "Ukraine" under Reich Commissioner Koch. The Reich Commissariats were divided into general districts and regions. Right from the beginning the eastern ministry was not conceived as an administrative authority built on a large scale but as a central office, a supreme authority which was to confine itself to over-all instructions and fundamental directives and in addition was to insure the

supply of material and personnel. The actual governing was the duty of the Reich Commissioner; he was the sovereign in his territory.

Moreover, it is of special importance that Rosenberg, as minister for the East, was not at the head of the whole eastern administration, but that several supreme authorities existed at the same time. Göring, as Delegate for the Four Year Plan, was responsible for the control of the economy in all occupied territories and in this respect had authority over the minister for the East, for Rosenberg could only issue economic decrees with Göring's agreement. The Chief of the German Police, Himmler, was solely and exclusively competent for police security in the Occupied Eastern Territories; there was no police division at all in the ministry for the East, nor in the Reich Commissariats. Rosenberg's competence was furthermore undermined by Himmler as Reich Commissioner for the Preservation of German Nationality and by Speer, on behalf of whom a Führer decree detached all technical matters from the eastern administration. It was further weakened by Goebbels who claimed for himself the control of propaganda in the Occupied Eastern Territories as well. Later on I shall come to the important question of labor mobilization, which was put under the authority of Sauckel. Nevertheless, Rosenberg was the minister responsible for the Occupied Eastern Territories. In view of this, the following must be emphasized:

In this Trial Rosenberg is not made responsible from the political standpoint, since the High Tribunal is no parliament; neither is he made responsible from the point of view of constitutional law, for the High Tribunal is not a supreme court of judicature. The liability of the defendant with respect to civil law is not in question either, but only his criminal liability, his responsibility for his own alleged crimes and for the crimes of others. I do not need to outline in more detail the fact that in order to establish criminal liability and to condemn it, it must be proved that the defendant illegally committed acts punishable by law and that he may only be punished for failure to act, that is, for an omission, if he had the legal duty to act and if it was due to his inactivity that the crime occurred, always assuming that the actual possibility existed of his preventing the crime.

The fact seems to me of decisive importance that Rosenberg although Minister for the Occupied Eastern Territories, was not a supreme ruler. Supreme rulers were the Reich Commissioners of the gigantic territories "Ostland" and "Ukraine." The lines along which these territories were to be constitutionally remodeled were not yet visible, but one thing was certain: The Reich Commissioner was the highest authority. For instance, it was he who, on the most important measures—like shooting of inhabitants of a

region for acts of sabotage—had the right to make the ultimate decision. I should like to insert that in practice in these cases the Police had exclusive competence. The Reich, that is, other authorities, had the right to fundamental legislation and over-all supervision. By a slight change in the well-known remark of Benjamin Constant, the French professor of constitutional law, "*Le roi règne, mais il ne gouverne pas*," one may define in the following way Rosenberg's position as Minister for the Occupied Eastern Territories: "*Le ministre gouverne, mais il ne règne pas*." As in certain dominions of the British Empire, there existed a sovereignty of the Reich Commissioner with a central over-all supervision by the minister for the East. Today nobody would think of summoning the competent British minister before a tribunal because a governor in India had allowed a native village to be bombed and burned down.

And so I come to my conclusion that in Rosenberg's case there exists no automatic criminal responsibility for the nonprevention of crimes in the East, if only because, although he had authority of supervision, he was not sovereign; the two Reich Commissioners had the supreme authority.

The question must furthermore be asked and briefly examined whether the defendant is individually guilty of the criminal exploitation and enslavement of the nations of the East and perhaps of further crimes. What was his attitude, what were the general lines and general trends of his policy, what did he do positively, and what did he prevent or at least try to prevent?

In the Baltic countries, national administrations or directorates were installed under German supervision. The German administration was compelled by the Reich Minister for the Occupied Eastern Territories to show great understanding for all desires which could be fulfilled and strive for good relations with the Baltic countries; the Baltic countries had a free legal, educational, and cultural system and were only limited with respect to questions concerning politics, economy, and the police. After the war of 1914-18 agrarian reform in the Baltic states was carried out almost exclusively at the expense of the 700-year-old German holdings. Nevertheless Rosenberg, as minister for the East, made a law returning to private ownership the farms which had been made collective by the Soviet Union since 1940 and, by this restitution of soil which had originally been taken away from German proprietors, showed the greatest possible good will of the German Reich. This, as well as the already-mentioned agrarian program, has been expressly confirmed by the witness Riecke.

In the General District of White Ruthenia independent administration was initiated under Reich Commissioner Kube. The White Ruthenia Central Committee was founded, as well as a White Ruthenian relief system and a

White Ruthenian youth organization. When a White Ruthenian youth delegation returned from a visit to Germany, Kube said that he would continue to act as a father to White Ruthenian youth; the following night he was murdered, yet this policy was not changed.

I should like to observe here in passing that the actual Russian territories between Narva and Leningrad and around Smolensk remained all the time under military administration; likewise the districts around Kharkov and the Crimea.

As far as the Ukraine is concerned, Rosenberg intended to give it extensive central self-administrative sovereignty, as soon as possible, similar to the directorates in the Baltic states and combined with a pronounced advancement of the cultural and educational needs of the people. After Rosenberg had originally considered himself entitled to assume that Hitler agreed with this idea, another conception later came to prevail, namely, that all forces should be directed toward the war economy. Rosenberg managed to achieve and carry through one thing only: The new agrarian program of 15 February 1942, which provided for a transition from the collective economy of the Soviet Union to private enterprise and then to ownership by the farmers. On 23 June 1943 the property decree was issued as a complement to this. At first it was not possible to carry this out because of Reich Commissioner Koch's opposition, and then military events brought everything to an end. A further fundamental decree was based on a general adjustment of the school system, which Rosenberg had ordered to be worked out because the Reich Commissioner of the Ukraine declined to do it himself. Rosenberg provided for elementary schools and higher technical schools; the Reich Commissioner protested against this. On account of the conflict, which became more and more acute, between Rosenberg and Reich Commissioner Koch, Hitler in June 1943 issued the following written instruction: The Reich Commissioner had no right to make any obstructions, but the Reich Minister for the Occupied Eastern Territories should confine himself to essential questions, and when issuing any orders should make it possible for the Reich Commissioner of the Ukraine to express his opinion beforehand, which practically meant Koch's co-operation beside Rosenberg.

During his examination of 8 April 1946 the witness Lammers described Rosenberg's peculiar constitutional position as Reich Minister for the Occupied Eastern Territories and his political position, which became constantly weaker. I would like to emphasize the following striking and especially important declarations made by the witness: The authority of the Reich Minister for the Occupied Eastern Territories was detracted from by the Armed Forces, by Göring as the Delegate for the Four Year Plan, by

Himmler as Chief of the German Police, by Himmler as Reich Commissioner for the Preservation of Germandom (resettlement measures), by Sauckel as Plenipotentiary General for the Allocation of Labor, by Speer in the field of armaments and engineering, and finally, through differences of opinion, by Propaganda Minister Goebbels.

Furthermore, Rosenberg was limited by the fact that two Reich Commissioners, Lohse and Koch, were appointed for the Occupied Eastern Territories. The Higher SS and Police Leader was "personally and directly" subordinated to the Reich Commissioner; but, as Lammers has declared, in technical respects he could not take any orders from Rosenberg or from the Reich Commissioner but only from Himmler.

Lammers said furthermore: Rosenberg always wished to pursue a moderate policy in the East; he was without any doubt against a policy of extermination and against a policy of deportation, which were widely advocated in other quarters. He made efforts to rebuild agriculture through the agrarian program, to put the educational system, church affairs, the universities and schools in order. Rosenberg had great difficulty in asserting himself, for especially the Reich Commissioner for the Ukraine simply did not follow Rosenberg's orders. Rosenberg favored instituting a certain degree of independence in the eastern nations; he particularly had at heart the cultural interests of the latter. The differences of opinion between Koch and Rosenberg, says Lammers, could have filled volumes of files. Hitler called Rosenberg and Koch to him and decided that they should meet each month in order to consult each other.

The witness Lammers said, quite rightly, that of Rosenberg as the superior minister it was asking too much to have to come to an agreement in each case with his subordinate, the Reich Commissioner. Subsequently it was shown that in spite of the meetings they came to no agreement, and finally it was Herr Koch who was right in the eyes of the Führer. As Lammers says it was about the end of 1943 that Rosenberg was received for the last time by the Führer, and even before that time he had always had great difficulties in reaching the Führer. There had been no more Reich Cabinet sessions since 1937.

Hitler's ideas tended more and more in the direction of Bormann-Himmler. The East became the ground for experiments.

To this group—as it is quite clear today, for the first time—it seemed hopeless to look for understanding on the part of Rosenberg as to the development of the Reich as they wished it. Rosenberg had no idea of the extent of the fight waged against him. His quarrel with Reich Commissioner

Koch, the exponent of Himmler and Bormann, is proof of this ignorance; but it is also complete proof of Rosenberg's integrity.

On 14 December 1942 Rosenberg issued a set of instructions to the Reich Commissioner of the Ukraine (Document Number 19-PS); his other instructions have unfortunately not been found. In this, Rosenberg requested the administrative chiefs to preserve decent attitudes and views; he demanded justice and human understanding for the population, which had always seen in Germany the supporter of legal order (Document Number 194-PS); the war had brought terrible hardships, but every offense should be fairly examined and judged, and should not be punished to excess. It is also inadmissible that German authorities meet the population with expressions of contempt. One can only show one is the master through correct manner and actions, not by ostentatious behavior; our own attitude must bring others to respect the Germans; those administrative chiefs who have shown themselves unworthy of their tasks, who have misused the authority they were given, and who by their obnoxious behavior have shown themselves to be unworthy of our uniform, must be treated accordingly and summoned before a court or removed to Germany.

The echo which such decrees called forth in Koch is shown in his memorandum of 16 March 1943 (Document Number 192-PS). Koch writes that "it is a strange thought that not only must a correct attitude be displayed toward the Ukrainians, but that we must even be amiable to them and always ready to help." Furthermore Rosenberg demanded esteem for the highly-developed consciousness of the Ukrainian people and, according to Rosenberg, a high degree of cultural self-administration was desirable for the Ukraine; nations as big as the Ukraine could not be kept in permanent dependence, and the eastern campaign was a political campaign and not an economic raid. Here Koch, addressing Rosenberg, refers in a cynical manner to the climax reached in the relations of his organization with Ukrainian emigration. There are other decrees of Rosenberg's which are criticized by Koch. One of these is the decree of 18 June 1942 concerning the acquisition by Rosenberg of Ukrainian schoolbooks for a total of 2.3 million Reichsmark to be charged to the budget of the Reich Commissariat without his previously even getting in touch with Koch. One million primers, one million spelling charts, 200,000 schoolbooks, 300,000 language books, and 200,000 arithmetic books were to be provided at a time when there was hardly even the most necessary paper for German school children.

Koch goes on to say:

> "It is not necessary to point out repeatedly in the decrees issued by your ministry and in telephone communications that no coercion

may be used in recruiting laborers and that the eastern ministry even demands to be informed of every instance in which compulsion has been used."

In a subsequent decree Koch says he is blamed for having caused the closing of vocational schools; and he also says that Rosenberg ordered the General Commissioners to adopt a different school policy, thereby overstepping his authority as Reich Commissioner. Koch then concludes with a veiled threat that to him, as a veteran Gauleiter, the way to the Führer could not be barred. So much challenging criticism of Rosenberg, so much unintentional praise, and so much proof of the absolute decency of his behavior and the far-sighted and statesmanlike direction of his office as chief of the eastern administration!

One last document in the fight of Rosenberg against Koch is the report regarding Reich Commissioner Koch and the timber region of Zuman of 2 April 1943 (Document Number 032-PS), regarding which Rosenberg gave exhaustive information as a witness. In this very matter Rosenberg displayed his conscientiousness particularly clearly.

And now we have again to unroll another scene before our eyes, because the Prosecution attached specific importance to it: In July 1942, Bormann wrote a letter to Rosenberg; Rosenberg replied, and a third party, Dr. Markull, an associate of Rosenberg in his ministry, wrote a commentary regarding it. According to Dr. Markull's representation the contents of Bormann's letter, the original of which is not extant, was the following: the Slavs should work for us; if of no use to us, they ought to die; health provisions were superfluous; the fertility of the Slavs was undesirable, their education dangerous; it would do if they could count up to one hundred. Every educated person is a potential enemy. We could leave them their religion as an outlet. As sustenance they should receive only the barest necessities; we are the masters and we come first.

To that letter by the closest collaborator of Hitler there could be only one reply by Rosenberg: feigned consent and feigned compliance. In the inner circle of the eastern ministry there arose considerable apprehensions regarding this significant change in the attitude of its chief, apprehensions which were expressed in Dr. Markull's memorandum of 5 September 1942. Rosenberg as a witness has stated that there cannot exist any doubt, when that document is read impartially, that he agreed only for the sake of pacifying Hitler and Bormann. Rosenberg wanted to insure himself against an attack from the Führer's headquarters, which he anticipated with certainty because he allegedly did more for the eastern population than for the

German people, because he required more physicians than there were available for sick Germans, *et cetera*.

The Markull memorandum is the truest possible bona fide reflection of Rosenberg's personality and influence, since it shows the anxious subordinate trying to conjure up the spirit of his minister as he had come to know and to love him in his work, and to dispel an alien phantom who seemed to have taken his place. It is stated there that such a train of thought conformed with the policy of Reich Commissioner Koch, but not with the decrees of the Reich Minister and the conception of at least 80 percent of the District Commissioners and specialists who were counting on their minister and who considered that the eastern population should be treated decently and with understanding, for it evinced a surprisingly high capacity for culture, its efficiency in work was good, and we were about to waste a precious stock of gratitude, love, and confidence. The controversy between the minister and the Reich Commissioner was well known among the high authorities of the Reich, and it was no secret that the ministry was unable to carry out its policies in opposition to the Reich Commissioners, who considered the eastern ministry as entirely superfluous; the writings of Bormann would disavow the entire policy of the eastern minister up to now, and one was given the impression that Koch had been backed by Hitler in his opposition to the minister. Since its foundation the ministry had had to register an ever-increasing loss of power. The Higher SS and Police Leaders refused to render to the General Commissioners the normal honors such as reports, et cetera. One jurisdiction of the eastern minister after another was being taken away by other highest Reich offices; in the offices in Berlin it was openly said that the remodeling of the ministry into a mere operations staff was to be expected. On the other hand, the Reich Ministry for the Occupied Eastern Territories, due to the personality of its leader, enjoyed the exceptional esteem of the public.

Dr. Markull implores the minister to stand by his original ideas, saying that the unfortunate master complex should be as much avoided as the opinion that the intelligentsia were alien to the masses. The influence of spiritual forces should be taken into consideration. Germany should prove a "righteous judge," acknowledging the national and cultural rights of nations. Such had been the ideas of the minister before, and such they should remain.

Rosenberg's attitude did not in fact change, since at that very time he was working on the great School Program (Schulverordnung). Later on he effected the reopening primarily of the medical faculties in colleges. And then came the conflict with the Führer in May 1943.

On 12 October 1944 Rosenberg tendered his resignation through Lammers to the Führer (Document Number Ro-14), because German eastern policy in general and the political psychological treatment of eastern nations in particular, were still contrary to the point of view which he had had from the very beginning, namely, his plan of autonomy for the eastern nations and the cultural development of their capacities as part of an all-European conception of a family of nations on the continent. He now inwardly broke down at seeing a great statesmanlike program destroyed. All he could do in regard to the policy of enslavement and looting which was going on in his country was merely to accept memoranda from his colleagues in the ministry, or at best indulge in a futile paper war with people like Koch. He had not been strong enough against the plans which benighted forces wanted to carry out in the East; and he was powerless against their influence, being in addition totally unaware at that time of all the police and military orders which were presented here to the Tribunal.

When Rosenberg once reminded Hitler of the creation of a university in Kiev, Hitler apparently agreed; after Rosenberg had left and he was alone with Göring, Hitler said, "This fellow has too many worries. We have more important matters on our minds than universities in Kiev." No episode can illustrate better than all the documents the one theme: Rosenberg and the reality in the East, and the other theme: Rosenberg as the alleged inspirer of Hitler.

As Rosenberg did not receive any reply to his request for resignation, he tried many times to talk to Hitler personally. It was all in vain.

On 11 December 1945 Mr. Dodd said:

> "The system of hatred, barbarism, and denial of personal rights which the conspirators had elevated to the national philosophy of Germany followed the National Socialist masters when they overran Europe. Foreign workers became the slaves of the master race, being deported and enslaved in millions."

And on 8 February 1946 General Rudenko said:

> "In the long line of ruthless crimes committed by the German-Fascist troops of occupation, the forcible deportation of peaceful citizens into slavery and bondage in Germany takes a particularly important place."

He said that Göring, Keitel, Rosenberg, and Sauckel were particularly responsible for the inhuman and barbaric instructions, directives and orders

of the Hitler Government, whose purpose was the carrying out of the deportation of Soviet people into German slavery.

I have already spoken of the formal and individual responsibility of Rosenberg as Reich Minister for the Occupied Eastern Territories. I have already explained, too, that in the field of labor employment it was not Rosenberg but Sauckel who, as Plenipotentiary General for the Allocation of Labor, was the highest authority and the responsible person, by virtue of the Führer's decree of 21 March 1942 (Document Number 580-PS). Thus Sauckel in this field was Rosenberg's superior.

He wrote to Rosenberg on 3 October 1942 (Document Number 017-PS):

> "The Führer has drawn up new and most urgent armament programs which require the speediest employment of two million additional foreign workers. For the execution of his decree of 21 March 1942 the Führer has given me more authority for my further tasks, particularly empowering me to use my own judgment in taking all measures in the Reich and in the Occupied Eastern Territories in order to insure the organized employment of labor for the German armament industry under all circumstances."

In his Program for the Allocation of Labor of 24 April 1942 (Document Number 016-PS), he emphasized that the state and local labor offices are in charge of all technical and administrative matters in connection with labor employment which come under the exclusive competence and responsibility of the Plenipotentiary General for the Allocation of Labor. The defense of Sauckel is not my task. But may I point out that he also did not take over his great and difficult task with a feeling of hatred and intentions of enslavement. In his Program for the Allocation of Labor just mentioned he says, for instance:

> "Everything has to be avoided which, beyond the shortages and hardships caused by war conditions, would aggravate and even cause unnecessary suffering to foreign male and female workers during their stay in Germany. It stands to reason that we should make their presence and their work in Germany, without any loss for ourselves, as bearable as possible."

On that point Sauckel and Rosenberg shared the same opinion.

Neither is it my task to state and to prove that many hundreds of thousands of foreign workers found good conditions in Germany, that in fact numberless persons were better off here than in their fatherland. I am only

concerned with the bad conditions which have been charged to the Defendant Rosenberg.

I come now to the "Central Agency for Nationals of the Eastern Territories."

Gentlemen of the Tribunal, several days ago I read the affidavit of Dr. Albert Beil. Essentially it contains an authoritative statement of whatever can be said about that subject. Therefore, I should like to omit this subject, "Central Agency for Nationals of the Eastern Territories," and ask the Tribunal to consider it as having been presented.

2. Central Office for Nationals of the Eastern Territories.

As the war became more and more intensified in regard to totality and brutality, the German workers, and the Germans altogether, did anything but live in a grand style; they too, as far as they had not been drafted for the Army, were assigned to labor duties, had to do heavy work for long hours, were separated from their families, had frequently to be content with second-rate billets—especially because of the increasing number of houses damaged by air attacks—and they, too, were severely punished for refusal to work or defaulting.

The fact that the foreign workers were likewise victims of this totality and brutality of the war and, admittedly, in some respects even more so, does not incriminate Rosenberg either legally or morally. He established, within his ministry, the Central Office for Nationals of the Eastern Territories, which had neither police tasks nor any other competencies of an administrative nature but was concerned solely with the welfare of nationals of the Eastern Territories and which employed trustees taken from among the eastern nations. In the report of 30 September 1942 (Document Number 084-PS, US-199) this office points out several inadequacies: That the accommodation, treatment, food, and pay of the Eastern Workers called forth strong criticism; that, though actually the situation was much better now (deadline 1 October 1942), the conditions for Eastern Workers were on the whole still far from being satisfactory. Rosenberg is therefore asked to discuss the matter with Hitler in order to have Hitler himself take energetic measures; Himmler was to be made to rescind his general regulations concerning the treatment of Eastern Workers; the Party Chancellery and the Party to be reminded of their historical responsibility for the millions of former Soviet citizens now guided by Germany and instructed to co-operate in all matters concerning Eastern Workers in the Reich with the Reich Minister; finally it was suggested to extend the scope of the Central Office for Nationals of the Eastern Territories as quickly as possible, so as to enable it efficiently to look after the interests of the aliens from the occupied territories living in the Reich, being, so to speak, the projected arm of the East ministry and the representative of these people. In this sense, namely, in the sense of social care and humane welfare, the eastern ministry was active for the Eastern Workers.

To refute the charge that Rosenberg was active as protagonist of the system of hatred and barbarism, of denying human rights, and of enslavement, I must add the following. Rosenberg received further unfavorable reports, one being the report of 7 October 1942 about the bad treatment of Ukrainian skilled workers (Document Number 054-PS, US-

198). Abuses in recruiting and during transportation were pointed out; the workers were frequently dragged out of their beds at night and locked up in cellars until the time of their departure; threats and blows by the rural militia were a matter of course; food brought from home was often taken by the militia; during transportation to Germany neglect and transgressions on the part of the escorting units occurred, *et cetera*.

Rosenberg had no authority whatsoever to intervene in those matters, yet he tried to do so in a letter of 21 December 1942 to Sauckel; Rosenberg first emphasized his fundamental accord with Sauckel; but after a few tactical and polite *clichés*, he complained seriously and urgently about the methods used in the employment of labor. I quote:

> "I must emphatically request, in view of my responsibility for the Occupied Eastern Territories, that in supplying the required quotas methods should be avoided which might one day cause me or my associates to be charged with connivance and with being responsible for the consequences."

Rosenberg further states that he empowered the Reich Commissioner for the Ukraine to make use, so far as required, of his sovereign rights and to give attention to the elimination of recruiting methods which were running counter to the interests of warfare and war economy in the occupied territories. He, Rosenberg, and the Reich Commissioners could not help being surprised that in numerous instances measures, which should have been previously agreed upon with the civilian authorities, were first learned of through the police or other offices. Without co-ordination of their mutual wishes Rosenberg was unfortunately unable to accept the joint responsibility for consequences resulting from these reported conditions. In conclusion Rosenberg expressed the wish to put an early end to such conditions for the sake of their common interest.

Rosenberg also tried personal consultations with Sauckel and got Sauckel to promise that he would do everything to bring about a fair solution of all these questions (conference of 14 April 1942). It was beyond Rosenberg's power and authority to do more. His secret opponent, supported by higher authorities, was Reich Commissioner Koch, who was indeed one of the chief culprits responsible for the cruel methods of recruiting and employment of Eastern Workers, and whose influence Rosenberg was unable to counteract.

When the prosecutor (Brudno, on 9 January 1946) charges the defendant with protesting against these methods not for humanitarian reasons but out of political expediency, I can only say that in my opinion one

cannot, without some sound reasons, simply maintain that the Defendant Rosenberg is devoid of any human qualities.

As an example of the defendant's particular bestiality, the so-called "Hay Action" has been repeatedly pointed out by the Prosecution (Document Number 031-PS). It concerned the intention of Army Group Center to evacuate 40,000 to 50,000 juveniles from the area of operations, as they represented a considerable burden to the area of operations and were besides, for the most part, without any parental supervision. Villages for children were to be established behind the front lines under native supervision; one of these villages had already proven its value. It was hoped that through the Organization Todt, being a particularly appropriate organization due to its technical and other possibilities, the juveniles might, in the main, be placed at the disposal of German handicraft as apprentices, in order to employ them as skilled workers after 2 years' training. At first Rosenberg, as Reich Minister for the Occupied Eastern Territories, was against this because he feared that the action might be considered as a deportation of children, while on the other hand, the juveniles did not represent a considerable increase of military strength. The chief of the political operations staff approached Rosenberg again, stating that Army Group Center attached particular importance to the fact that the children should enter the Reich, not by authority of the Plenipotentiary General for the Allocation of Labor, but through the agency of the Reich Minister for the East, as it was felt that only then could they be assured of correct treatment. The Army Group wanted the action to be carried out under the most correct conditions and asked for special regulations to be issued with regard to mail facilities between them and their parents, *et cetera*. In the event of a possible reoccupation of the territory the eastern ministry could then let the children go back. Together with their parents they would certainly form a positive political element during the subsequent reconstruction of the territory.

Finally, as reason for the second request addressed to the minister, it was stated in addition that the children, to be sure, would not essentially contribute to strengthening the military power of the enemy but that the important factor in this case was the long-range weakening of his biological strength; not only the Reichsführer SS but also the Führer had expressed themselves to this effect. Rosenberg finally gave his consent to this action.

With regard to this it may be said: This concerned a field which was not at all within the jurisdiction of Rosenberg's administration; he did not want to destroy a foreign element, even if biological weakening was given him as a reason—a reason which he himself did not recognize. Instead he wanted to have the children educated and trained and bring them and their parents back

to their homes later on. That is virtually contrary to the crime with which the defendant is charged. Later on, in the late summer of 1944, Rosenberg visited the Junkers plant in Dessau where approximately 4,700 young White Ruthenian craftsmen were employed and also visited a White Ruthenian children's camp. The clothing of the workmen was irreproachable; they were industrious, enjoyed the best treatment, and got along very well with the German workers. As Rosenberg was able to see for himself, the young people were taught languages and mathematics by Russian teachers. The children were cared for in their forest camp by White Ruthenian mothers and women teachers. The figure of 40,000 moreover, was never attained, in fact, barely half of it.

The attempt of the Prosecution in this instance to appeal especially to considerations of humanity in order to discredit the defendant cannot be successful in my estimation. For this very example compels me to point out the following in particular: We were in the midst of a war which was being conducted with terrible intensity on both sides. Is not war in itself "monstrous bestiality"? The "weakening of the biological strength of nations" is truly a fitting expression for the goal and purpose of the whole war, for that is what the thoughts and efforts of both belligerent parties are aimed at. It would surely be unthinkable that one should forget this in judging the actions of the defendants and that one should wish to hold the defendants responsible not only for unleashing the war, but in addition, for the fact that war in its very essence constitutes a great crime on the part of mankind, both against itself and against the laws of life.

The Prosecution contends that Rosenberg is guilty also insofar as it was he who issued the inhuman and barbaric decrees which aimed at carrying out the deportation of Soviet people into German slavery. This causes me to discuss the question as to whether the compulsory labor decree of 19 December 1941 and Rosenberg's other decrees concerning compulsory labor for the inhabitants of the Eastern Territories, were contrary to international law.

The Eastern Territories administered by Rosenberg were militarily occupied during the war. Through this occupatio bellica Germany realized complete domination and had the same sovereignty as over her own territory. While according to previous conceptions of international law the occupying power could act arbitrarily without consideration of rights and laws, the recent evolution of international law eliminated the principle of force and brought victory to the principles of humanity and culture. Therefore the formerly unlimited might of the occupying power was altered

to limited rights. The Hague Rules of Land Warfare stipulated in particular the legal obligations of the occupying power.

On the other hand, it is not true to say that the Rules of Land Warfare specify only certain privileges for the occupying power. They merely set a limit to the basically unlimited right of the occupying power to exercise all powers deriving from territorial sovereignty over an occupied territory.

THE PRESIDENT: Would that be a convenient time to break off?

[*The Tribunal adjourned until 10 July 1946 at 1000 hours.*]

ONE HUNDRED AND SEVENTY-FIFTH DAY

Wednesday, 10 July 1946

Morning Session

THE PRESIDENT: The Tribunal will sit in closed session this afternoon and will not sit in open session after 1 o'clock.

DR. THOMA: Mr. President, may it please the Tribunal, with regard to the question of the justification of the decree concerning the compulsory labor service of the inhabitants of the Eastern Territories, I should like to continue on Page 33.

Thus the following principle recognized by international law is indicated:

Measures undertaken by an occupying power in occupied territory are legal as long as they are not in opposition to a proven stipulation of the international rules of warfare. The occupying power is therefore assumed to be entitled to the full exercise of all powers derived from territorial sovereignty over an occupied territory. According to the uniform opinion of experts on international law the occupying power acts by virtue of an original law of its own, guaranteed and defined as to content solely by international law, in the interest of its own conduct of the war as well as for the protection of the civil population in the occupied territory. I quote Heyland from *Handbuch des Völkerrechts*.

> "The inhabitants of the occupied territory no longer have a duty of allegiance to the enemy sovereign but only to the occupying power; the will of the occupying power rules and decides in the occupied territory; the occupying power is the executor of its own will; its own interests alone are decisive for the exercise of its sovereign rights and, therefore, it is at liberty to act against the interest of the enemy state."

In view of Article 52 of the Hague Rules of Land Warfare the right to conscript labor in the occupied territory is acknowledged. It is stipulated

here that labor services may be demanded from the inhabitants of the occupied territory; the demand must be limited to the requirements of the occupation forces; it must be in proportion to the resources of the country and must be of such a nature as not to compel the population to participate in military operations against their own country. In these stipulations I cannot discern any prohibition of labor conscription in occupied territories; on the contrary, I consider that an approval of compulsory labor service can be clearly deduced from them. The employment of such labor in war industry is undoubtedly in accordance with the requirements of the occupation forces and, in my estimation, it is equally beyond doubt that this constitutes no commitment to military operations. The Rules of Land Warfare contain no stipulations as to whether labor service may be demanded only in the home country or whether the conscript may be transported into the native land of the occupying power for the purpose of rendering labor services there. Thus, the general principle holds good that the occupying power is assumed to be entitled to exercise to the utmost extent all powers deriving from territorial sovereignty.

If one takes the correct view that the international rules of warfare should tend to humanize war by limiting the rights of the belligerents and that the trend in this direction should be continued, one must consider on the other hand that the stern reality of war tends toward the opposite direction.

THE PRESIDENT: Dr. Thoma, the Tribunal would like to know whether it is your contention that the Hague Rules authorize the deportation of men, women, or children to another country for the purpose of labor service.

DR. THOMA: Mr. President, I propose to speak about the interpretation of the Hague Rules of Land Warfare and I am dealing here with the question as to whether it is permissible to transport inhabitants of the country in order to meet the requirements of the occupying forces. I have stated my position here that laborers can also be transported into the country of the occupying power. About children, of course, I have said nothing. I did not say anything about Jews either. I only spoke about persons able to work, who were required to work in accordance with the necessities of the occupying power, and I said it was admissible for them to be transported into the home country of the occupying power. I leave this problem to the discernment of the Tribunal.

THE PRESIDENT: The Tribunal would like to have any authorities in international law which you have to cite for that proposition.

DR. THOMA: Mr. President, I shall mention some more quotations, more detailed scientific quotations concerning this problem. I have already

quoted in that regard. I have repeatedly quoted Heyland's *Handbuch des Völkerrechts*, published by Stier-Somlo, and I shall give more quotations.

THE PRESIDENT: Will you tell me what language that book is in?

DR. THOMA: In German, Mr. President; it is the *Handbuch des Völkerrechts*, published by Stier-Somlo, 1923.

Present-day warfare is no longer what it was in 1907. War has developed into total war, a life-and-death struggle of annihilation, in which the very last physical and moral forces of the nation are mobilized, and the loss of which, as is shown by the example of Germany, means unconditional surrender and the total destruction of her existence as a State.

Can one maintain, in view of this fact, that Germany, in this struggle of life and death, should not have been granted the basic right of self-preservation recognized by international law?

I refer to Strupp, *Handbuch des Völkerrechts*, published by Stier-Somlo, Stuttgart 1920, Part III, "Violations of International Law," Page 128 *et sequentes*.

There is no doubt that the very existence of the State was at stake; that is, it was an emergency which justified the compulsory employment of labor, even if it had not been permissible according to international law. It is inherent in that great anomaly called war that, as soon as the state of war has been proclaimed, international law is in a large measure set aside in the interest of the objective of the war, the overpowering of the enemy.

I quote Strupp, as above, Page 172.

> "The development of civilization has seen a progressive moderation of the conception according to which everything is permissible in war until the enemy is destroyed; nevertheless the rules of warfare constitute even today a compromise between the demands of unrestrained military necessity and progressive humanitarian and civilized views.
>
> "One thing, at any rate, is certain, namely, that the existence of a genuine emergency may be pleaded, even under the stipulations of the Hague Rules of Land Warfare. During the negotiations preceding the formulation of Article 46 of the Hague Rules, the following was stated literally and without opposition in the plenary session of the Conference:
>
> " 'The restrictions might affect the liberty of action of the belligerents in certain extreme emergencies,' indicating that for extreme contingencies, therefore, a state of emergency may be

pleaded. It is recognized international law that even an aggressor must not be denied the right of pleading a state of emergency in case his existence is directly threatened."

In connection with the chapter concerning the eastern administration, I should like, without pointing out specifically all that the defendant has said during his testimony concerning accusations of the Soviet Prosecution, in particular the reports of the state commissions and the Molotov reports (Documents USSR-39, 41, 51, 89, and record of 16 April 1946), to express a hope that the factual corrections made by the defendant will be duly evaluated by the Tribunal.

Now I come to a new subject: Contrary to the assumption of the Prosecution, Rosenberg was in no instance the instigator of a persecution of Jews, any more than he was one of the leaders and originators of the policy adopted by the Party and the Reich, as the Prosecution claims (Walsh, on 13 December 1945, Volume III, Page 539). Rosenberg was certainly a convinced anti-Semite and expressed his conviction and the reasons for it both verbally and in writing. However, in his case anti-Semitism was not the most outstanding of his activities. In his book *Blood and Honor*, speeches and essays between 1919 and 1933, out of 64 speeches, for example, only one had a title referring to Jewry. The same applies to the other two volumes of his speeches. He felt his spiritual ancestors to be the mystic Meister Ekkehart, Goethe, Lagarde, and Houston Stewart Chamberlain; anti-Semitism was for him a negative element, and his chief and most positive efforts were directed toward the proclamation of a new German intellectual attitude, and a new German culture. Because he found this endangered after 1918, he became an opponent of Jewry. Even such different personalities as Von Papen, Von Neurath, and Raeder now confess to their belief that the penetration of the Jewish element into the whole of public life was so great that a change had to be brought about. It strikes me as very important, however, that the nature of Rosenberg's anti-Semitism was intellectual above all. For example, at the Party Rally of 1933 he explicitly mentioned a "chivalrous solution" of the Jewish question. We never heard Rosenberg use expressions like "We must annihilate the Jews wherever we find them; we shall take measures that will insure success. We must abandon all feelings of sympathy." The Prosecution itself quotes the following as an expression of the program Rosenberg set up for himself (Volume III, Page 529):

"After the Jews have been ousted as a matter of course from all official positions, the Jewish question will find a decisive solution through the setting up of ghettos."

GENERAL R. A. RUDENKO (Chief Prosecutor for the U.S.S.R.): Mr. President, rather reluctantly I interrupt counsel for the defense, and I do not like to take the time of the Tribunal, but what I just heard is going beyond any permissible limits. When the defendants sitting in the dock tried to express their Fascist views, this was deemed inappropriate and cut short by the Tribunal.

I think that it is absolutely inadmissible that defense counsel should use this place to promote antihuman propaganda; I cannot understand the contention of the lawyer who alleges the existence of a noble, spiritual anti-Semitism which Rosenberg advocates and that Rosenberg's belief in gathering all Jews in ghettos was chivalrous. Please note that the lawyer is not quoting any Nazi leader but expresses his own opinion, and I protest against the use of the International Military Tribunal for the spreading of Fascist propaganda. I ask the Tribunal to consider this objection of mine and to take appropriate action.

DR. THOMA: May it please the Tribunal—may I make an answer to that?

THE PRESIDENT: Dr. Thoma, we don't think it is necessary to trouble you. The Tribunal thinks—there may be, of course, differences of opinion as to the use of words in the course of your argument, but they see no reason for stopping you in the argument that you are presenting to the Tribunal.

DR. THOMA: Thank you, My Lord.

May it please the Tribunal, after what General Rudenko has said, I should like to make one statement. In my speech I have tried to argue upon the statements of the Prosecution and nothing else. I would like to say something else. The words "chivalrous solution of the Jewish question" were not my expression; I just quoted that as a statement made by Rosenberg a long time before he came into this Court. The Prosecution quotes the following as Rosenberg's statement of a program: "The Jewish question..." and so on; I have already read that.

It was not a mere question of chance that Rosenberg did not take part in, the boycotting of Jews in 1933, that he was not called upon to work out the laws against the Jews in 1933, 1934, 1935, and so on (expatriation, prohibition of marriages, withdrawal of the right to vote, expulsion from all important positions and offices). Above all, he never took part in the action of 1938 against the Jews, nor in the destruction of synagogues, nor in anti-Semitic demonstrations. Neither was he the instigator in the background who sent out, or ordered, lesser people to commit certain actions. To be sure, Rosenberg was a true follower of Hitler, who took up Hitler's slogans and passed them on. For example, the motto, "The Jewish question will be

solved only when the last Jew has left Germany and the European continent," and once the slogan of "Extermination of Jewry."

Exaggerated expressions were always part of the National Socialist weapons of propaganda. A Hitler speech was hardly imaginable without insults to his internal or external political opponents, or without threats of extermination. Every one of Hitler's speeches was echoed a million times by Goebbels down to the last speaker of the Party in a small country inn. The same sentences and words which Hitler had used were repeated, and not only in all the political speeches, but in the German press as well, in all the editorials and essays, until, weeks or months later, a new speech was given which brought about a new echo of a similar kind.

Rosenberg was no exception. He repeated, as everyone did, all of Hitler's slogans, including that of the "solution of the Jewish question," and once also that of the "extermination of Jewry." Apparently, like Hitler's other supporters, he gave as much or as little thought to the fact that in reality none of those phrases were clear but that they had a sinister double meaning and, while they might have meant real expulsion, they might also have implied the physical annihilation and murder of the Jews.

May I remind the Tribunal at this point that Rosenberg, during his testimony, made a reference to a speech of the British Prime Minister in the House of Commons in September 1943, in which speech it was stated that Prussian militarism and National Socialism had to be exterminated root and branch. No German interpreted that literally, and I believe no one interpreted it to mean that German soldiers and the National Socialism had to be exterminated physically.

Aside from the knowledge and will of the German people, and aside from the knowledge and will of the majority of the leadership of the Party—that is to say, known only to Bormann, Himmler, and Eichmann—there was hatched and carried out, from 1941 onward, a mass crime which surpassed all human concepts of reason and morality. The "Jewish question" was developed even further and brought to a so-called "final solution."

The Tribunal will have to decide the question whether Rosenberg, the specially characteristic exponent of the Party, the Reich Minister for the Occupied Eastern Territories, is also responsible for the murder of the Jews, and particularly for the murder of Jews in the East; that is, is he a murderer of Jews? Or must it be recognized and admitted that, although he stands but a hair's breadth from the abyss, it was, after all, external circumstances which led up to it all, and that these circumstances were outside his sphere of responsibility and guilt?

I believe I can say that Rosenberg never aimed, either openly or in secret, at the physical extermination of the Jews. His reserve and moderation were certainly no mere tactics. The slipping of anti-Semitism into crime took place without his knowledge or will. The fact in itself that he preached anti-Semitism justifies his punishment as the murderer of Jews as little as one could hold Rousseau and Mirabeau responsible for the subsequent horrors of the French Revolution.

Furthermore, no matter how much the first impression might lead to it, criminal guilt on his part cannot be deduced from his position as Reich Minister for the Occupied Eastern Territories. As already stated, the "responsible minister" cannot simply be held responsible for criminal acts committed in his sphere or his territory. Criminal responsibility, according to the German Penal Code, Paragraph 357, exists only if an official knowingly assents to the criminal actions of his subordinates, and if—the commentaries furnish this supplement—the superior is in a position to prevent the action.

I should like to take up the question of his responsibility on the grounds of the documents submitted for this purpose.

(1) The action taken against the Jews at Sluzk (Document Number 1104-PS).

On 27 October 1941, a horrible slaughter of Jews took place in Sluzk, committed by the four companies of a police battalion, because the commander received an order from his superior to clear the city of all Jews without exception. The district commissioner immediately made vigorous protests, demanded that the action be stopped at once, and gun in hand kept the police officers in check as far as he was able. He reported to the General Commissioner of White Ruthenia, Kube, at Minsk, and the latter suggested to the Reich Commissioner Ostland, Lohse, that the officers implicated be punished for this "unheard-of bestiality." He in turn reported to the Reich Minister for the East, with the request that immediate measures be taken at higher levels. The Reich Minister for the Occupied Eastern Territories sent the entire report to Heydrich, the Chief of the Security Police and of the SD, requesting further action. Due to an ingenious system according to which the Police were not responsible to the competent administrative chief and were not even obliged to report, Rosenberg could not take any further steps either in this or in similar cases. He was not head of the Police, and could only hope that the transmission of the report to Heydrich would be sufficient to stop what he considered to be regional excesses of the Police.

It can be seen from the indignation of all the administrative offices over the reported incidents that none of them knew that it was no question of excesses, but of an action ordered by Heydrich and Himmler. Even though

Rosenberg violently disliked Heydrich and Himmler, not even he could suspect anything of this kind.

(2) Also from October 1941 dates Document 3663-PS in which the Reich Minister for the Occupied Eastern Territories, for whom Dr. Leibbrandt signed, calls for a report by the Reich Commissioner Ostland, because a complaint has been made by the Reich Security Main Office that the Reich Commissioner Ostland had prohibited executions of Jews in Libau. To this the addressee replied:

> "I prohibited the execution of Jews in Libau because there was no justification for the way in which it was carried out."

This is followed by a request for further instructions. Regarding this document—which is signed by the departmental chief Leibbrandt, and which in no way points to any knowledge on the part of the Defendant Rosenberg—I wish to make the following provisional brief statement:

It is not conceived as a reproach by the Reich Minister for the East because the executions of Jews were discontinued, but it simply represents the transmittal of a complaint by the Reich Security Main Office, adding a request to report. It is to be presumed that the reason for the complaint was that the Reich Commissioner Ostland encroached on the competency of the Reich Security Main Office and the demand for a report was presumably issued in that sense. In a letter of 18 December 1941, the Reich Minister, in a letter also signed "By order: Bräutigam," asked the Reich Commissioner Ostland to settle directly any questions which might arise with the Higher SS and Police Leader.

To identify the letter "R" as Rosenberg's initial, because the Prosecution obviously was more than doubtful about Rosenberg's knowledge of matters, turned out to be equally unfortunate. This "R" is not Rosenberg's.

(3) Document Number 3428-PS concerns a letter of the General Commissioner for White Ruthenia to the Reich Commissioner for the East. It is a shocking document about the mass extermination of Jews in White Ruthenia; however, there is nothing of interest in it for the case against Rosenberg, because those horrible events could be attributed to him only if he knew of them, and in neglect of his duty failed to intervene. There is no actual proof to found a supposition of such knowledge. The claim that these documents were found in Rosenberg's possession cannot be in accordance with the actual facts, for they show the Reich Commissioner in Riga as the addressee.

(4) In the "Memorandum for the Führer of 18 December 1941" (Document Number 001-PS) the defendant suggested the following, which I must quote literally:

> "The assaults against members of the German Armed Forces have not stopped, but have gone on. It seems to be an obvious plan to disturb German-French co-operation, to force Germany to take measures of retaliation, thereby bringing about a new defensive attitude on the part of the French against Germany. My suggestion to the Führer is that instead of killing 100 Frenchmen, he should have 100 or more Jewish bankers, lawyers, *et cetera*, shot."

It is not my task here to discuss how far it is admissible to shoot hostages, but one thing is certain, that Rosenberg was convinced such a measure was admissible. In that case, however, his suggestion must be considered in that light, and can by no means be judged as an independent incitement to murder. Besides, the suggestion had no results. In his reply of 31 December 1941, Lammers, acting on behalf of the Führer, merely referred to the suggestion of utilizing the furniture and fittings from Jewish houses, and not to the shooting of hostages. Therefore, Rosenberg made no more reference to it.

At this point I should like to interpolate the following: The French prosecutor charged Rosenberg, when the latter was in the witness box, with the fact that this was murder. Gentlemen of the Tribunal, it was not murder, because no execution took place. But neither was it incitement to murder. One can only incite someone who still has to be persuaded. However, if the man who commits the act is already prepared for anything, is an *omni modo facturus*, then he can be incited no more, and there only remains the offense of a suggestion of a criminal act, which, according to German law, must be judged as an offense to receive only slight punishment, because it has had no consequence.

Just at this point I should like to recall that Rosenberg testified as a witness that on one occasion a court sentenced a district commissioner in the East to death for having extorted valuables from a Jewish family, and that that sentence was carried out. Please do not consider it an improper argument of the defense when I say: Does that not prove that Rosenberg abhorred criminal acts against the Jews?

(5) Document Number Rosenberg-135, Exhibit Number USSR-289, refers to the report of the General Commissioner of White Ruthenia in Minsk, dated 1 June 1943, on the subject of what happened in the prison of Minsk as regards gold fillings. This was addressed to the Reich

Commissioner Ostland, who forwarded the report on 18 June 1943 with the utmost indignation. At his hearing before the Tribunal on 16 April 1946 the defendant already made a statement on this point. I should like to repeat this briefly now: The defendant had returned on 22 June 1943 from an official visit to the Ukraine and found a pile of notices about conferences, a number of letters, and above all the Führer decree from the middle of June 1943, in which Rosenberg was instructed to limit himself to the fundamentals of lawmaking and not to bother about details. Herr Rosenberg did not read the letter concerned, but he has to surmise—he cannot remember this—that the letter was explained to him by his office, and presumably in the course of the reading he was informed of many documents and learned that there was again serious trouble between the Police and the civilian administration, and it is probable that Rosenberg said: Turn that over for investigation to Gauleiter Meyer or to the liaison officer. Otherwise the terrible details would certainly have remained in Rosenberg's memory.

Nobody doubts for a moment that the horrible crimes shown in these documents and all the other frightful things not covered in the documents, but which actually happened, call for atonement. Nobody doubts that not only the lesser henchmen acting on higher orders shall be punished, but also above all those who issued the orders, and those responsible for the crimes. Rosenberg did not issue an order to murder Jews; that much is clear. Is he, in spite of this, responsible for the frightful murders?

There is no trace of the defendant's handwriting on any of the murder documents. Nor has it been determined in any case that he knew anything about what went on. Can we condemn Rosenberg on the basis of his presumed and probable knowledge? Rosenberg has by no means the intention of playing a false and cowardly game of hide-and-seek behind his advisers and officials. But let us remember how cunningly the so-called executions of the Jews were kept secret, not only from the public, but even from Hitler's closest collaborators.

Is it not possible, and even credible, that they were playing a game of hide-and-seek even with Rosenberg? The thoughts and intentions of none of the other NSDAP leaders were revealed so openly and clearly to all the world as particularly those of the author Rosenberg. Of none other could one be so sure that he would turn with indignation from inhuman and criminal acts.

But let us go one step further and assume that Rosenberg had full knowledge of this greatest crime. It is not proved, but one could imagine it and surmise it. Is he then responsible, too? Peculiar, even subtle, as we well know, was the departmental authority, and the responsibility which went

with it, in the eastern countries. The entire police system had been taken from Rosenberg's sphere of influence, at the highest level of which was Himmler, and under him Heydrich. Of their orders and measures Rosenberg naturally had no knowledge and no idea.

The lower echelons of police leaders and police agencies were in effect subordinate and responsible to their police superiors and no one else. It was quite immaterial whether or not Rosenberg knew anything of the measures taken by the Police; he could change them as little as any other of his fellow citizens in the Third Reich. One might say: Yes, he could have remonstrated with Himmler or Hitler; he could have resigned. Of course, he could have done so. The decisive point, however, is not whether he could have done it; the question is whether he would have achieved anything by doing so—that is to say, whether he could have prevented the execution; for only in such a case could his responsibility be affirmed on the basis of his failure to act, and only in such a case could one speak of causality without which criminal responsibility is unthinkable.

One might further claim, still under the assumption of Rosenberg's knowledge of matters, that Rosenberg could at least have taken steps against the Reich commissioners, who were obviously involved in these matters. We know that the administrative organization and the dividing up of final authority in the East were vague, to say the least. The Reich commissioners were sovereign masters in their own territory, who had the final decision in the shooting of hostages and in other retaliatory measures of far-reaching consequence. And what was the actual extent of their authority? In case the Reich Commissioner was dissatisfied with Rosenberg—and mostly he was dissatisfied—he went to Hitler. Does anyone really believe that if Rosenberg disagreed with Koch as regards the execution of Jews, he would have been upheld by Hitler if he had approached him? Here again, there is a lack of that causality which is indispensable for a legal condemnation.

I come now to the Einsatzstab Rosenberg, the Operational Staff Rosenberg.

No less than three prosecutors have taken the stand in this Trial against Rosenberg, and have accused him of wholesale stealing of objects of art and science in the East and West (Storey, 18 December 1945; Gerthoffer, 6 February 1946; Smirnov, 15 February 1946). First I must take exception to some obvious exaggerations and injustices, that is, the assertion that the activities of the special staff in the West extended to public and private property without distinction (Volume VII, Page 55), and that the objects of art Germany appropriated amount to more than the combined treasures of the Metropolitan Museum in New York, of the British Museum in London,

of the Louvre in Paris, and of the Tretjakov Gallery. Further, I must declare the statement incorrect that the "looting program" of Rosenberg was intended to rob the occupied countries of their entire centuries-old possessions of art and science. Finally, the Prosecution contrasts Rosenberg's actions to the looting of art treasures in former wars. It says that while egotism, conceit, taste, and personal inclination used to be the underlying motives of such looting, the National Socialists primarily had the criminal intention of storing up reserves of valuables (Volume VII, Page 65). I think it unnecessary to refer to the looting of art treasures in former times as far back as Napoleon, because the concepts of international law and regulations have changed in the meantime, but I should like to mention two things:

First, how many of the most famous objects of art in the most famous galleries of the world got there through the channels of war and how many got there in a peaceful way?

Second, I am prepared to accept the fact that the Prosecution denies Rosenberg's delight in art, or joy in the possession of art treasures as a possible motive for his actions, because Rosenberg was no robber, no plunderer, of art. He had no intention of appropriating the objects of art for himself or for someone else.

What were the actual facts? Rosenberg's operational staff was active in the East and in the West. It had two tasks: First, to search libraries, archives, *et cetera*, for material suitable for the proposed "university" of the Party, to confiscate this material and take it away for the purpose of research, and secondly, to seize objects of cultural value which were in the possession of or which belonged to Jews, or which had no owner or were of a doubtful origin. The Prosecution says: "The true and only motive, the true and only purpose of this 'seizure' was robbery and looting; there could be no question of intentions of mere 'safeguarding.'"

On 20 August 1941 Rosenberg wrote to the Reich Commissioner Ostland that he wished distinctly to prohibit the transfer of any kind of art treasure from any place whatsoever without the approval of the Reich Commissioner (Document Number 1015(c)-PS). On 30 September 1942 the Commander-in-Chief of the Army issued an order (Document Number 1015(n)-PS) in agreement with Rosenberg to the following effect:

> "Apart from exceptional cases when it is urgent to safeguard endangered objects of cultural value, it is desired that for the time being such objects be left where they are."

Later on, it says:

> "The troops and all military commands within the operational area are now as before directed to spare valuable cultural monuments as far as possible and to prevent their destruction or damage."

In the report of the Special Staff for Creative Arts (report on work carried out between October 1940 and 1944, Document Number 1015(b)-PS) it is stated that in the Occupied Eastern Territories the activities of the Special Staff for Creative Arts were restricted to the scientific and photographic registration of official collections, and that the safeguarding and protection of these was carried out in co-operation with the military and civilian agencies. It says further that in the course of vacating the territories, several hundred valuable icons and paintings, *et cetera*, were saved and, with the co-operation of the individual army groups, were brought to a place of safekeeping in the Reich. Finally, on 12 June 1942 Rosenberg sent out the following decree in a circular letter to the highest Reich authorities, which reads:

> "In the Occupied Eastern Territories a number of offices and individuals are engaged in the safeguarding of objects of cultural value. They work from various approaches to the subject and independently of each other. It is absolutely essential for the administration of these territories that a survey be made of the existing objects of cultural value. Furthermore it must be endeavored, as a general rule, to leave them where they are for the time being. To this end I have set up a central office for the registration and safeguarding of objects of cultural value in the East as a special division within my ministry."

Thus Rosenberg, as can be proved, proceeded from the point of view that objects of cultural value had to remain in the country and only through the retreat of the German troops were a few hundred valuable icons and paintings brought into Germany.

In time of war, objects of cultural value, both mobile and immobile, are as exposed to the danger of destruction as are any other objects of value. Rosenberg stopped all unnecessary destruction, theft, and removal; he centralized the safeguarding of objects of cultural value and had all necessary actions taken through his operational staff in the East and the West (for example, see Abel's report on the library at Minsk, Document Number 076-PS). It is quite in accordance with the conception of international law (I quote Scholz, *Privateigentum im besetzten und unbesetzten Feindesland*, Berlin 1919, Page 36) that care should be taken on the part of the occupying powers not only to protect, but to safeguard and salvage protected objects of

art as far as the war situation permits. It is even considered a cultural duty for the occupying power to remove particularly valuable objects of art from the combat zone and place them in safety as far as possible. Under certain circumstances the concept of international law may render it the cultural duty of the occupying power to bring into his own country for reasons of salvage objects of special scientific and artistic value. This is not an inadmissible "seizure" (Article 56, Paragraph 2, Rules of Land Warfare), because this term could only apply to acts which are anti-cultural, not to acts which are procultural. (See Scholz, as above, Page 37).

Finally, I want to refer to Document Number 1109-PS, a report according to which scientific institutes that had been saved were ready to be taken back to the Ukraine immediately after the hoped-for re-entry of the troops. I consider it completely impossible to read anything about looting into this clear text.

Certainly, in the East great quantities of cultural objects of considerable value were destroyed by direct military actions, or by wanton destruction, or looting. It would be a fundamental misconstruction of the true facts of the case, and a great injustice, if these losses should be charged to the account of the Einsatzstab and its chief, for his efforts went exactly in the opposite direction.

In the West (I refer to the testimony of the witness Robert Scholz of 19 June 1946, Document Number Rosenberg-41), the case was different but, in my opinion, here also the defendant cannot be charged with looting and robbing objects of art. When in the summer of 1940 the inhabitants of Paris, with the exception of the Jews, had once more returned, somebody conceived the idea of searching the now ownerless apartments, houses, and palaces for books and libraries and of taking to Germany whatever of this scientific material was of interest. From various branches of the Armed Forces came the report that especially in Jewish-owned palaces there were collections of objects of art which one could not guarantee to remain intact in case of a long occupation. Thereupon, Rosenberg made the proposal that his Einsatzstab be allowed to direct its attention to objects of art and to take them into its custody, which was then ordered by Hitler. What did the Einsatzstab do with these objects of art? It set up an accurate card index containing the names of the particular owner of each picture, photographed the art objects, scientifically appraised them, repaired them expertly insofar as was necessary, packed them carefully and shipped them to the Bavarian castles of Neuschwanstein and Chiemsee. Because of the danger of air raids, they were then stored in an old Austrian mine. Rosenberg attached great importance to keeping separate the objects cared for by the Einsatzstab, and

not to have them mixed with the large-scale purchases which Hitler made for the proposed gallery in Linz.

Was that looting, robbery, theft? Looting is the indiscriminate and wanton carrying-off of objects in situations involving general distress and danger. Robbery is carrying off by force. Theft is carrying off without force. In all cases intent must exist to appropriate the object illegally for oneself or somebody else. What intent did Rosenberg have? He never denied that he and his co-workers had hopes of the pictures remaining in Germany. Perhaps as compensation or as a security for the peace negotiations, but in any case his intent was only directed at confiscating and safeguarding the objects and it has been proved that the question of what should be done with the confiscated items was left open until the end and that no decision was made on it. It is absolutely certain that Rosenberg did not have the intention of appropriating the things for himself or anybody else. If Rosenberg had been a plunderer of objects of art, he certainly would not have had exact notations made concerning dates and place of confiscation and names of the owners. As a precaution, however, I should also like to point out that because of the flight of their owners the objects were virtually ownerless, and that the question of the lack of a possessor and of the legality of their acquisition by Rosenberg cannot be judged by normal circumstances, but must be judged according to the extraordinary circumstances of the war. If the Prosecution claims that public and private objects of art were stolen at random, I should like to reply to the statement that only Jewish possessions, and indeed the specified ownerless objects were confiscated. Above all it is not true that state-owned property was also touched. Finally he did not act on his own responsibility but in carrying out a governmental order, and I want to ask that the fact be not overlooked that Rosenberg acted without any egotistical motive. Not a single picture passed into his private possession; he did not gain a single Reichsmark from this transaction involving millions, and after all, all the artistic and cultural property has been found again. I would like to thank the French Prosecution for having acknowledged this fact here publicly.

Göring supported the work of the Einsatzstab and, as he admits, "diverted" some objects for his own use, with the Führer's approval. This disturbed Rosenberg because the Einsatzstab was in his name, and he declared that as a matter of principle he did not want to give anything even to the museums, that his task was purely one of registration and safeguarding. The Führer should have the final decision on these works of art. Rosenberg could not undertake anything against Göring, but he ordered his deputy Robert Scholz at least to make an accurate inventory of what was

given to Göring, and to have the latter sign a receipt, which he did. Thus, most certainly it cannot be proved that Rosenberg had the intention of illegally appropriating the objects of art for himself or for somebody else. Furthermore, Robert Scholz confirmed that Rosenberg also forbade all his assistants to acquire any objects of art or culture even by virtue of an official appraisal (Document Number Rosenberg-41).

The Prosecution says that with the Rosenberg Einsatzstab a gang of vandals broke into the European House of Art in order to plunder in a barbarous way. If one contemplates the tremendous work of drawing up an inventory, of cataloging, of restoration, and of scientific appraisal, and if one finally bears in mind that all these treasures were most carefully stored away, and certainly came through the war better than would have been the case if the German authorities had not taken care of them, then I believe that, objectively speaking, one can use any term but that of "vandalism."

THE PRESIDENT: I think this would be a good time to break off.

[*A recess was taken*.]

DR. THOMA: Rosenberg is also especially charged with looting furniture. He allegedly ransacked the contents of 79,000 Jewish-owned homes, among them 38,000 in Paris, and took the loot to Germany. Unquestionably, these measures were taken for the benefit of air-raid victims; in the cities which had been destroyed by air warfare new homes were set up for the homeless. It was in line with National Socialist mentality and it must certainly be morally condemned that the confiscation was limited to Jewish property. The essential question, however, is whether the confiscation was at all legal. In all my statements I have avoided trying to excuse a weak legal position with a state of military emergency, and I do not wish to do it at this point either, for, as an expert on international law states, "The state of emergency is the lever by means of which the entire body of martial law can be torn from its hinges." In this case, does not the justification of national and military necessity exist, did not air warfare bring intense and general distress to Germany?

One might object that such distress could have been ended by unconditional surrender. In my opinion, however, the above-mentioned justification cannot be denied to the defendant by this reference to unconditional surrender, entailing the Reich's abandonment of its own existence, its independence, and its own vital interests. The appropriation of enemy private property took place in application of a right of requisitioning, which was extended beyond the legal terms of martial law and justified by

the state of emergency. I venture to assert that his procedure of confiscating furniture, in view of the devastating effects of air warfare against Germany, was not contradictory to "the customs among civilized peoples," "the laws of humanity," and "the demands of the public conscience" (Marten's clause in the preamble to the agreement concerning the Laws and Customs of Land Warfare; see Scholz, in the afore-mentioned book, Page 173).

May it please the High Tribunal, I shall now pass on to the Norway operation. The Prosecution characterizes Rosenberg and Raeder as the most energetic conspirators in the Norway operation, and later in the same matter calls Rosenberg a "dealer in high treason." The opinion of the Prosecution and also the assumption of the present Norwegian Government (Norwegian Report of 13 October 1945, Document Number TC-56) are obviously to the effect that the Party's Foreign Political Office, of which Rosenberg was the head, and Quisling had plotted the war against Norway in mutual conspiracy. I believe that of all the charges against Rosenberg hitherto dealt with, none has less foundation than this one. On the basis of the few documents which have been submitted to the Court, in my opinion the case could doubtlessly be cleared up in favor of the defendant.

There existed a Foreign Political Office of the Party, which had the task of informing foreign visitors about the National Socialist movement, of referring any suggestions to the official offices, and otherwise of functioning as a central office of the Party for questions of foreign policy. The special interest, and I may say the special sympathy, of the leading men of the Party and the State was directed toward the Scandinavian countries. It was specifically in this direction that the Foreign Political Office placed the main emphasis on the field of cultural policy. The already existing "Nordic Society" was expanded, the birthdays of great Scandinavian scientists and artists were observed in Germany, a great Nordic music festival was held, and so forth. The relations took on a really political note only with the appearance of Quisling, whom Rosenberg had seen for the first time in 1933 and who then, in 1939, 6 years later, looked up Rosenberg again after the convention of the Nordic Society in Lübeck; the former spoke of the danger of European entanglements and expressed the fear that Norway was in danger of being drawn into them. He then feared above all a partitioning of his country in such a manner that the Soviet Union would occupy the northern and England the southern part of Norway.

Quisling again came to see Rosenberg in Berlin in December 1939. The latter arranged for a conference with the Führer. Hitler declared that he would by far prefer to have Norway remain completely neutral and that he did not intend to extend the theater of war and involve more nations in the

conflict, but he would know how to defend himself against a further isolation of Germany and further threats against her. In order to counteract the increasing activity of enemy propaganda, Quisling was promised financial support of his movement, which was based on the pan-Germanic idea. The military treatment of the questions now taken up was assigned to a special military staff; Rosenberg was to deal with the political aspect, and he appointed his assistant Scheidt to maintain liaison. Hagelin, a Norwegian confidential agent of Quisling's, in January 1940 gave Rosenberg some more disturbing reports on the feared violation of neutrality by the Norwegian Government, and Rosenberg passed them on to Hitler. After the *Altmark* incident, Hagelin, who moved in Norwegian Government circles, intensified his warnings to the effect that the Allies had already begun to examine the Norwegian seaports for disembarkation and transportation possibilities; in any case, the Norwegian Government would be satisfied with protests on paper, and Quisling was indicating that any delay in undertaking a counteraction would mean an exceptional risk. Rosenberg again handed the reports immediately to Hitler. If he had not done so that would have been downright treason to his country. The German counterblow followed on 9 April 1940, and Rosenberg learned about it from the radio and the newspapers like any ordinary citizen. After his above-mentioned report, which he made in the line of duty, Rosenberg, did not participate in either diplomatic or military preparations.

Should there still be any doubt that in the Norwegian case Rosenberg was only an agent who forwarded information to Hitler, and not an instigator, conspirator, or traitor, I should like to refer to two documents. First, to Document Number C-65, Rosenberg's file note concerning Quisling's visit. Obviously, it is the information on Quisling which Hitler had requested from Rosenberg. If Rosenberg had been on closer terms with Quisling, he certainly would have been only too glad to inform Hitler about it. Rosenberg had only heard of a fantastic and impracticable plan of Quisling's for a *coup d'état* (occupation of important central offices in Oslo by sudden action, supported by specially selected Norwegians who had been trained in Germany, afterward having the German fleet called in by a newly formed Norwegian Government). However, an earlier report of Quisling appeared less fantastic to Rosenberg; according to this—names being given—officers of the Western Powers traveled through Norway as consular officials, ascertained the depth of the water in ports of disembarkation, and made inquiries into the cross-sections and clearances of railway tunnels. This was the true and only reason for everything Rosenberg did in the Norwegian matter.

The second document is the report concerning "The Political Preparation of the Norway Operation" (Document Number 004-PS, Exhibit Number GB-140), a report from Rosenberg to Hess of 17 June 1940. In this interdepartmental report there is also nothing which deviates from Rosenberg's own trustworthy statement and which would allow him to appear as an instigator of war and of high treason. Rosenberg was not called into any political or military discussion concerning Norway. Thus, what criminal act did Rosenberg commit? Was it criminal that he tried "to gain influence in Norway" (Document Number TC-56), or that with his knowledge the Foreign Office gave subsidies to Quisling? Finally, I should also like to point out that later on, after the operation had succeeded, Rosenberg was in no way entrusted with an office or function with regard to Norway; that even the appointment of a Reich Commissioner for Norway was carried out without consulting him.

I shall not deal with the case of Minister Goga, which I have set forth in detail, but I ask the High Tribunal to consider it as having been dealt with. Now I turn to the topic: Persecution of the Church.

The Prosecution maintains that Rosenberg, together with Bormann, issued the orders for religious persecutions and induced others to participate in these persecutions. However, not a single order of that kind is known. There were presented only letters by Bormann, partly to Rosenberg, partly to others, from which no charges against Rosenberg can be drawn. On the contrary Rosenberg was repeatedly reproached, as on one occasion when in the presence of Hitler he praised a book by Reich Bishop Müller (Document Number 100-PS); another time when Rosenberg gave Reich Bishop Müller instructions to work out directives for thoughts regarding religious instruction in schools (Document Number 098-PS); once again when Rosenberg sponsored a strictly Christian work by General Von Rabenau.

As a witness Rosenberg himself declared (Volume XI, Page 461) that he had opposed propaganda advocating withdrawal from the Church and had never called for state and police measures against his opponents in the fields of theology and research, and particularly that he had never used the Police for suppressing those who were opponents of his book *The Myth of the 20th Century*. In December 1941, as Reich Minister for the Occupied Eastern Territories, he issued an edict for Church toleration (Documents Number 1517-PS and 294-PS). Rosenberg had nothing to do with arrests, the deportation of priests, and persecution of the Church. He had no part either in the negotiations with the Vatican over the Concordat or in the assignment of the Protestant Reich Bishop; neither did he take any part in measures which were hostile to the Church, and which were later carried out by the

Police. He never participated in any other administrative or legislative anticlerical measures.

In my opinion it is quite impossible, for lack of documentary evidence, to construe from what Rosenberg thought and said about religious and philosophical matters—which I will quote presently—that he conspired toward a political suppression of religion by force. The only document (Number 130-PS) pointing in this direction was withdrawn by the American Prosecution itself before I was obliged to draw attention to its being a pamphlet directed against Rosenberg.

His book *The Myth of the 20th Century*, which is allegedly written for the reshaping of the denominations in the direction of a Germanic Christianity, is moreover chiefly addressed to those who had already broken with the Church. "No consciously responsible German," says Rosenberg at one place in it, "should suggest withdrawal from the Churches to those who are still believing members thereof" (Document Number Rosenberg-7, Document Book 1, Page 122), and once again: "Science would never have the power to dethrone true religion" (see as above, Page 125). His writings are not addressed to the faithful churchgoers of today in order to hinder them in the course of their chosen spiritual life, but to those who have already discarded their religious faith (Document Number Rosenberg-7, Document Book 1, Page 125). In his speeches he upheld the view that the Party is not entitled to establish norms in metaphysical matters which contest immortality, et cetera. After he had been assigned to supervise ideological education, he said explicitly in his Berlin speech of 22 February 1934: "No National Socialist is allowed to engage in religious discussions while wearing the uniform of his Movement," and he declared at the same time that "all well-disposed persons should strive for the pacification of the entire political and spiritual life in Germany" (Document Number Rosenberg-7(a), Document Book 1, Page 130). That in this respect, too, things developed along different lines is not due to the desire or influence of Rosenberg.

Moreover, I need make only brief allusion to the fact that it is a question of the 1000-year-old problem of relations between the clerical and so-called temporal powers. The struggle of emperors, kings, and popes in the Middle Ages; the French Revolution with the shooting of priests; Bismarck's clerical controversies; the secular legislation of the French Republic under Combes; all those were things, which from the standpoint of the Churches ...

Mr. President, may I make a brief statement by way of explanation? I wanted to say that I have concluded this topic, that I do not wish to concern

myself with the problem of Church persecutions any further. I have finished with it. I am coming to the topic of ideology and general politics.

Ideology and education have been nothing but a means of obtaining power and consolidating that power; uniformity of thinking has played an important part in the program of the conspiracy; the formation of the Armed Forces has only been possible in conjunction with the ideological education of the nation and Party—so says the Prosecution (Brudno, on 9 January 1946). And continuing its attacks against Rosenberg, the Prosecution proceeds by saying that Rosenberg's ideas formed the foundation of the National Socialist movement, and that Rosenberg's contribution in formulating and spreading the National Socialist ideology gave foundation to the conspiracy by shaping its "philosophical technique."

I think that one will have to take care, in judging Rosenberg's case, not to yield to certain primitive ways of thinking and become a victim of them: First of all an exaggeration of the conception of ideology and the inexact use of that concept. At best it was a political philosophy which was hand in glove with Hitler's political measures and which Hitler himself preached in his book *Mein Kampf*, but it was not an ideology in an all-embracing sense. It is true that National Socialism endeavored to create a spiritual philosophy and an ideology of its own, but it had not reached that stage yet by far. Rosenberg's book *The Myth of the 20th Century* is an attempt in that direction, being a personal confession, without any suggestion of political measures. Therefore, his philosophy cannot have formed the ideological basis of National Socialism. In addition there is a total lack of proof that a straight spiritual line, a clear spiritual causal connection, exists between the conceptions of Rosenberg and the alleged and actual crimes.

If one goes to the trouble of looking through the book, *The Myth of the 20th Century*, one will immediately observe that though there is some philosophizing in the National Socialist way, it would be, however, pure fiction to affirm that there is any dogmatic formulation of a tangible program in this book, or that it is a foundation for the activities of the responsible leaders of the Reich in this World War. Another mistake of National Socialism was perhaps the boundless unification and simplification: people were made uniform; thinking was made uniform; only one uniform type of German was left. There was also alleged to be only one National Socialist way of thinking, and only National Socialist ideology. But in spite of this, as we see today, the leaders were frequently of different opinions on essential questions. I will recall the question of the policy in the East. Here too, there seems to be danger of accepting this way of thinking, of observing everything through the spectacles of uniformity, and of saying: One idea,

one philosophy, one responsibility, one crime, one punishment. Such a simplification, apart from its primitive nature, would certainly also constitute a great injustice toward the Defendant Rosenberg.

Finally, when one hears how the Prosecution attacks "Germanic Christianity," the "heathen blood myth," making much of Rosenberg's expression, "the Nordic blood is the mystery which has superseded and overpowered the old sacraments," one feels inclined to close one's eyes for a moment and to picture oneself attending a session of the Inquisition in the Middle Ages where they are about to sentence Rosenberg to the stake as a heretic. Yet nothing must be farther from the Tribunal's mind than to harbor thoughts of intolerance, since here, in spite of all attempts by some of the prosecutors, it is not ideologies but crimes which are involved.

In the Defendant Rosenberg's case it is a question of whether by his teachings he was guilty of preparing and promoting crimes. The Prosecution has brought forth arguments to this end, but have not proved it, while I can prove the opposite merely by pointing to Rosenberg's activities in the East. Had he been the bearer and apostle of a criminal idea, he would have had an opportunity, such as no criminal has ever yet had in world history, to indulge in criminal activities. I have stated explicitly that in his case it was just the opposite. So when the bearer and apostle of an idea himself has the greatest of opportunities and yet in practice himself behaves morally, then his teachings cannot be criminal and immoral either. Above all, he cannot then be punished as a criminal on the basis of his teachings. What criminally degenerate persons practiced as alleged National Socialism cannot be laid to the charge of Rosenberg. Moreover, Rosenberg's speeches in three volumes, which express what he taught in the course of 8 years, bear witness to the honorable nature of his endeavors.

Thus, if we relinquish the false conception of uniformity: One party, one philosophy, one ideology, one crime—and we will have to, in view of the indisputable fact that Rosenberg himself never pursued a policy of extermination, destruction, and enslavement in the East—we shall have to admit that the facts of the terrible central executive orders and of Rosenberg's philosophy are not identical, and on these grounds alone the conclusions of the Prosecution are invalid.

Karl Marx teaches that historical events and political social reality are conditioned by the mere casual play of materialistic forces. Whether Marx in addition acknowledges the independent influence of man and ideas on history is at least doubtful. On the other hand, Rosenberg stresses emphatically the influence and the necessity of the highest ideas in the history of peoples. But Rosenberg does not overlook the fact that every

event in history is the result of a totality of acting forces. The will, the passions and the intelligence of the people involved work together to form a historical process which cannot be calculated in human terms. It has already been pointed out that, just as little as Voltaire's and Rousseau's ideas can be recognized as the causes of the French Revolution, and the slogans of "Liberty, Equality, and Fraternity" be taken as the cause of the Jacobinic terror, as little as one can say that Mirabeau and Sièze had wanted or plotted such a blood bath, so little can one ascribe to Rosenberg as his moral or even criminal guilt that which National Socialism became during its development through the decades. In other words, I believe it is as unjust as it is unhistorical to ascribe today, in retrospect, the negative aspects of National Socialism, which were connected with the terrible collapse, to a plan desired from the outset and emanating from Rosenberg's ideas.

Therefore, in considering Rosenberg's work the mistake of a standardization which does not correspond to reality is added to the further mistake of mechanization; there is neither a mechanical man nor mechanical history. And, finally, the construction of the Indictment is also an absolutely negative one; it views the defendant from the standpoint of political polemics and is impressed by the excitement of people in these excited times. I must briefly take exception to this distortion of the defendant's mental traits.

The spiritual state of the period after the first World War and even of the preceding period, which gave birth to the defendant's ideas, are known to all of us only too well: The turmoil in the spirit and soul of man brought about by the technical age, his hunger and thirst for a new spirit and a new soul; liberty was the slogan and a "new beginning" the impulse which directed the will of youth. Its longing and enthusiasm were aimed at nature. The thoughts and wishes of this generation were led into political paths by the contrast between rich and poor, which youth considered unjust and sought to bridge through socialism and the fellowship of the people. In Germany the development along political lines was given further impetus by the national misfortune of 1918-19 and the Treaty of Versailles, which was likewise felt to be unjust. The idea of building German history through the union of nationalism and socialism glowed unconsciously in the hearts of millions, as the undisputed tremendous success of National Socialism proves. The spiritual foundation was the desire for external and internal self-assertion and love for one's fellow countrymen and for the people themselves, who had had to suffer so much torment and misery in history.

The desire for self-assertion and love for one's own people, together with the whole system of National Socialist ideas, then developed in an

inexplicable manner into a furious conflagration. The most primitive considerations of common sense were eliminated just as in a delirium; in complete delusion everything was risked and everything was lost.

The searching questions which present themselves to Rosenberg time and time again are whether he could have done more for what he thought and upheld as just and worthy; where he neglected essential things; where he fell short of requirements; what negative symptoms, insofar as he had knowledge of them, he should have paid more attention to. Can such questions, which every person asks when he is crushed by disaster, be considered as evidence for his objective guilt? I do not think so. On 17 January 1946 the French Chief Prosecutor, M. de Menthon, stated the following, which I quote (Volume V, Pages 378, 379):

> "We are rather facing systematic criminality which directly and necessarily derives from a monstrous doctrine with the full will of the leaders of Nazi Germany. The crime against peace, which was undertaken, is immediately derived from the National Socialist doctrine."

To refute this assertion I must briefly present this doctrine. I have classified the National Socialist ideology—in accord, I believe, with scientific opinions—under the so-called new romanticism. This trend, which was grounded in fate and the necessities of history, had gone through the whole civilized world since the turn of the century as a reaction against rationalism and the technical age. It differs from the old romanticism in that it adopts the naturalistic and biological consideration of man and history. It is borne up by a confident faith in the value and meaning of life and the whole of reality. It does not glorify sentiment or intellect, but the innermost motives of man—heart, will, and faith. This philosophy receives its National Socialist stamp through the emphasis which is placed upon the mysterious importance of peoples and races for all human experience and activity. It is in the people, in the common possession of blood, history, and culture, that the real roots of strength are thought to be found. Only by participating in the movements of a people and its strength does the individual serve himself and his generation.

Rosenberg's scientific contribution to the racial ideology consists in his description of the rise and fall of great historical figures, who sprang from races and peoples and set up definite standards in all spheres: language, custom, art, religion, philosophy, and politics. According to Rosenberg the efforts of the twentieth century to establish a form for itself are a struggle for the independence of the human personality. In Rosenberg's opinion, its

essence is the consciousness of honor. The myth of national honor is at the same time the myth of blood and race, which produce and support honor in its highest form. Therefore, the struggle for honor in its highest form is also a spiritual struggle with other systems and their maximum values. Thus, intuition stands against intuition, will against will.

Rosenberg expresses this thought in the following manner (*The Myth of the 20th Century*, Introduction, Pages 1 and 2):

> "History and the task of the future no longer mean a struggle between classes, no longer a struggle between Church dogma and dogma, but the dispute between blood and blood, race and race, people and people. And this means: A struggle between psychologies."

Consequently, Rosenberg had, in any case, no ideas of genocide as Raphael Lemkin expounds in *Axis Rule in Occupied Europe*, Page 81, where he ends the above quotation after the words "race and race, people and people," but he believed in a struggle between psychologies, in other words, spiritual controversy.

I mention this spiritual trend in order to explain the peculiar fact in National Socialism that political considerations born of the intellect often gave way before the pathos of will and faith. In Rosenberg's case this danger did not appear so much since in making everything revolve around the "soil," that is, the fatherland, and its history and peasantry as the force from which springs the essence of a race, he remains in the sphere of life's realities. Perhaps unaware of it himself, he was nevertheless borne upward by this current. The question arises as to what effects this ideology had on political life.

It is clear that the emphasis on will and faith gave special weight to political demands. After the Treaty of Versailles the political demands of Germany were aimed at recovering freedom and equality among the peoples as a still fettered great power. This had been the objective of German statesmen even before Hitler. The other great powers had certain misgivings about recognizing Germany again as such. Rosenberg fought to remove these misgivings. His weapon was his pen. The Tribunal has allowed me to present in evidence a group of excerpts from Rosenberg's speeches and writings. I submitted it in my Document Book 1, Volume II. In view of the quantity of material and of my intention to submit only the most important matter, I depend on the Court's being familiar with my document book.

In the first place I wish to call attention to the effect which these works had on German youth. I may recall the witness Von Schirach's testimony. I

repeat verbally:

> "At conventions of youth leaders, at which he spoke once a year, Rosenberg chiefly chose educational, character-building subjects. I remember, for instance, that he spoke on loneliness and comradeship, personality and honor, and so forth. At these conventions of leaders he did not deliver any speeches against Jews. As far as I remember, he did not touch on the religious problem of youth either, in any case not to the best of my memory. Mostly I heard him talk on such subjects as I have just mentioned before."

The attitude of youth was actually better than before the taking over of power. Idleness, the root of all evil, had ceased and had been replaced by work, the fulfillment of duty, the aiming at ideals, patriotism, and the will to get ahead. It was a fatality here too, that through Hitler's policy these values were directed in the wrong manner.

The charges by the Prosecution that Rosenberg was the advocate of a conspiracy against peace, of racial hatred, of the elimination of human rights, of tyranny, of a rule of horror, violence, and illegality, of unbridled nationalism and militarism, of a German master race, I could already refute by pointing to the excerpts from *The Myth of the 20th Century*, which the Prosecution itself has submitted as evidence for the truth of its assertions. In reply to this, in order to refute this assertion by the Prosecution, I want to point in particular to the following facts: To prove Rosenberg's honest struggle for the peaceful existence of nations side by side I wish to refer to his speech in Rome in November 1932 before the Royal Academy of Rome (reproduced in *Blood and Honor*, Document Book 1, Page 150). In his speech in Rome Rosenberg pointed to the fateful significance of the four great powers and proclaimed—I quote his words:

> "Therefore he who strives in earnest to create a Europe which shall be an organic unit with a pronounced multiplicity of form and not merely a crude summation, must acknowledge the four great nationalisms as given to us by fate and must, therefore, seek to give fulfillment to the force radiating from their core. The destruction of one of these centers by any power would not result in a 'Europe,' but would bring about chaos in which the other centers of culture would also have to perish. In reverse it is only the triumph of the radiations in those directions where the four great forces do not come into conflict with each other which would result in the most dynamic force of creative being and

organic peace, not an explosive forced situation such as prevails today, whereby it would guarantee to the small nations more security than appears possible today in the struggle against elementary force."

To this line of thought Rosenberg, as Chief of the Foreign Political Office of the Party, remained true. Unfortunately, he could only work for it through his words. No witness could confirm in this courtroom that Rosenberg had any influence on actual foreign policy, whether it was directed by Neurath, Ribbentrop, Göring, or Hitler himself. Neither in the Austrian, nor in the Czech, nor in the Polish, nor in the Russian subject matter has his name been mentioned in connection with the charge of participation in aggressive wars. Everywhere he was placed before accomplished facts. In the war against the Soviet Union he received his orders only when the war against Russia had already been established as an acute possibility. He did not stir up the Norwegian campaign, but passed on personal information in accordance with his duty.

Now, as regards Rosenberg's speeches and writings on the problems of general foreign policy, he advocated the Anschluss of the Austrians, who had been forcibly excluded from the Reich, as a demand born of the right to self-determination which had been proclaimed by the Allies themselves. The revision of Versailles was a postulate of justice against a violation of the Treaty of 11 November 1918. To advocate the German Armed Forces was, in view of the nondisarmament of the other powers, a defense of the solemnly promised equality of rights.

I shall now take up the charge of racial hatred.

Rosenberg's opinions in regard to the race question were the result of racial research of international scientists. Rosenberg repeatedly asserts (I refer again to the opinion stated in Document Book 1, Volume II) that the purpose of his racial political demands was not contempt of race, but respect for it. I quote Page 70:

"The leading moral idea of an approach to world history based on the laws of heredity belongs to our times and to our generation, being in full accord with the true spirit of the modern eugenics movement with regard to patriotism, that is, the upholding and expansion of the spiritually, morally, intellectually, and physically best hereditary forces for our fatherland: only in this way can we preserve our institutions for all future times."

These words embody the main theme of his demands, though their originator was not Rosenberg, but Henry Fairfield Osborn, Professor at

Columbia University, who wrote them in discussion of the book by his colleague in science, Madison Grant, *The Decline of the Great Race*. This research, long before the existence of the Third Reich, led to eugenic legislation in other countries, in particular to the American Immigration Law of 26 May 1924, which was aimed at a strong reduction of immigrants from southern and eastern Europe while favoring those from the north and west of Europe.

I do not think I have to say that I am not hereby defending the murders of those mentally diseased in Germany as an alleged eugenic measure. With this measure, too, Rosenberg did not have the slightest connection.

For Rosenberg it was a question of the spiritual strengthening and consolidation of the German nation, indeed of the Aryan race. He would like to have his ideology considered in that light, above all *The Myth of the 20th Century*. His preaching of the significance of race in history did not call—I stress this again—for race contempt, but for consideration and respect of race, and demanded the acknowledgment of the racial idea only by the German people, not by other nations. He considered the Aryan nations as the leading ones in history. And if in doing so he underestimated the significance of other races, as for instance the Semitic ones, he, in his praise of Aryan races, did not think of the German nation alone, but of the European nations in general. I refer to his speech in Rome of November 1932.

I am keeping within the framework of historical truth in pointing to the fact that anti-Judaism is not an invention of National Socialism. For thousands of years the Jewish question has been the minority problem of the world. It has an irrational character which can be understood to some extent only in connection with the Bible. Rosenberg was a convinced anti-Semite, who in writing and speech gave expression to his convictions and their foundations. I have already emphasized that even such different personalities as Von Papen, Von Neurath, and Raeder are still of the opinion that the predominance of the Jewish element in the entire public life had reached such proportions that a change had to come about in this respect. The concrete result of that predominance, the fact that the Jews in Germany when attacked knew how to repay in kind, sharpened the anti-Semitic fight before the accession to power.

I wanted to present to the Tribunal a selection of Jewish literary attacks on the national feeling at that time, but the Tribunal ruled that my application was irrelevant; as these writings were not introduced as evidence I cannot speak about them. It is, however, an injustice to Rosenberg to assert that blind hatred of the Jewish race had goaded him into that controversy. He

had before his eyes concrete factual evidence of the disintegrating activities of Jews.

It appeared as if the Party program of placing Jews under a generous law of aliens would be realized. It is true that Goebbels at that time arranged a one-day boycotting of Jewish stores. Rosenberg, however, in his speech of 28 June 1933, the anniversary of the Versailles Treaty, in the assembly hall of the Reichstag in the Kroll Opera House, declared that it was no longer necessary that in the capital of the Reich 74 percent of all lawyers should be Jews, and that 80 to 90 percent of the physicians in Berlin hospitals should be Jewish; about 30 percent of Jewish lawyers in Berlin would suffice amply. In his speech at the Party Rally in September 1933 Rosenberg stated in addition, and I quote:

> "In the most chivalrous way, the German Government has excluded from the percentage stipulations those Jews who have fought for Germany at the front, or who have lost a son or a father in the war" (Document Book 1, Page 153a).

In his speech at the Kroll Opera House Rosenberg gave the reason for this measure, saying that there was no intention thereby to discriminate against a whole people, but that it was necessary for our younger German generation, who for years had had to starve or beg, now to be able to obtain bread and work too. But despite his strong opposition to the Jews he did not want the "extermination" of Jewry, but advocated as the nearest aim the political expatriation of Jews, that is, through classifying them by law as aliens and giving them protection as such. In addition, he granted to the Jews a percentage access to nonpolitical professions, which still by far exceeded the actual percentage of Jews in the German population. Of course, his final aim was the total emigration of the Jews from Aryan nations. He had no understanding and appreciation of how great a loss to the Aryan nations themselves such an emigration would be in cultural, economic, and political respects. But one will have to admit that he believed that such an emigration would prove useful for the Jews themselves, first, because they would be set free from all anti-Semitic attacks, and also, because in their own settlement area they might live unhampered and according to their own ways.

The dreadful development which the Jewish question took under Hitler, which he justified as being a reaction against the policy pursued by emigrants, was never more regretted by anyone than by Rosenberg himself, who blames himself for not having protested against the attitude of Hitler, Himmler, and Goebbels as firmly as he protested against Koch's actions in

the Ukraine. Nor does Rosenberg hesitate to admit that his suggestion to Hitler to shoot 100 Jews instead of 100 Frenchmen after the recurring murders of German soldiers was an injustice born of a momentary feeling—despite his belief in its formal admissibility—because, from the purely human standpoint, the real basis for such a suggestion was lacking, namely, the active participation of those Jews.

I have returned to this case again, as in my opinion it is the only instance where Rosenberg desired retribution by the death of Jews. On the other hand, one must insist with the greatest emphasis that there is no proof of Rosenberg's having been aware of the extermination of five million Jews. The Prosecution accuses him of making preparations for an anti-Semitic congress as late as 1944, which did not take place only because of the course of the war. What point could such a congress have had, had Rosenberg known that the majority of the Jews in Europe had been exterminated already?

Rosenberg had no faith in democracy, because in Germany it led to a splitting up into numerous parties and a constant change of government, and finally made the formation of an efficient government impossible. Another reason for his not having faith in democracy was that non-German democratic powers did not stand by their democratic principles in certain cases where they might have been of benefit to Germany, for instance in 1919, when Austria was willing to be incorporated in Germany, and later on at the plebiscite in Upper Silesia. But Rosenberg did not for that reason turn toward tyranny. In connection with Paragraph 25 of the Party Program he said in his comments, on Page 46:

> "This central power"—referring in this case to the Führer's power—"should have as advisers representatives of the people as well as those councils which had evolved in the course of time" (Document Book 3, Page 6).

And in his speech in Marienburg on 30 April 1934 on the state of the German Order, he said that the National Socialist State must be "a monarchy on a republican foundation." I quote:

> "From that standpoint the State will not become a deified end in itself, neither will its leader become a Caesar, a God, or a deputy of God" (Document Book 1, Page 131).

In his speech on German law of 18 December 1934, Rosenberg stressed:

"In our eyes the Führer is never a tyrannical commander" (Document Book 1, Page 135). Only in such terms was a protest against the development of tyranny possible.

The development passed over Rosenberg and degenerated. Rosenberg himself learned this while acting as Minister for the East. Rosenberg was an idealist, but he was not the unscrupulous man who inspired the State and the Führer to commit crimes. I believe, therefore, that he should not be included in Mr. Justice Jackson's Indictment (Page 8), where it says that Rosenberg belonged to those men in Germany who have been "the very symbols of race hatred, of the rule of terror and violence, of arrogance and cruel power."

In looking through Rosenberg's writings one finds, on the contrary, statements and expressions which give a decided impression of tolerance. He says, for example, in his Myth, of the national Church which he aspired to:

> "The German Church cannot pronounce compulsory dogmas which every one of its followers is compelled to believe at the very risk of losing his everlasting salvation."

In his speech on ideology and dogma at the University of Halle-Wittenberg, he called for tolerance toward all denominations with a demand for "inner respect for every genuine denomination." In his speech on German intellectual freedom of 6 July 1935 he also spoke up for the freedom of conscience. No document was presented which contained a request by Rosenberg for criminal persecution of one of his numerous ideological opponents, although he might easily have been prompted to do so by their sharp attacks on his opinions.

Further, the Prosecution accused him of promoting militarism. Rosenberg was indeed an admirer of the soldier's profession and a soldierly attitude toward life, but he also admired the peasant's standards as the basis of the national character. He advocated the creation of a people's army, both as the outward expression of Germany's capacity as a political ally and for the purpose of training and educating the people at home. However, he denies having contemplated world conquest. On this point I can refer to his speech on Germany's Position in the World of 30 October 1933. There he offered peace to Russia on the occasion of the German withdrawal from the League of Nations (Document Book 1, Page 147). I shall quote this passage, for it also proves that National Socialism did not desire to interfere in the affairs of other countries:

> "We are ready at any time to maintain absolutely correct relations with Soviet Russia, because naturally we do not necessarily want

to modify an ideology in the field of foreign policy and foreign relations."

In the same speech he emphasizes that the avowal of an ideology he describes as racial science is "not meant to be an expression of racial hatred, but an expression of racial respect" (*Blood and Honor*, Page 377).

Mr. Justice Jackson called Rosenberg's nationalism a "wild" one. Rosenberg was passionate, but he wanted thereby to overcome class conflict in the nation, which threatened its existence. For a clearer understanding of the facts it may also be said ...

THE PRESIDENT: Dr. Thoma, the Tribunal would like you to finish your speech before lunch, if you could possibly summarize some parts of it. I don't know whether that is possible.

DR. THOMA: I shall try to do that, Mr. President.

I once more refer to Mr. Jackson's statement that Rosenberg's nationalism, or militarism, was "wild." In this connection I should like to refer only to the fact that such nationalism was a compensatory symptom, which is easily found in a conquered country.

The accusation dealing with anti-Christianity and neopaganism is something which I have already mentioned, and I should just like to refer to it. I have dealt with the term "master race," mentioning the fact that these words are not found in Rosenberg's works at all.

Concerning the Party Program, I stated that Rosenberg did not draft it, but only supplied a commentary upon it, and that it is not a question of what is contained in the Party Program, but rather with what its effect was. I referred to the witness Funk, who stated that his first action and his first program as Minister of Economics had no reference at all to the Party Program, but was simply democratic and liberal.

The Party Program was adhered to neither in a positive nor a negative sense. The government was carried on just as in other states, on the basis of general necessity.

May it please the Tribunal, I shall turn to the charge that Rosenberg was the delegate of the Führer for the supervision of all education and spiritual ideology within the NSDAP. During the reading of the affidavit by Dr. Eppe I pointed to the fact that Rosenberg, as head of this office, had no executive power, and that Rosenberg interpreted the duties of his office in such a way that he published magazines on all cultural and scientific topics, especially the *NS Monatshefte*, the polemic political contents of which, after 1933, were more and more superseded by historical, scientific, and cultural subjects. On the basis of all the literature at our disposal it is not in

accordance with the facts that Rosenberg interpreted his position as one from which to sow hatred. After 1933 he mainly endeavored to intensify and promote new definite talent. I have said in addition that this nonpolitical office concentrated its efforts on exercising a regulating and guiding influence on all noble and cultural values which manifested themselves.

May it please the Tribunal, I shall now turn to the topic: "Morality as a basis of the Indictment." I should like to ask the High Tribunal, even though I do not propose to read this passage, to consider it as having been presented by me. I refer to Pages 82a through 82g, and I should like to ask the High Tribunal for permission not to read this matter and yet to have this matter considered as having been submitted in its entirety and read into the record. I shall now sum up ...

THE PRESIDENT: Dr. Thoma, all the speech will be taken as being presented to the Tribunal. By your summarizing it, you are not excluding it from the record of the Tribunal. The Tribunal will take note of it all.

DR. THOMA: Thank you, Mr. President.

I shall now sum up in conclusion, and I should like to point out the following:

... that he is to be understood as a phenomenon of psychic compensation, as often appears in a conquered people. In addition, Germany, situated in the middle of Europe, was always exposed to so many political and military dangers that military circles in Germany, particularly after the entrance into the Ruhr in 1923, were necessarily particularly sensitive on national questions. As a German Balt he was brought up in a national way of feeling that led him to expect more of self-assertion and mobilization for defense than of the disappointments resulting from the international negotiations carried on up to that time. He was always ready for an understanding based on equal representation (Document Number 003-PS, Exhibit Number USA-603).

Rosenberg has been further reproached with anti-Christianity and neopaganism. It is true that this reproach was not brought against his theory, but in connection with the persecution of the Christian religion in all its forms which later resulted. Rosenberg was an opponent of Christianity in its—as he sees them—present historical forms, just as he was of Jewry. In place of Christianity he strove for an idealistically, racially, and ethnically, conditioned religion, an emotional religion of blood and soil.

He thereby attacked both Christianity and Jewry theoretically, and hoped that the Christian Churches would gradually become extinct among the German people; yet it will always have to be admitted that Rosenberg staged no violent persecution. He carried on this battle with intellectual weapons. Here, too, since he expected freedom of conscience for himself, he advocated freedom of conscience for others, and pointed out that with his M y t h and his new religiousness he did not wish to confuse Church believers but to create new spiritual ties for those, too, who had ceased to be believers in the Church.

The term “master race,” to my knowledge, does not appear in Rosenberg’s writings, nor does it fit into Rosenberg’s ideology, which proceeds from the race as a general law. Therefore, Rosenberg speaks of the Nordic, Mediterranean, Dinaric race, in relation to races which are biologically different, not in the sense of an arrogant judgment as to value, but in the sense of racial facts, in the sense of honoring the entire human race of Europe.

As far as the Party Program is concerned, despite the assertions of the Prosecution, it was not he, Rosenberg, who designed it. Like so many other things, the meaning and action of the Party Program has also been overestimated and exaggerated. It was one of the first deeds of the National Socialist Government to design a reconstruction program, of which the Defendant Funk said that almost any other liberal or democratic government could accept it also. In place of breaking up capital investment, the reinstatement of a sound money and credit system was demanded. I could go on quoting a number of examples, for instance the program of aliens’ status for Jews, which was not carried out. The Party Program was never adhered to subsequently either in the positive or the negative sense. Rules were simply enacted as in other states, too, based on the necessities of the moment.

The entire ideology of the journalist and author Rosenberg becomes intensified and is rendered more menacing to peace, according to the Prosecution, by the fact that Rosenberg was nominated the deputy of the Führer for the supervision of the entire intellectual and ideological education of the NSDAP. How did this assignment come about and what were the circumstances concerning it? On the basis of his previous experience in the educational work of the Party, its organizational leader asked Rosenberg whether he would not undertake a common intellectual project. Rosenberg answered in the affirmative, if the Führer so desired. Thereupon, on 24 January 1934, the Führer appointed him chief of that office. It was a Party office and had nothing to do with the schools, as is erroneously assumed. The office had no right to issue directives to Reich offices; even any correspondence with them had to be sent via the Party Chancellery. Neither did it have any right to suppress books, et cetera. Even a right to issue directives to the Party was not granted, the more so since the branch school directors were also subordinated to the Reich leaders (SA, SS, HJ). Therefore, from the very beginning Rosenberg did not consider his work as representing the tasks of an intellectual police, but as an executive and unifying work, as the central point of the expression and realization of the factual and personal power of conviction and initiative.

He had no offices in the various Gaue, not even individual representatives; he agreed to the Gau education leader as his deputy at the same time, in order to maintain a connection with practical education in the country.

The office had many things to review in the course of time, yet it remained limited in extent. It became subdivided into various spheres of work; teaching and education proper, cultivation of literature, the arts, cultural and general problems. About twice a year, for the purpose of comparing tuition experiences, Rosenberg called together the so-called “Working Community for the Instruction of the Entire Movement.”

In it were represented the educational deputies of the political leadership and its various subdivisions. They reported on their work and expressed their suggestions. On the basis of these

suggestions, Rosenberg frequently lectured in the Gaue on appropriate topics, and likewise induced his collaborators to handle such questions in all the subdivisions. These are the two educational meetings which the Prosecution mentioned by reason of their alleged "broad influence on the community schools" as an indication of criminal activity (Volume V, Page 48). This generally executive work found expression particularly in the periodicals of the offices of Rosenberg's department; primarily in the N. S. Monatshefte, which after 1933 acquired a gradually increasing polemical political content in the interest of handling historical, cultural, and scientific topics. Die Kunst im Deutschen Reich achieved special significance by simply offering the most beautiful examples in the way of contemporary plastic art, excellently presented without discussion. The Bücher Kunde offered a monthly cross section of writings and literary contributions. The monthly periodical Musik devoted itself above all to serious art, the cultivation of the German classics, and without any pettiness toward new creations. The journal Germanisches Erbe published contributions on research in early history, the Deutsche Volkskunde was devoted to games, folk songs, peasant customs. Deutsche Dramaturgie described the ambitions and problems of the contemporary theater.

Besides this there were special exhibitions of the lifework of great artists in Rosenberg's exhibition building in Berlin, and book exhibitions in various cities.

It is simply not true if the Prosecution declares that Rosenberg used his assignment to disseminate hatred. The essence of his entire work after 1933 went toward a profounder and large-scale promotion of new positive talents.

Political polemics in these seven years had almost entirely disappeared. But for the difficulties in the language, one would find, in glancing through the journals and speeches, an honest great effort, whether Rosenberg spoke to youth or to the technicians, teachers, lawyers, workers, professors, women, at meetings of historians, or before the Northern Society.

The heads of his offices were instrumental in publishing and promoting valuable works of art: Classics of music, history of the German ancestry, world political libraries, development of German peasantry, and others. In the present impassioned days one is not interested to know of this side of somebody's lifework, and therefore I only touch upon it; but I wish to emphasize that it was just that which seemed to Rosenberg, since 1933, to constitute the essential part of his work, and similarly he intended to devote himself in his old age entirely to scientific-cultural research and teaching. I shall permit myself a few more words about this later.

Contrary to some opinions which at first appeared necessary, although some Individuals may perhaps have looked upon them as rather petty, Rosenberg advocated at the universities of Munich and Halle the right of examining new problems of our times as well as the independence of scientific thinking. He declared that we would have to "feel that we were the intellectual brothers of all those who once in mediaeval times raised the flag for this free research" (Document Book 1, Page 134). Against certain attempts to identify certain scientific physical theories with the Party, he protested in an official declaration which rejected this danger of hairsplitting. "It is not the task of the National Socialist movement," he said in a speech about Copernicus and Kant on 19 February 1939, "to make

any regulations for research other than necessarily connected with our philosophy of life" (Document Book 1, Page 173).

When a certain trend toward mass statistics, peak figures for the number of visitors, et cetera, developed in the otherwise desirable progress achieved by the German Labor Front, he made a determined stand in favor of emphasis on the personal element. He rejected this idea of "mass production" in an address to youth with the words: "One cannot receive art and culture like mass-produced, ready-made clothes in a department store" (Document Book 1, Page 155). Today poisoning of this youth is imputed to him, but on the contrary he asked (Document Book 1, Page 161) for comprehension in teaching on the part of everybody to whose care young people are entrusted, and he decidedly rejected any orders in the intellectual field.

With regard to any form of collectivism, as has already been mentioned, he impressed on youth the importance of comradeship, but emphasized the personal element and the right to solitude. When on the grounds of certain occurrences many voices criticized the teaching class, Rosenberg began to fear lest general discrimination against the profession might develop. He took a stand against this danger in two speeches: at a great meeting in October 1934 at Leipzig, and later at the conference of the N.S. Teacher's League at Bayreuth (Document Book 1, Page 162), where he declared that the National Socialist movement would step in and see that the teaching class be respected, just as it would have done for all other professions.

By these brief allusions I mean to say that Rosenberg, as a regulating and leading intellectual force, advocated high cultural values and the rights of personality in a manner rendered convincing by his attitude and motives. Throughout the whole Party it was no secret that this activity involved profound opposition to the Propaganda Minister. Rosenberg from the very beginning considered it a calamity that culture and propaganda should be associated in one ministry. For him art was a creed, propaganda a form of tactics.

As things at first could not be changed, Rosenberg emphasized his attitude to the outside world by not attending a single annual meeting of the Reich Chamber of Culture, in the firm hope that at some later day another conception would win through.

Many things Rosenberg said did not fail to have their effect and certainly prevented some harmful actions, but more, and probably the most important, did not succeed because the legislative and executive powers in the State lay in quite different hands, and these finally, due to the war and in spite of the will to sacrifice, brought about not the development of the National Socialist idea but its degeneration. Moreover, this happened to an extent which Rosenberg could not foresee.

It was seen that the foundations for the spiritual education of the Party were not sufficient, and round about 1935 there developed a wish to create a serious place for research and study. This desire led to the idea later known as "high school," which was intended to take the form of an academy. Rosenberg considered the creation of this academy as a task for his old age. Since it would have taken years to provide tuition material and to choose suitable personnel, the Führer authorized Rosenberg at the end of January 1940 to carry on the preparatory work he had started on official orders. Thus, contrary to what the Prosecution asserts, (Volume V, Page 48) the "high school" had nothing to do with Rosenberg's "Einsatzstab," which was not even planned at that time.

Mr. Justice Jackson, in his fundamental speech of 21 November 1945, expressed the desire, that this Trial should appear to posterity as the fulfillment of the human yearning for justice. Mr. Jackson furthermore declared that he had brought the Indictment because of conduct which according to its plan and intention meant injustice from the moral and the legal standpoint. In his report of 7 June 1945 Mr. Justice Jackson outlined that by this Trial those actions are to be punished which since time immemorial have been considered as crimes and are designated as such in any civilized legislation. The most difficult problem, the greatest task, and the most tremendous responsibility for the Tribunal lies concentrated in this single point: What is justice in this Trial?

We have no code of laws, we have, however astonishing it may sound, not even any fixed moral concepts for the relations of nations among each other in peace and war. Therefore the Prosecution had to be satisfied with the general terms "civilized conception of justice," "traditional conception of legality," "conception of legality built on sound common sense with regard to justice"; they have spoken of "human and divine laws" (Volume VII, Page 78); the Hague Land Warfare Rules refer in their preamble to the "laws of humanity" and to the "demands of the public conscience."

The basis of justice is without any doubt a morality, the moral law; thus if we wish to determine what injustice among nations is, what is contrary to the idea of justice among nations according to international law, then we must broach the question of morality. The answer will be: everything is moral which our conscience accepts as being moral.

But what is the original cause of moral discrimination: desire and happiness of the individual; or progress, improvement, preservation of the life of an individual, of a people, of humanity; or virtue; or duty?

How can we recognize what is good and what is bad? By intuition, or by experience, or by authoritarian and religious education? What is good and bad in the actions of a State, what is good and bad in the mutual relationship between nations? Does a difference exist between national morals and private morals? Can the State commit any injustice at all? From Saint Augustine through Machiavelli and Nietzsche to Hegel, Tolstoy, and the pacifist thinkers, yearning humanity has received the most different answers to this question.

And furthermore: Have fixed moral laws existed since time immemorial or have changes in the ideals of nations brought about changes in morals, too? What is the situation with regard to this today?

I have already said once that, according to my opinion, war itself is a brutality and a great crime of humanity against itself and the laws of life. An essentially different question is whether this conviction has already entered the conscience of humanity. We consider ourselves far above the moral level of former nations and ages, and are, for example, surprised to find that the highest representatives of Greek morality such as Plato and Aristotle consider abandoning of children and slavery to be absolutely right, or that in certain parts of East Africa even today only robbery and murder give a man the stamp of heroism; on the other hand it is absolutely compatible with our present-day idea of morality that human beings are killed by hundreds of thousands in war and that the products of human welfare and culture are wantonly destroyed. Neither in a moral nor in a legal sense is this considered as unjust.

If the Prosecution now charges the defendant with a wrong in the moral or legal sense, it is its duty to present the prerequisites for a punishment of the defendant, in such a way as to convince the Court, for, according to the hitherto existing moral concepts of nations, killing in war is not murder within the meaning of the penal codes of the individual countries, and the measures of a sovereign country in war or in peace have never been interpreted as an offense within the meaning of these penal codes or as punishable and immoral acts by the legal convictions of civilized humanity. Christianity teaches us to return good for evil and to love one's enemies; this has been a world religion for 2,000 years, but many people today will laugh outright if one should venture to claim certain principles for the relations of nations between each other. In the face of the yearning of humanity the Prosecution now desires to aid its progress, even if only step by step, in this direction; it seeks to achieve the end that "unequivocal rules" shall emerge from this Trial; its mistake however, is that it wants to explain "traditional opinions of justice" and civil criminal laws as the contents of a public conscience which hardly exists any longer, compliance with which cannot in any case be demanded retroactively of the defendants.

It is certainly very true that a profound change is commencing today in the moral thinking of humanity, a regeneration of the moral law of nations, and that this Trial before the High Tribunal marks the beginning of this new era. However, it appears to me very doubtful whether it is proper to impress a new kind of justice upon the conscience of mankind by making an example of the defendants.

It is easy to speak of human and divine laws, or of the demands of public conscience, but we become greatly embarrassed for an answer to the question: What is the substance and content of private morality, when is an act immoral according to private morality? In their concern over what is good or evil, some rely on religion, others have been taught wisdom by experience and education, still others find an explanation in the philosophers.

The State has in recent times taken up the moral education of its citizens in increasing measure, not only through criminal laws but also through "political education" or whatever other name is used for it. Not only did the National Socialist State have a great advantage here over the liberal states, but so do all totalitarian states of the world: They have hammered moral principles into the minds of their citizens, both of a private and public nature. They have proclaimed moral ultimate values, such as fidelity, honor, and obedience. By this means reflection concerning private and public morals is made easier for the individual citizens and they are obliged by force to uphold these ultimate values in the prescribed form. The German people, who had become tired and resigned as a result of continual warlike disputes and religious upheavals, willingly followed National Socialism, even when the latter's ethics were exalted to a faith; it took this leap into the unknown, not with the idea of being taught by this means to deceive people, to enslave them, to rob them, to kill them, to torture them (see Volume VII, Page 78), but because it was in search of moral elevation, an authoritative moral leadership in its material and spiritual distress, and because nothing else was offered to it, especially not by a liberal world conscience which did not know how to make the fundamental principle of humanity a reality. The National Socialist ethical conceptions were taught to Germans as s u m m u m b o n u m , as the highest idea, and they believed the idea to be moral and good. Then National

Socialism came into conflict not only with ideologies, but also with the plans of power of other states, because it could not find the formula which would include not only perfection and life for Germany, but also the interests and justice for all nations of the world. To try to construe out of such inadequacy of a national ethical idea, however inefficient, a punishable action, a conspiracy, is not admissible in my opinion, if only because uniformly acknowledged national morality has not yet developed, and unlimited national egotism has not yet been dethroned and is still considered the highest moral instance of the State.

It might be objected that the Germans should only have followed the teachings of their great philosopher Kant in thought and action, according to his "categorical imperative": Act in such a way that the maxim of your will could always serve as a principle for general legislation! Then they would and should have recognized the moral instability of National Socialist teachings. To that I can answer with the words of the great English philosopher, John Locke, who says on the question of what is good or evil in his Essay Concerning Human Understanding; Book 2, Chapter XXVIII, Paragraph 6: "God has ordained it in such a manner that certain activities produce general happiness, preserve society, and even reward the doer. Man has discovered this, and has established it as a practical rule. With that rule are connected certain rewards and punishments either by God Himself (reward and punishment of infinite size and duration in the Beyond) or by mortals (legal penalties, social approval or condemnation, loss of honor); good and evil which are not the natural effect and results of the actions themselves. Then men look to those rules or laws, be they divine or made by the State, and the laws of usage or of private opinion, and measure their actions by them. They judge the moral value of their actions according to whether they conform with the rules or not. Moral good or evil therefore amounts only to conforming or not conforming our action with a law which by the will and power of the legislator determines for us what is good and evil."

Therefore good and evil has been and still is today what the authorities want or do not want. Christianity for centuries has been preaching not only to Germans but to all nations of the world: "Let every man be subject to the authority above him." And the authorities do not move beyond conscience and morality so long as the expansion of national egotism is not opposed by clear laws and commandments and irrefutable legal convictions.

The highest good, summum bonum, in international morals of nations has not yet been mandatorily codified. There does not exist any authoritative idea for the community of nations. Instead of discussions on individual ethics and individual criminality, the Prosecution should have submitted its accepted principles and criteria as international common law, which was not done.

Therefore, with regard to the standpoint of the prosecuting authorities as to the personal responsibility of acting statesmen, I feel impelled to look upon this as a totally new philosophy and one which is very dangerous in its consequences.

Apart from the misdeeds of the individual, which do not satisfy even the minimum of moral conceptions, the ethical conceptions of National Socialism and the actions resulting from them, insofar as they are an expression of National Socialist ethics, cannot be subjected to the judgment of a human forum, since they are an event of world history. And the fate and guilt of the Defendant Rosenberg likewise cannot be judged conclusively within the framework of this Trial. As to the

question of deciding the criminal guilt of the defendant, that is the hard task of the High Tribunal; but his potential historical guilt cannot and will not be judged by the Tribunal. Rosenberg, like all persons of historical importance, has acted according to his character and spirit, thereby perhaps becoming guilty in the eyes of history. The more freedom of action a given personality has in his will, the clearer the importance of conditions and the one-sidedness of all human activities becomes, and out of an insignificant guilt there grows, particularly in historical personalities, an enormous power which decides the fate of many, and which remains a gloomy foreboding for whoever lets it loose.

Goethe once said: "The doer never has a conscience; no one feels his conscience but the observer." But this maxim can never mean that a person must not move and act to the best of his knowledge and conscience, and particularly for his country's sake. And we all know that in reality nobody is capable of attaining the good he is striving for. Just as his knowledge, so will his actions always be incomplete: Any action we accomplish as free beings is an infringement on the operating forces of the universe, which we are never able to assess.

Rosenberg was caught up in the destiny of his nation in a period of severe foreign political oppression and internal dissension. He struggled for cultural purity, social justice, and national dignity, and rejected vehemently all elements which did not admit these high values or consciously attacked them in an irreverent manner. With respect to foreign policy he stood for an agreement between the four central powers of the European continent, in full realization of the grave consequences of a lost war. He acted in all loyalty and respect toward a personality who appeared to give political shape and increasing power to his ideals. After the political victory at home, Rosenberg proposed that the polemics and other aspects of the period of struggle be subdued. He stood for a chivalrous solution of the existing Jewish problem, for spiritual and cultural instruction of the Party on a high plane and, contrary to the statements of the Prosecution, he opposed any form of religious persecution. He can hardly be reproached for emphasizing a definite religious-philosophical conviction of his own.

The practical application of many of his views was practiced to an increasing degree by authoritative agencies of the Party, although later they were disregarded, especially after the outbreak of the war. Finally, as has been discovered now, they were often turned into the opposite of what Rosenberg fought for.

Until 17 July 1941 Rosenberg was excluded from participation in any national legislation. Considered from the point of view of personal responsibility, all his speeches and writings up to that time come within the scope of unofficial journalistic activity which every politician and writer must admittedly be free to engage in—a freedom which the Tribunal has fundamentally acknowledged with regard to all utterances by the statesmen of other countries during the unofficial period of their career. It seems to be

all the more significant that Rosenberg as a private citizen did not call for war or for the commission of any inhuman or violent acts.

As Minister for the East he advocated a generous solution in accordance with the understandable national and cultural aspirations of the eastern European peoples. He fought for this concept as long as there were any prospects for its realization. Ultimately realizing that Hitler refused to be persuaded, he requested his dismissal. The fact that Rosenberg could not prevent many outrages from happening in the East cannot be charged against him in the criminal sense. Neither the Armed Forces nor the Police nor the Allocation of Labor were subject to his authority. Whenever injustices or excesses came to his knowledge, he did everything he could to counteract them.

For almost a whole year, Rosenberg endeavored to keep labor recruiting on a voluntary basis. Later, when several age groups were drafted, he protested against every abuse by executive agencies and always demanded redress. Quite apart from the legitimate requirements of the occupation power, his labor legislation for the Eastern Territories was necessary for the establishment of order and the repression of arbitrary measures as well as of dangerous idleness, increasing sabotage, and the growing number of murders. There was a war on and it was a war area, not a postarmistice period, much less one following final capitulation.

So far as he was informed of things and commanded any influence, Rosenberg fought for his convictions. The fact that adverse powers became stronger than he was cannot be brought up as a charge against him. One cannot punish offenses, and at the same time punish those who revolted against them. In view of the terrible extermination orders which have now been disclosed, it is certainly possible to raise the point whether Rosenberg could not have exerted much stronger opposition. To expect this would, however, suppose an earlier knowledge of things which he only learned about after the collapse. Should he be charged with any carelessness it must not be forgotten that he felt it to be his duty to serve the Reich engaged in the struggle for its existence, and that terrible injuries were also inflicted upon the German nation, injuries which Rosenberg was equally unable to recognize as war necessities.

His official tasks, as for example the duties of the Einsatzstab in the West and East, were carried out by Rosenberg without compromising his personal integrity. The requisitioning of artistic and cultural objects he always carried out provisionally, subject to final decisions by the supreme authority and, as far as was at all possible, with proper identification of the proprietor. Moreover, in the use of unclaimed furniture for the benefit of air-

raid victims in Germany, provision was made for the subsequent indemnification of the owners based upon a precise inventory.

In considering his entire personality we see that Rosenberg followed with faith and devotion an ideal of social justice combined with national dignity. He fought for it openly and honorably, went to prison, and risked his life for it. He did not step in only when National Socialism afforded the opportunity to begin a career, but at a time when it was dangerous and asked only for sacrifice. In his speeches after 1933 he took his stand in favor of deeper spiritual formation, a new cultural education, personality values, and respect for every form of honest work. He accepted the gloomy days of that time as unfortunate but inevitable accompanying phenomena of a revolution otherwise acclaimed as having passed without bloodshed, without having in fact learned of the secret details. He fully believed that good forces and ideas would prevail over these other human imperfections. During the war he was at the service of the Reich in accordance with his duty.

For 25 years, throughout the revolution and the events of the war, he maintained his personal integrity and untainted character. He had to witness with deep sorrow that a great idea, in the hands of those possessed with the lust for power, was gradually abused, and in 1944, at Party meetings, he protested against this abuse of power entrusted to its holders. During this Trial he had to his dismay and horror to look upon the evidence of the degeneration of his life's ideal; but he knows that his aspirations and the aspirations of many millions of other Germans have been honorable and decent. Today he still adheres to his honorable, honest, and humanly irreproachable conduct and, full of sorrow for the wounds inflicted upon all nations and for the downfall of the Reich, he awaits the sentence of a just Tribunal.

[*The Tribunal adjourned until 11 July 1946 at 1000 hours.*]

ONE HUNDRED AND SEVENTY-SIXTH DAY

Thursday, 11 July 1946

Morning Session

THE PRESIDENT: The Tribunal will adjourn this afternoon at four o'clock to sit in closed session.

Dr. Seidl, will you present the case of the Defendant Frank?

DR. ALFRED SEIDL (Counsel for Defendant Frank): Mr. President, My Lords. The Defendant Dr. Hans Frank is accused in the Indictment of having utilized his posts in Party and State, his personal influence, and his relation with the Führer, for the purpose of supporting the seizure of power by the National Socialists and the consolidation of their control over Germany. He is also accused of having approved, led, and taken part in the War Crimes mentioned in Count Three of the Indictment, as well as in the Crimes against Humanity mentioned in Count Four, particularly in the war crimes and crimes against humanity committed in the course of the administration of occupied territories.

As I have already explained in the case of the Defendant Hess, the Indictment fails to adduce any facts in substantiation of these accusations. It is similar in the case of the Defendant Frank; here again the Indictment contains no statement of factual details to substantiate the accusations. Like all the other defendants, the Defendant Frank is accused of having taken part in a common plan which is alleged to have had as its object the planning and waging of wars of aggression and the commission in the course of these wars of crimes which infringe upon the laws and customs of war.

The evidence has shown that the Defendant Frank joined the National Socialist Party in the year 1928. Both before and after the assumption of power by the National Socialists he was concerned almost exclusively with legal questions. The Reich Law Department was under his control as Reichsleiter of the Party until the year 1942. After Adolf Hitler's appointment as Chancellor, Frank became the Bavarian Minister of Justice. In the same year he was appointed Reich commissioner for the co-ordination

of legal institutions. This task consisted in the main of transferring to the Reich Ministry of Justice the functions of the administrative legal departments of the component states of the Reich. That was completed by the year 1934. When the affairs of the Bavarian Ministry of Justice had been transferred to the Reich, the office of the Defendant Frank as Bavarian Minister of Justice came to an end. In December 1934 he was appointed Reich Minister without Portfolio. In addition he became, from 1934 onward, President of the Academy for German Law, which he himself had founded, and President of the International Chamber of Law. Finally, he was the Leader of the National Socialist Lawyers Association.

This list of the various posts held by the Defendant Frank in Party and State would alone be sufficient to show that his work was almost exclusively concerned with legal matters. His tasks were in the main confined to the execution of Point 19 of the Party Program, which demanded a German common law. And in actual fact almost all speeches and publications by the Defendant Frank, both before and after the assumption of power by the National Socialists, dealt with legal questions in the widest sense of the term.

In the course of his examination in the witness box, the Defendant Frank testified that he had done everything he could to bring Adolf Hitler to power and to carry out the ideas and the program of the National Socialist Party. But whatever the defendant undertook in this respect was done openly.

The aims of the National Socialists before they assumed power can be expressed in a few words: Liberation of the German people from the shackles of the Versailles Treaty; elimination of the mass unemployment which had arisen in consequence of that treaty and the unreasonable reparations policy of Germany's former enemies; counteraction against the symptoms of degeneracy—political, economic, social, and moral—connected with that unemployment; and finally, the restoration of the sovereignty of the Reich in all spheres.

The Prosecution was unable to produce any evidence to show that the revision of the Versailles Treaty was, if necessary, to be carried out by violent means and by war. The political, military, and economic situation in which Germany found herself before the assumption of power—a situation in which it could only be a question of eliminating the terrible consequences of the economic collapse and of enabling seven million unemployed again to play their part in the economic process—could not but make any serious thought of a war of aggression appear futile.

Moreover, the evidence brought forth nothing to show the existence of the common plan as stated in Count One of the Indictment, as far as one understands thereby a definite and concrete plan among a narrow uniform circle of persons. The evidence, in particular the testimony given by the witness Dr. Lammers and the defendant himself in the witness box, has shown on the contrary that Frank did not belong to the circle of Hitler's closer collaborators. The Prosecution was unable to present to the Tribunal a single document dealing with important political or military decisions with which the Defendant Frank was connected. In particular, the Defendant Frank was not present at any of the conferences with Hitler which the Prosecution considers especially important in proving the alleged common plan, the minutes of which conferences the Prosecution has submitted as Exhibits, Numbers USA-25 to 34.

The only statute which is important in this connection is the Law on the Reintroduction of General Conscription of 16 March 1935. The facts have already been explained, and will be further enlarged upon, which led to the promulgation of that law and why it cannot be looked upon as an infringement of the Versailles Treaty. The Defendant Frank signed that law in his capacity as Reich Minister, as did all the other members of the Reich Government. That law, which had as its object the restoration—at least in the military sphere—of the sovereignty of the German Reich, did no harm to any other nation. Nor did the content of that law, or the circumstances which led to its enactment, admit the conclusion that it was part of a common plan with the object of launching a war of aggression.

The German people had been obliged to realize, during the preceding 17 years, that the voice of a nation without military power, and in particular a nation in Germany's geographical and military situation, cannot make itself heard in the concert of nations if it has not at its disposal adequate instruments of power. The Government of the Reich faced the consequences of this realization after equality of rights had been promised the German people over and over again for 14 years and that promise had not been kept, and in particular after it had become clear in the years 1933 and 1934 that the Disarmament Conference would not be capable of fulfilling its appointed functions. For the rest, I refer to the proclamation of the Reich Government to the German people, which was issued in connection with the publication of that law.

Further, the work of the Defendant Frank, even after the assumption of power and up to the beginning of the war, was confined almost exclusively to the execution of tasks connected with the leadership of the Academy for German Law and the National Socialist Lawyers Association. The objects of

the Academy for German Law are apparent from the law concerning its establishment of 11 July 1933. It was intended to encourage the reform of German legal procedure and, in close and constant co-operation with the appropriate legislative authorities, to put the National Socialist program into practice in the whole sphere of law. The academy was under the supervision of the Reich Minister of Justice and the Reich Minister of the Interior. The function of the academy was to prepare drafts of statutes; legislation itself was exclusively restricted to the Reich ministries for the various departments.

One of the tasks of the academy was to exercise the functions of the legal committees of the former Reichstag. In actual fact the work of the academy was done almost exclusively in its numerous committees, which had been established by the defendant. Acceptance into the academy was not dependent on membership in the Party. Most of the members of the academy were legal scholars and eminent legal practitioners who were not Party members. Moreover, it is well known that the Academy for German Law kept up close relations with similar establishments abroad and that numerous foreign scholars gave lectures in the academy. These facts entirely exclude the assumption that the academy could have played any important part in the common plan alleged by the Prosecution. The same is true of the position of the Defendant Frank as leader of the National Socialist Lawyers Association.

Adolf Hitler's attitude toward the conception of a State founded on law, insofar as any doubt could still have been entertained about it, has become perfectly clear through the evidence presented at this Trial. Hitler was a revolutionary and a man of violence. He looked on law as an impeding and disturbing factor in the realization of his plans in the realm of power politics. Incidentally, he left no doubt about this attitude of his and discussed the subject of the State founded on law in a number of speeches. He was always very reserved in his dealings with lawyers, and for this reason alone it was impossible from the outset that any close association could have developed between him and the Defendant Frank. The Defendant Frank considered it his life's work to see the conception of the State founded on law realized in the National Socialist Reich and, above all, to safeguard the independence of the judiciary.

The Defendant Frank proclaimed these principles as late as 1939, before the outbreak of war, in a great speech he made before 25,000 lawyers at the final meeting of the Congress of German Law at Leipzig. Among other things he declared on that occasion:

"First, no one should be sentenced who has not had an opportunity of defending himself.

"Second, no one shall be deprived of his property, provided that he uses it unobjectionably from the point of view of the community, except by judicial sentence. Legal properties in this sense include honor, freedom, life, and earnings.

"Third, an accused person, no matter under what procedure, must be enabled to procure someone to defend him who is capable of making legal statements on his behalf; and he must have an impartial hearing according to law. If these principles are applied to their full extent, then the Germanic ideal of law will be fulfilled."

These principles constitute a definite repudiation of all methods employed in a police-ruled State and imply, moreover, the definite rejection of the system of concentration camps. The Defendant Frank had actually spoken against the establishment of concentration camps before the date indicated. The evidence has shown that in the year 1933, in his capacity as Bavarian Minister of Justice, he was opposed to the concentration camp at Dachau, that he urged the application of the so-called legality principle, that is, the prosecution of all offenses by the State, even in these camps, and that, over and above this, he demanded the dissolution of the concentration camp at Dachau. That this last point is a fact is shown by the evidence given by the witness Dr. Stepp, who was questioned elsewhere.

The Prosecution also appears to see in the sentence, "Right is what benefits the people," an indication of the participation of the Defendant Frank in the alleged common plan. Such a conclusion could only be drawn in complete misapprehension of the idea which the Defendant Frank wished to express by means of this sentence. This was merely a challenge to the exaggeratedly individualistic legal idea. In the same way as by the phrase, "The common good before one's own," the sentence quoted is intended to express the demand for a legal system which, to a greater extent than in previous years, should take account of common law and socialist tendencies. It is in reality nothing more than a different way of saying: *Salus publica suprema lex*.

These material differences alone would have been sufficient to make it unthinkable that the Defendant Frank could have belonged to the inner circle of Hitler's collaborators. The differences of outlook in regard to the functions of law were bound to become more pronounced in the course of the war. It could therefore cause no surprise that after the death of the former

Reich Minister of Justice, Dr. Gürtner, it was not the Defendant Frank who was appointed his successor, but the President of the Peoples' Court, Dr. Thierack.

Summing up, it may be said that there is no factual foundation for the assumption that the Defendant Frank participated in a common plan, a common plan which had as its object the waging of an aggressive war and in connection therewith the commission of crimes against the rules of war. Before I turn to the points of accusation brought against the Defendant Frank within the framework of his career as Governor General, I will refer shortly to his responsibility under penal law as a member of the organizations accused of criminality.

So far as Frank's responsibility as member of the Reich Government is under investigation, I can here in the main refer to the statements which I shall later make in the case of the Defendant Hess. The only difference lies in the fact that whereas Hess, too, was only Reich Minister without Portfolio, he had—as the Führer's Deputy under the Führer's decree of 27 July 1934—a considerable influence on the preparation of laws. That, however, was not the case with the Defendant Frank. Frank had hardly any influence at all on the legislation of the Reich. That is why he was cosignatory of so extraordinarily few Reich laws. With the exception of the law of 16 March 1935, by which general conscription was reintroduced, his name is to be found under none of the laws which the Prosecution has presented to the Tribunal as relevant to the proof of the criminal nature of the Reich Government as an organization.

The Defendant Frank, in his capacity as Reichsleiter and Leader of the Reich Law Department, was also a member of the Leadership Corps of the National Socialist German Workers' Party. An investigation of this point of accusation seems all the less called for since in this respect no act can be attributed to the Defendant Frank which fulfills the requirements of any penal law. For the rest, here too I can refer to my statements in the case of the Defendant Hess.

In Appendix A to the Indictment it is alleged that the Defendant Frank was a general of the SS. The evidence has shown that Frank at no time belonged to the SS and that he did not even have the honorary rank of a general of the SS. On the other hand, he was an Obergruppenführer in the SA. With respect to the application made by the Prosecution to declare that organization as criminal, too, the same may be said as in the case of the application to declare the Leadership Corps criminal. The Charter and the Prosecution here again depart from the principle which hitherto has been considered an indispensable component of any modern criminal law

practice, namely, that no punishment is admissible unless guilt has been established in every individual case.

I now pass to the points of accusation in connection with the career of the Defendant Frank as Governor General. When the Polish Government had left the country after Poland's military collapse, the German occupying forces were faced with the task of building up an administration without the help of any parliamentary, representation or any representatives of the former Polish State. The difficulties arising out of this situation were bound to be all the greater because, in spite of the comparatively short time that the war had lasted, the war damage, especially to the communications system, was not inconsiderable. Above all, however, the establishment of an orderly administration was rendered more difficult by the fact that the homogeneous economic area of the former Polish State was divided into three parts. Of the 388,000 square kilometers which made up the territory of the former Polish State, about 200,000 were taken over by the Soviet Union and 97,000 formed the Government General, while the rest was incorporated in the German Reich. A change came on 1 August 1941. On that date Galicia was annexed to the Government General as a new district, whereby the territory of the Government General was increased to an area of approximately 150,000 square kilometers with about 18 million inhabitants. This frontier delimitation made it all the more difficult for the administration, as the agricultural excess production all went to the Soviet Union, while on the other, hand important industrial cities such as Lodz, and above all the coal fields of Dombrowa, fell to the Reich.

Directly after the military collapse of Poland, a military government was set up to cover the four military districts of East Prussia, Posen, Lodz, and Kraków, Commander Von Rundstedt being placed at the head of that government. The Defendant Frank became Supreme Chief of Administration (Oberverwaltungschef). The military government ended on 26 October 1939 with the coming into force of the decree of the Führer and Reich Chancellor concerning the administration of the occupied Polish territories under the date of 12 October 1939. Under this decree the Defendant Frank was appointed Governor General for the occupied Polish territories which were not incorporated in the Reich and which shortly afterward became known as the Government General.

As the time at my disposal is short, I will not go into detail on the question as to whether the administration of the territories of the former Polish State, jointly designated as the Government General, should have conformed to the principle of *occupatio bellica* (occupation of enemy territory), or whether it should not rather be assumed that the principles of

debellatio (complete subjection and incorporation in a foreign state) were applicable in that case.

I come now to the question of the powers vested in the Defendant Frank by virtue of his office of Governor General. According to Article 3 of the Führer's decree of 12 October 1939 the Governor General was directly subordinate to the Führer. The same provision placed all branches of the administration in the hands of the Governor General. In actual fact, however, the Governor General had by no means such wide powers as it would seem at first sight. The Führer's decree itself provided in Article 5 that the Ministerial Council for the Defense of the Reich could also make laws for the territory of the Government General.

The Delegate for the Four Year Plan had the same power. Article 6 provided that, moreover, all supreme Reich authorities could issue decrees necessary for planning within the German living space and economic area and that these would be effective also for the Government General.

Apart from this limitation of the authority of the Governor General as provided in the Führer decree of 12 October 1939, other powers were conferred at a later date which no less impaired the principle of uniform administration. That is particularly true of the position of the Plenipotentiary General for the Allocation of Labor. I refer at this point to the appropriate documents presented by the Prosecution and the Defense, in particular to the Führer's decree of 21 March 1942, in which it is expressly provided that the powers of the Plenipotentiary General for the Allocation of Labor extend to the territory of the Government General. The whole armament industry in the Government General was at first in the hands of the OKW, but after the establishment of the Reich Ministry for Armaments and War Production it came under the jurisdiction of the latter.

The evidence has shown that in other directions, too, the principle of uniform administration was extensively infringed upon. For this I refer to the statements of the witnesses Dr. Lammers and Dr. Bühler and to the content of the documents submitted by me, especially Document USA-135. This deals with the directives in "special matters concerning instructions Number 21 (Case Barbarossa)," in which it is expressly provided that the commander-in-chief of the Army shall be entitled "to order such measures in the Government General as are necessary for the execution of his military duties and for safeguarding the troops" and in which the commander-in-chief is empowered to delegate his authority to the army groups and armies.

All these infringements of the principle of a uniform administration of all special powers, however, pale beside the special position allotted to the Reichsführer SS Himmler also in respect of the territory of the Government

General. The evidence, and particularly the testimony of Dr. Bilfinger, Oberregierungsrat in the RSHA, shows that as early as in 1939 when the defendant was appointed Governor General, a secret decree was issued in which it was provided that the Higher SS and Police Leader, East was to receive his instructions direct from the Reichsführer SS and Chief of the German Police, Himmler. Similarly, it is provided in the decree of the Führer and Reich Chancellor for the Preservation of German Nationality that the Reichsführer SS shall be directly empowered to effect the planning of new German settlement areas by means of resettlements. These two decrees conferred on the Reichsführer SS Himmler powers which, from the very first day of the existence of the Government General, tended to confront its administration with almost insurmountable difficulties. It was very soon evident that the general administration under the Governor General had at its disposal no executive organs, in the true meaning of the term. Since the Higher SS and Police Leader, East received his instructions and orders direct from Reichsführer SS Himmler and refused to carry out instructions emanating from the Governor General, it was very soon seen that in reality there were two separate authorities ruling over the Government General. The difficulties which thus arose were bound to become all the greater, as Higher SS and Police Leader Krüger, who for no less than 4 years was Himmler's direct representative in the Government General, did not even inform the administration of the Government General before carrying out police measures.

It is a well-known experience in the life of any state that an administration lacking executive police organs is in the long run not capable of carrying out its appointed functions. This is true even under normal conditions, but it must be all the more pronounced in the administration of occupied territory. If we remember, moreover, that not only did the Reichsführer SS Himmler issue his instructions direct to the Higher SS and Police Leader, ignoring the Governor General, but that over and above this the Offices III, IV, V, and VI of the RSHA also gave direct orders to the Commander of the Security Police and the SD in Kraków, we can well assess the difficulties with which the civil administration of the Government General had to wrestle day by day.

Under these circumstances the Governor General had no choice but to make every attempt to reach some form of co-operation with the Security Police, unless he was prepared to relinquish any hope of building up a civil administration in the Government General. And in fact the history of the administration of the Government General—which lasted for over 5 years—is for the greater part nothing but a chronicle of uninterrupted struggles

between the Governor General and the administration on the one hand, and the Security Police with the SD as represented by Reichsführer SS Himmler and the Higher SS and Police Leader, East, on the other.

The same applies to the activity of Himmler and his organs in the field of resettlement. As Reich Commissioner for the Preservation of German Nationality, Himmler and his organs carried out resettlement measures without even establishing previous contact with the administration of the Government General or informing the Governor General.

The numerous protests of the Governor General, addressed to Dr. Lammers, the Reich Minister and Chief of the Reich Chancellery, with regard to the measures taken by the Reichsführer and the Higher SS and Police Leader, East, and the difficulties they put in the way of the administration of that territory, have been established by the evidence. These protests led in the year 1942 to an attempt at redirecting the relationship between the administration and the Police. In retrospect, it can be said today as a result of the evidence that even this attempt was only utilized by Himmler and the Security Police to undermine internally and externally the position of the Governor General and his civil administration.

By a decree of the Führer dated 7 May 1942 a State Secretariat for Security was established in the Government General, and the Higher SS and Police Leader was appointed State Secretary. According to Article II of this decree, the State Secretary for Security also became the representative of the Reichsführer SS in his capacity as Reich Commissioner for the Preservation of German Nationality. The decisive provision of this decree is contained in Article IV, in which it is stated verbatim:

> "The Reichsführer SS and Chief of the German Police can issue direct instructions to the State Secretary for Security in matters pertaining to security and the preservation of German nationality."

Herewith, the contents of the secret decree issued in 1939 on the establishment of the Government General—which also provided that the Higher SS and Police Leader, East was to receive his instructions direct from the Berlin central offices and particularly from the Reichsführer SS in person—was expressly, and now publicly, confirmed. It is true that Article V of the Führer decree of 7 May 1942 provided that in cases of difference of opinion between the Governor General and the Reichsführer SS and Chief of the German Police the Führer's decision was to be obtained through the Reich Minister and Chief of the Chancellery.

The Chief of the Reich Chancellery, Lammers, was interrogated on this subject when he appeared as a witness before this Tribunal. He testified that

insofar as he found it possible at all to gain the Führer's ear in these matters, the latter on principle invariably approved Himmler's view. This is not surprising if we remember Himmler's position in the German governmental system, particularly during the later war years. This deprived the Defendant Frank of the last possibility of influencing in any way the measures taken by Himmler and the Higher SS and Police Leader, East.

In consequence of Article I, Paragraph 3, of the Führer decree of 7 May 1942 the scope of duties of the State Secretary for Security had to be newly defined. Both the Higher SS and Police Leader and, backing him, the Reichsführer SS attempted to bring as wide a field as possible under their jurisdiction in connection with the new regulation of the competence of the State Secretariat; on the other hand, the Governor General, in the interest of the maintenance of some sort of order in the administration, naturally tried to obtain control of at least certain departments of the Regular Police and the Administration Police. There is no doubt at all that it was the Police that emerged the victor in these struggles.

On 3 June 1942 the Governor General was obliged—in a decree concerning the delegation of duties to the State Secretary for Security—to declare himself willing to transfer to the State Secretary all the departments of the Security Police and the Regular Police. I have submitted this decree to the Tribunal (together with its two Appendices A and B) in the course of the evidence as Exhibit Number Frank-4. The two appendices list all the functions of the Regular and Security Police that have ever existed in the German police system. In Appendix A, which covers the departments of the Regular Police, there are 26 headings in which not only all the departments of the Regular Police are transferred to the State Secretary for Security, but over and above that, almost all the departmental functions of the so-called Administration Police. I will only mention Heading 18 as one example among many. This transfers to the Regular Police, and thereby to the Higher SS and Police Leader, all matters connected with price control. What is true of the Regular Police applies in even greater measure to the departments of the Security Police. No change as compared with the earlier situation was brought about by placing under the jurisdiction of the Higher SS and Police Leader the whole of the Political and Criminal Police, political intelligence, Jewish affairs, and similar departments; these competencies were already his as leader of the Security Police and the SD, and were made entirely independent of the administration of the Government General under the secret decree of 1939. Departments were also transferred to the State Secretary for Security which had only the remotest connection with the tasks

of the Security Police, for example, matters such as the regulation of holidays and so on.

Of considerable importance are the two last headings in the Appendices A and B, in which it is expressly provided that at conferences and meetings, particularly with the central Reich authorities, on all matters pertaining to the Regular and Security Police, the Government General—not the Governor—should be represented by the Higher SS and Police Leader. Therewith any competency possessed by the Governor General, even in regard to comparatively unimportant branches of the Administration Police, was transferred to the organs of Reichsführer SS Himmler, and the Government General was thus deprived of even the last remnants of an executive of its own.

Only by considering these facts and the development of the conditions obtaining between administration and police in the Government General is it possible to form an even approximately correct appreciation of the events in the Government General, which form part of the subject of the Indictment in this Trial.

Your Lordships, the Prosecution seeks to prove its accusations against the Defendant Dr. Frank in the main by quotations from the defendant's diary. In this connection I have the following basic observation to make.

That diary was not kept personally by the Defendant Frank but was compiled by stenographers who were present at Government conferences and other discussions of the Governor General. The diary consists of 42 volumes with no less than 10,000 or 12,000 pages of typescript.

With one exception, the entries do not represent the outcome of dictation by the defendant, but take the form of stenographers' transcripts. For the greater part—and this is evident from the diary itself—the authors of this diary did not record the various speeches and remarks word for word, but made a summarized version in their own words. The entries in the diary were not checked by the defendant, nor—again with one single exception—were they signed by him. The attendance lists stapled into several volumes of the diary—they are only contained in such volumes as relate to Government conferences—cannot be looked upon as a substitute for a confirmatory note.

Moreover, the evidence has clearly established that very many entries in the diary were not made on the basis of personal observations but came about through the fact that the author was told by participants about the subjects of Government meetings or other conferences after they had taken place, and then expressed it in the diary in his own words. Moreover, by an

examination of the diary it can easily be ascertained that the entries cannot be considered complete.

All these facts bring us to the conclusion that the material evidential value of this diary must not be overestimated. The evidential value of this diary can in no way be compared with the evidential value of entries made personally by the person concerned.

Above all, however, it seems to me essential to point out the following: The contents of any document are of material evidential value only insofar as the document is appreciated in its entirety. The diary of the Defendant Frank with its 10,000 or 12,000 pages is one uniform document. It is improper to put in as evidence certain individual entries without showing the context in which alone some of them can be understood. But it is particularly improper—and this infringes upon the principles of any presentation of evidence—to select from some uniform whole, such as a long speech, a few sentences and put them in as evidence. In Document Book Number 2, I have listed a few examples of this and hereby refer to them.

As the Defendant Frank himself rightly pointed out in the witness box, the diary is a uniform whole; only in its entirety can it be probative and form part of the presentation of evidence. I have read through that diary of more than 10,000 pages and can only confirm his opinion. And that was why I did not use individual entries in presenting my evidence but put in the whole diary.

If I myself, in presenting evidence, have read certain single entries from the diary and if in the course of my present address I shall quote a few more passages from it, then, just as in the case of the extracts put forward by the Prosecution, their evidential value can certainly be gauged only within the framework of the whole diary.

The following may also be looked upon as having been established by the evidence: As the diaries show, and as is evident in particular from the testimony given by the witnesses Bühler, Böpple, and Meidinger, the Defendant Frank in his capacity as Governor General often made two or three improvised speeches in the course of one day. The extracts from the diary presented by the Prosecution consist, for the most part, of single sentences from such speeches. If we take into consideration both the temperament of the defendant and his habit of expressing himself in an incisive manner, then that is another reason which tends to reduce the probative value of these extracts from the diary. And we actually do find many diary entries which flatly contradict other entries on the same subject occurring a little earlier or later.

In connection with the many speeches made by the Defendant Frank, the following must not be left out of consideration and may also be looked upon as established by the evidence: It was a foregone conclusion that the Defendant Frank, as an avowed champion of the idea of a State founded on law and of the independence of the judiciary, would come into increasingly sharp conflict with the representatives of the police-state system; this developed to an even greater degree in the course of the war, both within the Reich and in occupied territory. The representatives of the police state, however, were Reichsführer SS Himmler and, for the area of the Government General, the Higher SS and Police Leader, East, above all and in particular SS Obergruppenführer and General of Police Krüger. The relation between the Defendant Frank on the one hand, and Reichsführer SS Himmler and his representative, Obergruppenführer Krüger, on the other, had been extremely bad even at the time the Government General was established. They deteriorated still more as the divergence of outlook concerning the tasks of the Police came ever more openly to the fore; and the Defendant Frank was forced to lodge increasingly strong protests with the Chief of the Reich Chancellery, Dr. Lammers, and the Führer himself regarding the violent measures taken by the Security Police and the SD.

As I have already mentioned, the Governor General, lacking an executive of his own, had no choice but to make repeated attempts to co-ordinate the work of the general administration with that of the Police, in order to be in a position to carry out any administrative work at all. Obviously these objectives demanded—at least on the face of things in a certain degree—a conciliatory tendency toward the general attitude of the Security Police and, above all, of the Higher SS and Police Leader, East. Moreover, the evidence has further established that the tension existing between the Governor General and the Higher SS and Police Leader often reached such a degree that the Defendant Frank could not but feel himself menaced and—to quote the words of the witness Bühler—was no longer a free agent and master of his own decisions.

The testimony of the witnesses Bach-Zelewsky and Dr. Albrecht leaves no doubt on this point. Quite rightly, therefore, the witness Dr. Bühler also pointed out that the Defendant Frank expressed himself with particular vehemence when the Higher SS and Police Leader or the commander of the Security Police and the SD were present at conferences, while his utterances were made on quite a different note when he was speaking to an audience composed only of members of the administration. Even a cursory inspection of the diary will confirm this. All these circumstances must be taken into

consideration in assessing the substantive evidential value of the Defendant Frank's diary.

It should also be noted that these diaries constituted the only personal property that Frank was able to rescue from the castle at Kraków. On his arrest he handed over all the diaries to the officers who took him into custody. It would have been an easy matter for him to destroy these documents.

Your Lordships, I now turn to the individual accusations brought against the defendant, and their legal aspects. The Defendant Frank is accused of having approved of, and participated in, War Crimes and Crimes against Humanity in the administration of occupied territory.

As the law stands, it rests on the principle that only a sovereign state, not an individual, can be a subject of international law. To make international law binding on an individual, such law itself would have to lay down that a certain set of facts constitutes a wrong and that the rule thereby established is applicable to an individual creating such a set of facts. Only in that way can individuals, who under the law as it stands are subject only to the criminal law applying in each state, by way of exception be directly bound by international law.

Deviating from this rule, existing international law permits, in exceptional cases, a state to punish the national of an enemy state who has fallen into its power, if before his capture he has been guilty of infringing the rules of war. But even here punishment is excluded if the deed was not committed on the person's own initiative, but can only be attributed to his state of allegiance. Moreover, the conception of war crimes and their factual characteristics are the subject of great controversy both in judicial decisions and in legal literature.

Nor do the Hague Rules on Land Warfare, which form the Appendix to the IVth Convention on the Laws and Customs of War on Land and purport to be a codification of certain subject matter of the laws of war, list any facts which could be interpreted as a basis for the criminal liability of individuals. In Article 3 of this convention it is, on the contrary, expressly provided that not individuals but the state which infringed the rules may, under certain circumstances, be liable to pay an indemnity and is also responsible for all acts done by persons belonging to its armed forces.

In connection with the Hague Rules for Land Warfare of 1907 the following should also be noted: The principles therein enunciated were evolved from the experience of wars in the 19th century. Those wars were confined in the main to the armed forces directly concerned therein.

Now the first World War already overstepped this framework, and not only in respect of the geographical extent of conflict. On the contrary, the war became a struggle for extermination of the nations involved, a struggle in which each belligerent party utilized the whole of its war potential and all its material and imponderable resources. War technique having meanwhile been considerably perfected, the second World War was bound altogether to destroy the framework set up for the conduct of war by the Hague Rules for Land Warfare. That can be seen at a glance—the condition of Europe today reveals it. If we remember in addition that in Germany alone the greater part of almost every city has been destroyed as a result of bombing raids; and not only that, but that considerably more than a million civilians thereby lost their lives and that in a single major raid on the city of Dresden almost 300,000 people were killed, then it will be possible to realize that the Hague Rules for Land Warfare, at any rate in respect of many activities coming under the rules of war, can no longer be an adequate expression of the laws and customs to be observed in waging war. But if any doubt should exist on this subject, then that doubt will certainly be removed on contemplation of the consequences of the two atom bombs which razed Hiroshima and Nagasaki to the ground and killed hundreds of thousands of people.

Taking these circumstances into consideration, it is not possible to adduce the provisions of the Hague Rules for Land Warfare, even indirectly or by way of analogy, to establish individual criminal liability. Seeing that this is the case, it must be looked upon as impossible to give a clear and general definition of the factual characteristics of so-called war crimes. Referring to the fact that even Article 6 of the Charter of the International Military Tribunal only purports to furnish a list of examples, it will be realized that the question as to whether a certain line of conduct amounts to the commission of a war crime or not can only be answered on the merits of each particular case, and then only if all the circumstances are taken into consideration.

In the course of the presentation of evidence for the personal responsibility of the Defendant Frank, the Prosecution submitted as Exhibit USA-609 (864-PS) minutes of a conference held by the Führer with the Chief of the OKW on the future form of Polish relations to Germany. This conference took place on 17 October 1939. It is alleged that these minutes alone, by which the administrative goals of the Defendant Frank in the Government General are said to be established, reveal a plan or conspiracy at variance with the laws of warfare and humanity. This is an inadmissible conclusion, at least insofar as the Defendant Frank is concerned.

The Prosecution was unable to prove that the Führer entrusted the Defendant Frank with a task in conformity with the administrative aims demanded in that conference. Moreover, this seems very unlikely, because the directives laid down at that conference dealt mainly with measures which could not be carried out by the general administration, but only by the Security Police, the SD, and the other organs and offices under Reichsführer SS Himmler. In this connection special mention should also be made of the powers vested in Reichsführer SS Himmler before the date of that conference in his capacity of Reich Commissioner for the Preservation of German Nationality. Actually, there is at the end of Exhibit USA-609 a reference to a commission with which Himmler was charged. In consideration of the fact that the Defendant Frank, in the course of a short interview with Hitler about the middle of September 1939, had been told to take over the civil administration of occupied Polish territory as Chief of Administration and had not seen Hitler for a very long time after that, it can safely be assumed that the directives laid down at the conference between Hitler and the Chief of the OKW were intended, not for the Defendant Frank, but for Reichsführer SS Himmler, who was the only person to have the necessary executive organs at his disposal.

THE PRESIDENT: We will adjourn now.

[*A recess was taken.*]

DR. SEIDL: Mr. President, My Lordships, another document to which the Prosecution has referred and which is also alleged to show the criminality of the administrative aims of the Defendant Frank is Exhibit Number USA-297, which is EC-344(16). The content of this document is a discussion which the Defendant Frank is said to have had on 3 October 1939 with a certain Captain Varain. The Defendant Frank testified in the witness box that he had never made any such or similar statements to an officer. Moreover, a comparison of the dates shows that this conversation, even if it should have taken place, can have no connection with the subject of the conference between the Führer and the Chief of the OKW, the latter not having been held until 17 October 1939, that is, at a later date.

Not within the framework of the evidence presented in connection with the personal responsibility of the Defendant Frank, but in connection with the accusation of so-called Germanization, a document was submitted with the Exhibit USA-300, 661-PS. This is a memorandum entitled "Legal Aspects of German Policy toward the Poles from the Ethno-Political Point of View." According to a note on the title page, the legal part of this was to

serve as a model for the Committee of the Academy for German Law which dealt with legal nationality questions. This document can have no probative value in connection with the personal responsibility of the Defendant Frank. He testified in the witness box that he had given no instructions for the writing of that memorandum and that he was not aware of its contents. Over and above this, it would seem that no substantive evidential value can be attached to that document within the scope of this whole Trial. Nor is it evident, from the memorandum, who wrote it or who gave instructions that it should be written. Its whole form and content would seem to show that it is not an official document, but rather the work of a private individual. It was stated to have been found at the Ministry of Justice in Kassel. But in actual fact there has been no Ministry of Justice at Kassel for many decades. All these circumstances would seem to indicate that the material probative value of this document is, to say the least, extremely small.

But whatever the evidential value of minutes of conferences that took place in the year 1939 on the occasion of the establishment of the Government General, the following should be pointed out:

In judging the conduct of the Defendant Frank it is not of such essential importance to know what Hitler, he himself, or other persons said on one occasion or another, but what policy the Defendant Frank actually pursued toward the Polish and Ukrainian peoples. And here there can be no possible doubt—on the basis both of the general result of the evidence and, in particular, of entries in the diary of the defendant himself—that he repudiated all tendencies and measures designed to effect Germanization. That is shown with great clarity by the extracts from the diary which I have submitted to the Tribunal. Thus on 8 March 1940 he declared at a meeting of department chiefs, that is, to an audience of men who as leaders of the various main departments were deputed to put his directives into practice:

> "I have been charged by the Führer to look upon the Government General as the home of the Polish people. Accordingly no Germanization of any sort or kind is possible. In your departments you will please see that the two-language principle is strictly observed; you will also point out to district and provincial officers that no violence is to be used in opposing such safeguarding of Polish national existence. We have in a certain sense herewith taken over on trust from the Führer the responsibility for Polish national life."

This declaration alone makes it apparent that the directives laid down in the conference between Hitler and the Chief of the OKW on 17 October

1939, as contained in Exhibit USA-609, 864-PS, cannot possibly have been made the subject of the duties with which the Defendant Frank was charged. On the other hand, in view of the entire activities of the Higher SS and Police Leader, East from the first day of his appointment, it can safely be assumed that it was Reichsführer SS Himmler whom Hitler charged with carrying out the directives laid down at his conference with the Chief of the OKW.

A diary entry of 19 February 1940 is on the same lines; in this the Defendant Frank advocates the formation of a Polish government or regency council.

On 25 February 1940, at a service conference of officials of the District of Radom, the Defendant Frank gave out, in program form, his directives regarding general administration. On this occasion the Defendant Frank said among other things:

> "1. The Government General comprises that part of the occupied Polish area which is not a component part of the German Reich ...
>
> "2. The Führer has decreed that this territory shall be the home of the Polish people. The Führer and Field Marshal Göring have impressed on me over and over again that this territory is not to be subjected to Germanization.
>
> "3. In accordance with the instructions we have received under the Führer's decree Polish laws will remain in force here."

On 7 June 1942 the Defendant Frank stated word for word as follows:

> "It is not as rulers by violence that we come and go in this country. We have no terroristic or oppressive intentions. Welded into the interests of Greater Germany, the living rights of the Poles and Ukrainians in this territory are also safeguarded by us. We have not taken away from the Poles and Ukrainians either their churches, their schools, or their education. We Germans do not wish to denationalize by violent means. We are sufficient unto ourselves, and we know that people must be born into our community and that it is a distinction to belong to it. And that is why we can look the world in the face in this our task."

These examples could be amplified by many more, which all show clearly that the measures taken, at any rate by Frank, were intended to care for the Polish nation and that he repudiated any terror policy.

I now come to the so-called "peace-enforcing action." When the campaign against Poland had ended in September 1939 that did not mean that all resistance had ceased. Very soon afterward new centers of resistance sprang up; and when on 9 April 1940 German troops occupied Denmark and Norway and on 10 May 1940 the German western army had begun their attack, the leaders of the Polish resistance movement believed that, in consideration of the general political and military situation, the time for action had come. This resistance movement was all the more dangerous because dispersed but not inconsiderable remnants of the former Polish Army were active in it. A large number of entries in the diary of the Defendant Frank show that the security situation deteriorated from day to day during that period. Here for instance is an entry for 16 May 1940:

> "The general war situation requires that the most serious consideration be given to the internal security situation of the Government General. A large number of signs and actions lead to the conclusion that there exists a widely organized wave of resistance on the part of the Poles in the country and that we are on the threshold of violent happenings on a large scale. Thousands of Poles are already organized in secret circles; they are armed and are being incited in the most seditious manner to commit all kinds of violence."

In consideration of this menacing general situation, the order was given —as the diary shows, by the Führer himself—that in the interest of the maintenance of public security all measures were to be taken to suppress the imminent revolt. That order was given through Himmler to the Higher SS and Police Leader. The administration of the Government General at first had nothing to do with it. It intervened, however, in order as far as possible to prevent the Security Police and the SD from taking violent measures and to make sure that innocent people should under no circumstances lose their lives.

The testimony given by the Defendants Frank and Seyss-Inquart in the witness box and the evidence given by the witness Dr. Bühler have shown that the efforts made by the administration of the Government General were so far successful in that all the members of the resistance movement rounded up by this special action were brought before a drumhead court-martial introduced by a decree issued in 1939; and moreover, the decisions of this court were not carried out before being submitted to a Board of Pardon which in many cases modified the sentence. The chairman of this Board of Pardon, until his appointment as Reich Commissioner for the Netherlands, was the Defendant Dr. Seyss-Inquart. As his testimony revealed, no less than

half the death sentences pronounced by the summary court were commuted to imprisonment by the Board of Pardon. For the rest, in regard to the so-called peace-enforcing action, I refer to the oral testimony and to the extracts from the diary of the Defendant Frank which I read into the record.

Within the scope of the charges against him personally, the Defendant Frank is accused of having supported the resettlement plans of the Reich Commissioner for the Preservation of German Nationality (Himmler) and of having thereby also committed a war crime. There is no question but that resettlement, even when carefully planned and well prepared, means great hardship for those who are affected by it; in many cases a resettlement means the destruction of a person's economic existence. Nevertheless, it seems doubtful whether resettlement constitutes a War Crime or a Crime Against Humanity, for the following reasons:

Germany today is being flooded with millions of people who have been driven from their homes and who own no property but what they carry with them. The misery thereby caused, which is bound to increase to an immeasurable degree in consequence of the devastation wrought by the war, is so terrible that the bishops of the Cologne and Paderborn ecclesiastical districts were moved on 29 March 1946 to bring this state of affairs to the attention of the whole world. Among other things they said:

> "Some weeks ago we found occasion to comment on the outrageous happenings in the East of Germany, particularly in Silesia and the Sudetenland, where more than 10 million Germans have been driven from their ancestral homes in brutal fashion, no investigation having been made to ascertain whether or not there was any question of personal guilt. No pen can describe the unspeakable misery there imposed in contravention of all consideration of humanity and justice. All these people are being crammed together in what remains of Germany without means for earning a livelihood there. It cannot be foreseen how these masses of people who have been driven from their homes can become other than peace-disturbing elements."

My Lords, I am not mentioning this in order to point out the enormous dangers connected with such measures, dangers which must arise, if only out of the fact that in view of her planned deprivations of territory, Germany —with an area reduced by 22 percent as compared with 1919—will have to feed a population increased by 18 percent and that in future there will be 200 inhabitants to the square kilometer. I am, further, not pointing to this state of affairs to show that if the present economic policy is continued and the so-

called industrial plan is maintained, Germany is heading for a catastrophe the consequences of which cannot be confined to the German people. The evidential relevance of these facts is however shown by the following:

Millions of Germans were driven from their ancestral homes in accordance with a resolution taken at Potsdam on 2 August 1945 by President Truman, Generalissimo Stalin, and Prime Minister Attlee.

GENERAL RUDENKO: ML President, excuse me for interrupting the defendant's counsel, but it seems to me that his legal considerations and the criticism of the decisions taken at Potsdam have no bearing on the present case.

DR. SEIDL: Mr. President, may I briefly define my attitude on this?

As far as I am concerned, I do not wish to criticize the decisions of the Potsdam Conference. However, I am anxious to find out whether, employing the rules of the Charter, a certain conduct which has been alleged on the part of the Defendant Frank constitutes evidence for War Crimes or Crimes against Humanity. It is only within the framework of investigating that question that I find myself forced to go into the decisions of the so-called Potsdam Conference and bring them up in my argument.

THE PRESIDENT: Dr. Seidl, the Tribunal considers that your references to the Potsdam Declaration are irrelevant, and the objection of General Rudenko is therefore sustained. You are directed to go on to some other part of your argument.

DR. SEIDL: Mr. President, I presume that the Tribunal have the translation of my presentation at hand. I am not quite clear about the question as to whether the final conclusion, which appears on Page 38, is also affected by the decision of the Tribunal which you have just announced.

THE PRESIDENT: It is affected by that, and I think you can pass on to Page 40, where you begin to deal with the subject of the Jews. That is the second paragraph on Page 40.

DR. SEIDL: Very well, Mr. President.

The Defendant Frank is further accused of having approved and carried out a program for the extermination of Jews of Polish nationality, thereby infringing upon the laws of war and humanity.

It is true that in a number of speeches given by the Defendant Frank in his capacity as Governor General, he revealed his point of view on the Jewish question. The extracts from the diary submitted by the Prosecution in connection with this matter comprise practically everything relevant thereto in the Defendant Frank's diary of 10,000 or 12,000 typed pages. Nevertheless it shall not be denied that the Defendant Frank made no secret

of his anti-Semitic views. He spoke in detail on this question when giving his testimony in the witness box.

But the question of the importance to be attached to the diary entries submitted by the Prosecution is quite another matter. Almost all of them consist of statements made by the Defendant Frank in speeches, but there has not even been an attempt by the Prosecution to prove the existence of a causal connection between these statements and the measures carried out against the Jews by the Security Police.

As a result of the evidence, in particular of the testimony given by the witnesses Dr. Bilfinger and Dr. Bühler, it can be looked upon as certain—in connection with the secret decree concerning the jurisdiction of the Security Police and the SD, of the year 1939, and the decree concerning the transfer of certain tasks to the State Secretary for Security—that all the measures concerning Jews in the Government General were carried out exclusively by Reichsführer SS Himmler and his organs. That is true for both the initiation and the organization of ghettos and the so-called final solution of the Jewish question.

In regard to the latter it may be said here, on the basis of the testimony given by the witnesses Wisliceny and Hoess and of the documents presented by the Prosecution, that these measures were undertaken on Hitler's express orders and that only a small circle of persons was concerned in their execution. This small circle was confined in the main to a few SS leaders of Department IVA, 4b of the RSHA and the personnel of the concentration camps that had been selected for the purpose.

The administration of the Government General had nothing to do with these measures. The above facts also show that the anti-Semitic statements by the Defendant Frank as submitted by the Prosecution have no causal connection with the so-called final solution of the Jewish question. Since a causal link must be established before the question of illegality and guilt can even be considered, it does not seem necessary to dwell further on the matter —all the less because the factual elements of any punishable offenses can only be said to exist if at least an attempt has been made, that is, if the commission of the offense has at least been begun. Under the principles derived from the criminal law of all civilized nations, the statements contained in the diary of the Defendant Frank do not even constitute preparatory acts. In consideration of the tense and sometimes extremely frangible relationship between the Government General, on the one hand, and the Reichsführer SS Himmler and the Higher SS and Police Leader Krüger, on the other, it would also seem to be impossible to look upon the statements of the Defendant Frank as acts of incitement or complicity. The

evidence has shown on the contrary that all the efforts of the Defendant Frank to investigate successfully the rumors about the elimination of the Jews, at least within his own administrative district, failed completely. Only to complete the picture need it be mentioned that the Concentration Camp of Auschwitz was not in the Government General, but in that part of Poland which was annexed to Upper Silesia. For the rest it cannot be clearly seen whether the erection and administration of concentration camps is in itself to be looked upon as fulfilling the requirements of a war crime or a crime against humanity, or whether the Prosecution considers the establishment of such camps solely as part of the so-called common plan. Setting aside the crimes committed in the concentration camps and considering the nature of concentration camps to be that in which people are confined for reasons of state and police security on account of their political opinions and without an opportunity of defending themselves in an ordinary court of law, it appears at least doubtful whether an occupying power should not have the right to take such necessary steps as this in order to maintain public order and security. Apart from the fact that it was not National Socialists and not Germans at all who first established such camps, the following must be mentioned:

In the American Occupation Zone alone there were, according to a statement ...

DR. ROBERT M. KEMPNER (Assistant Trial Counsel for the United States): Mr. President, we raise an objection. This matter is completely irrelevant.

THE PRESIDENT: Dr. Seidl, do you wish to say anything in answer to the objection?

DR. SEIDL: Mr. President, I beg you to overrule the objection by the Prosecution, and I should like to say the following: I am not interested in criticizing an occupying power; I am only concerned with the question of whether certain conduct of which the Defendant Frank has been accused by the Prosecution constitutes the evidence of a criminal act.

I base my case on the assumption that what is proper for one occupying power must, under similar circumstances, be allowed for another occupying power, especially when it is a question of accusations made against the defendant concerning actions carried out during the war, while, the state of war with Germany having ceased on 8 May 1945 at the very latest, these urgent reasons now perhaps no longer exist to that extent.

THE PRESIDENT: The Tribunal sustains the objection. There is no evidence of the statements which you have made. And in any event, the Tribunal considers them entirely irrelevant.

DR. SEIDL: I assume, Mr. President, that in that case I may continue with the last paragraph on Page 44.

THE PRESIDENT: I think so, yes, the last paragraph.

DR. SEIDL: It is not necessary to go into this matter in more detail here, because the evidence has shown that it was the Defendant Frank who from the first day of the National Socialists' assumption of power fought against the police-state system and, above all, decried the concentration camps as an institution which could in no way be made to harmonize with the idea of a state founded on law. In this connection I refer to the testimony given by the witness Dr. Stepp, to the defendant's own statement, and above all to the extracts from the defendant's diary which I put in evidence. The evidence has further shown that the establishment and administration of the concentration camps lay within the sphere of Reichsführer SS Himmler's organization. The camps, both in Reich territories and in all areas occupied by German troops, were exclusively under the command of the SS-WVHA or the Inspector General of the Concentration Camps. Neither the Governor General nor the general administration of the Government General had anything to do with these camps.

A further point of accusation against Frank is the charge that he supported violence and economic pressure as a means of recruiting workers for deportation to Germany. It is true that during the recent war many Poles came to work in Germany. But in this connection the following should be noted:

Even before the first World War, hundreds of thousands of Poles came to Germany as vagrant workers. This stream of vagrant workers continued to flow also during the period between the first and the second World Wars. In consequence of the unfortunate demarcation line, the Government General became an area that was distinctly overpopulated. The agricultural excess production areas had fallen to the Soviet Union, whereas important industrial areas were incorporated into the Reich. Under these circumstances, and because there were no riches to be found in the soil, the only valuable means of production lay in the working capacity of the population. And this—at any rate for the first few years—could not be utilized to a sufficient extent, because the other production factors were lacking. In order to avoid unemployment, and above all in the interest of maintaining public order and security, the administration of the Government General was bound, if only for reasons of State policy, to try to transfer as many workers as possible to Germany.

There can indeed be no doubt that during the first years of the administration most of the Polish workers went to the Reich voluntarily.

When later, in consequence of the continuous bombing raids, not only Germany's cities but also her factories crumbled to ruins and a not inconsiderable part of Germany's capacity for the production of war materials had to be removed to the Government General for reasons of security, the aim of the Defendant Frank necessarily was to put a stop to any further transfer of labor. Over and above this, however, the Defendant Frank had from the very beginning opposed all violent measures in recruiting labor and solely for security reasons and in order not to create new centers of unrest had insisted that no compulsory measures were to be used and only propagandistic methods employed. That is established by the testimony of the witnesses Dr. Bühler and Dr. Böpple, and also by a large number of entries in the diary. In my presentation of evidence I have already referred to several of them. Thus, for example, the Defendant Frank said, among other things, on 4 March 1940:

> "... I refuse to issue the decree demanded by Berlin establishing compulsory measures and threatening punishment. Measures that, viewed from the outside world, create a sensation must be avoided under all circumstances. There is everything to be said against the removal of people by violence."

On 14 January 1944 he made a similar statement to the Commander of the Security Police. I quote:

> "The Governor General is strongly opposed to the suggestion that police forces should be used in recruiting labor."

These quotations could be amplified by many more.

I refer further to the evidence presented by me in respect to the treatment of Polish workers in Germany. The Defendant Frank continuously and repeatedly pleaded for better treatment of the Polish workers in the Reich.

For the rest, the legal position in the matter of recruiting foreign labor does not appear to be quite clear. I do not intend to go further into the legal questions pertaining to this matter. The defense counsel for the Defendant Sauckel will go into this matter fully and I just wish to say the following:

In the literature of international law it is undisputed that the conception of vital stress (Notstand) as recognized in criminal law would, in international law, too, preclude illegality in the case of a given violation of law. If the vital interests of a State are endangered, that State may, these interests being preponderant, safeguard them if necessary by injuring the justified interests of a third party. Even those writers who deny the

application of the "vital stress" theory to international law—they are in the minority—grant the threatened State the "right to self-preservation" and therewith the right to enforce "necessities of state" even at the cost of the just interests of other States. It is a recognized principle of international law that a State need not wait until the direct threat of extinction is at its very threshold. There can be no doubt that after the entry into the war of the United States, with which for all practical purposes the productive capacity and the military might of almost the whole world were gathered together to overthrow Germany, the German Reich was faced with a situation which not only threatened the State as such with extinction but over and above that placed the bare existence of the people in jeopardy. Under these circumstances the right of the State leadership to make use of labor forces, even those in occupied territory, in this defensive struggle had to be acknowledged.

In addition, the following should not be passed over: The Prosecution alleges that many, if not most of the foreign workers were brought to Germany by force and that they were then obliged to do heavy labor under degrading conditions. However one may look upon the evidence on this question, the fact cannot be ignored that there are hundreds of thousands of foreign workers still living in Germany who were allegedly deported thither by force. They refuse to return to their homes, although no one now attempts to hinder them. Under these circumstances it must be assumed that the force cannot have been as great, nor the treatment in Germany as bad, as is alleged by, the Prosecution.

Another allegation refers to the closing of the schools. It may be left out of account whether international law recognizes any criminal classification which would make the closing of schools appear as a war crime or a crime against humanity. In time of war this would seem to be all the more unlikely as it is well known that schooling in wartime was considerably reduced, not only in Germany, but also in many other belligerent countries. There is all the less reason to investigate this question more thoroughly, as the evidence has shown that the schools were for the most part already closed when the defendant assumed office as Governor General. During his whole period of office he left no means untried to reactivate, not only the elementary and vocational, but also the higher forms of school. In this connection I will only mention the university courses which he initiated.

The Soviet Prosecution has presented as Exhibit Number USSR-335 a decree issued by the defendant to combat attacks against German reconstruction work in the Government General, dated 2 October 1943.

There is no question but that this decree setting up a drumhead court-martial is not in conformity with what must be demanded of court procedure under normal circumstances. However, this decree can only be judged correctly if the circumstances which led to its promulgation are taken into consideration.

In general it should first be said that the reconstruction work of the administration of the Government General had to be carried on in a difficult territory and under circumstances which must be among the most difficult that have ever fallen to the lot of any administration. After the collapse of the Polish State, the German administration found, so to speak, a vacuum in which to organize and administer. In all spheres of administration they had to start completely afresh. If, in spite of the difficulties, they succeeded fairly quickly in repairing the war damage, particularly in the communications system, then that is incontestably to their credit.

The year 1940 was, however, to prove the only one in which the work of restoration in the area of the Government General could be carried out under fairly normal conditions. As the year 1941 began, the Germans proceeded to concentrate their troops for action against the Soviet Union and therewith initiated a period of immense strain for the administration of the Government General. The Government General became the greatest repair workshop and the greatest military transit territory that history has ever known. This carried in its train an increasing deterioration of the security situation. The resistance movement began to reorganize on an intensified scale. But the menace inherent in the security situation developed to a still more alarming degree when the German armies were forced to arrest their progress in Russia and when—after the catastrophe of Stalingrad—their march forward was transformed into a general retreat. In the course of the year 1943, the activities of the resistance movement and in particular of the numerous guerrilla bands, in which thousands of lawless elements were grouped, reached extremes that represented a danger to any kind of orderly administration. The administration of the Government General was forced again and again to deal with this matter. Thus on 31 May 1943 a service meeting of the authorities of the Government General was held to deal with the security situation. At that meeting the President of the Chief Department Internal Administration felt obliged to state among other things—I quote from the diary:

> "... In their activities the guerrilla bands have revealed an increasingly well-developed system. They have now gone over to the systematic destruction of institutions belonging to the German administration; they steal money, procure typewriters and duplicating machines, destroy quota lists and lists of workers in

the communal offices, and take away or burn criminal records and taxation lists. Moreover, raids on important production centers in the country have multiplied, for instance, on sawmills, dairies, and distilleries, as also on bridges, railway installations, and post offices. The organization of the guerrillas has become strongly military in character."

In the course of the summer and autumn of the year 1943, the increasing activities of the partisans and the improvement in their military organization and equipment so endangered security in the Government General that it might perhaps under the circumstances have been better to turn over its entire administration to the appropriate army commanders and to proclaim a state of emergency. It is indeed not possible to describe conditions then existing in the Government General as anything else but a state of war. It was the period when at any moment the possibility had to be taken into account that a general revolt would break out over the whole country.

All this notwithstanding, the Defendant Frank even then made every effort under all circumstances to thwart any violent measures by the Security Police and the SD. It was in order to exercise at least a modifying influence on the Security Police and the SD and to have at least some guarantee against excesses that the Defendant Frank agreed to the order dated 9 October 1943 setting up a drumhead court-martial.

It is quite obvious from the content of this decree that its main purpose was to serve as a general preventive. It was meant as a deterrent to the guerrillas, and there can be no question but that in this it was temporarily successful. For the rest, the evidence has shown that even while this drumhead court-martial order was in operation, the Boards of Pardon continued to act and that many sentences passed by the drumhead court-martial were reversed by the boards.

In the course of the present Trial repeated mention has been made of the report by SS Brigadeführer Stroop concerning the destruction of the Warsaw Ghetto in the year 1943; Exhibit USA-275 (1061-PS). Both that report and a number of other documents reveal that all the measures in connection with the Warsaw Ghetto were undertaken exclusively on the direct instructions of Reichsführer SS and Chief of the German Police Himmler. I refer in this connection to the affidavit of SS Brigadeführer Stroop of 24 February 1946, submitted by the Prosecution as Exhibit Number USA-804 (3841-PS) and to the affidavit of the same date given by the former adjutant of the SS and Police Leader of Warsaw, Karl Kaleske. That is Exhibit Number USA-803 (3840-PS). These documents show quite

clearly that those measures, like all others within the competence of the Security Police and undertaken on direct orders from either Reichsführer SS Himmler, the Higher SS and Police Leader, East, or on instructions from the RSHA, were carried out exclusively by the Security Police and the SD and that the administration of the Government General had nothing to do with them.

The Soviet Prosecution has also put in evidence as Exhibit USSR-93, under Article 21 of the Charter, the Report of the Polish Government. That report makes no distinction between the areas which were incorporated in the Reich and the territories of the former Polish State which were grouped together in the Government General. But particularly in view of the fact that the report makes no substantial statements as to the personal responsibility of the Defendant Frank, it does not seem necessary to delve further into this voluminous document. Like the Indictment itself, the report constitutes an accusation of a general nature; it does not deal in detail with the results of investigations and with evidence which might justify the conclusions drawn in the report. The objections to be raised to the report must appear all the more valid, since, to take only one example, in Appendix (1) of the report directives for cultural policy are appended which obviously purport to represent instructions given by the Governor General or his administration. Actually, however, nothing of the kind is to be found either in the *Official Gazette* of the Government General or in any other documents. The witness Dr. Bühler stated during his interrogation that the administration of the Government General had never issued such or similar directives. In consideration of this alone, it would seem at most admissible to attach substantive probative value to this Exhibit USSR-93 only insofar as the statements therein made are confirmed by genuine documents and other unobjectionable evidence.

According to the Indictment, and in particular according to the statements in the trial brief presented by the Prosecution, the Defendant Frank is also alleged to be responsible for the undernourishment of the Polish population. Actually, however, the Prosecution is unable to produce any evidence to show that in the area governed by the Defendant Frank either famine occurred or epidemics broke out. The evidence has revealed on the contrary that the efforts of the Defendant Frank in the years 1939 and 1940 were successful in inducing the Reich to deliver no less than 600,000 tons Of grain. That made it possible to overcome the food difficulties caused by the war.

It is true that in the following years the Government General contributed in no small degree to the war effort by itself delivering grain.

But it must not be overlooked that these deliveries were made possible by an extraordinary increase in agricultural production in the Government General. And this was in its turn made possible by a farseeing economic policy, especially by the distribution of agricultural machinery, seed corn, and so on. Nor should it be forgotten that the deliveries of grain by the Government General from the year 1941 onward also served to feed the Polish workers placed in Reich territory and that in general these grain deliveries were utilized to maintain the internal balance between the European economic systems. In principle, however, the following should be said concerning this question:

In a number of points of accusation the Prosecution has leveled reproaches against the administrative activities of the Defendant Frank in his capacity as Governor General without making an attempt to give an even approximately adequate description of the general work of the defendant and without pointing out its inherent difficulties. There can be no question but that such an attitude transgresses the fundamental rules of any criminal procedure. It is a recognized principle derived from the criminal law principles of all civilized states that a uniform natural process must be judged in its entirety and that its evaluation must take into account all the circumstances of the case that are in any way fit for consideration by the court when passing judgment. This would seem to be all the more necessary in the present case, as the Defendant Frank is accused of having pursued a long-term policy of oppression, exploitation, and Germanization.

My Lords, if the Defendant Frank had in truth had any such intentions, then he could certainly have attained his goal in far simpler fashion. It would not have been necessary to issue hundreds of decrees every year, decrees which for example for the year 1940 reached the proportions of this volume that I hold here in my hand. The Defendant Frank, from his first day of office, set himself to integrate the entire economic policy in a manner which one can only term constructive. Certainly he did this partly in order to strengthen the production capacity of the German nation engaged in a struggle of life and death. But at the same time there can be no doubt that the success of these measures also benefited the Polish and Ukrainian peoples. I do not intend to go into this matter in detail. I will only ask the Tribunal in this connection to take notice of the report given by the Chief of Government on the occasion of the fourth anniversary of the existence of the Government General on 26 October 1943. I have included this report in the document books I put in evidence. It is in Volume IV, Page 42. The report gives a concise summary of the measures taken and the successes achieved by the administrative acts of the defendant during these 4 years in all fields

of industrial economy, in agriculture, commerce, and transport, in the finance and credit system, in the sphere of public health, and so on. Only in consideration of all these facts is it possible to form an approximately correct estimate of the whole position. For the sake of completeness I will add that the defendant by his administration succeeded in reducing the danger of epidemics—in particular typhus and typhoid—to a degree which had been found impossible in this area in the preceding decades.

If much of what had been achieved by the Defendant Frank in the Government General was destroyed in the subsequent fighting, that can certainly furnish no grounds for reproach against the general administration, which had nothing to do with military measures.

My Lords, I am certainly not going to deny that in the course of the recent war terrible crimes were committed in the territory known as the Government General. Concentration camps had been established in which mass destruction of human beings was carried out. Hostages were shot. Expropriations took place; and so on. The Defendant Frank would be the last to deny this; he himself waged a 5 year struggle against all violent measures. The Prosecution has put in evidence, as Exhibit Number USA-610 (437-PS), a memorandum which Frank addressed to the Führer on 19 June 1943. In this memorandum, on Page 11, he listed nine points in which he sharply condemned all the evils which had arisen in consequence of the violence practiced by the Security Police and the SD and of the excesses committed by various Reich authorities, against which all his efforts had proved unavailing.

These nine points are in the main identical with the points of accusation against Frank. The content of the memorandum of 19 June 1943, however, shows very plainly that the defendant denies responsibility for these abuses. It reveals, on the contrary, quite clearly that neither the defendant nor the general administration of the Government General can be held responsible for the said evils but that the whole responsibility must be borne by the institutions mentioned above, in particular the Security Police and the SD, or the Higher SS and Police Leader, East. If the Defendant Frank had had the instruments of power wherewith to abolish the evils he condemned, it would not have been necessary for him to address that memorandum to Hitler at all. He would then himself have been able to take all necessary steps. In addition to this the evidence has shown that that memorandum of 19 June 1943 was not the only one addressed to the Führer on the matter. It is clear from the testimony of the witnesses Dr. Lammers and Dr. Bühler and the defendant's own statements in the witness box that from the year 1940 onward he sent protests and memoranda at regular intervals of a few months

both to Hitler personally and to the Chief of the Reich Chancellery. These written protests were invariably on the subject of the violent measures taken and the excesses committed by the Higher SS and Police Leader and the Security Police, including the SD. But none of the protests met with success.

As can also be said on the basis of the evidence, the Defendant Frank continually made suggestions to Hitler on the subject of improving relations between the administration of the Government General and the population. The memorandum of 19 June 1943 is also cast in the form of a comprehensive political program. It includes, moreover, all the essential points of protest contained in a memorandum presented in February 1943 to the Governor General, at his own desire, by the leader of the Ukrainian Chief Committee. This latter memorandum was put in evidence by the Prosecution as Exhibit Number USA-178 (1526-PS). Such suggestions were also consistently rejected by Hitler.

Under these circumstances it is pertinent to ask what else the Defendant Frank could have done. Certainly he should have resigned. But that too he did. He offered his resignation no less than 14 times, the first time as early as 1939. His resignation was rejected by Hitler as often as it was tendered. But the Defendant Frank did more. He approached Field Marshal Keitel with the request that he be allowed to rejoin the Armed Forces as a lieutenant. That was in the year 1942. Hitler refused his consent to that too. These facts allow of only one conclusion, namely, that Hitler saw in the Defendant Frank a man behind whose back he (with the help of Himmler and the organs of the Security Police and the SD) could carry out the measures he considered requisite for attaining the aims of his power policy.

My Lords, when it became more and more obvious that Hitler and Reichsführer SS Himmler were about to abolish the last remnants of a State founded on law; when it became increasingly apparent that the power of the Police knew no bounds and that a police state of the purest water was in process of development, the Defendant Frank came forward and addressed four great speeches to the German public with a last appeal on behalf of the idea of a State founded on law. He did that when Hitler stood at the summit of his power. He addressed this appeal to the German public at a time when the German forces were marching on Stalingrad and into the Caucasus, when the German Panzer Armies in Africa stood at El Alamein, barely 100 kilometers from Alexandria. In the course of the evidence I read some extracts from these great speeches which the Defendant Frank made in Berlin, Heidelberg, Vienna, and Munich. Those speeches contained a clear repudiation of every form of police state and championed the idea of the State founded on law, of the independence of the judiciary, and of law as

such. These speeches found a tremendous echo among lawyers, but unfortunately not in wider circles. Nor in particular were they echoed by the men who alone would have possessed the power to ward off the threatening catastrophe.

The consequences of this attempt to avert the extinction of the idea of the State founded on law by a last great effort are well known. The Defendant Frank was deprived of all his Party offices: he was dismissed from his post as President of the Academy for German Law. The leadership of the National Socialist Lawyers Association was conferred on the Reich Minister of Justice, Thierack. Frank himself was forbidden by Hitler to speak in public. Although the Defendant Frank again on this occasion sent in his resignation as Governor General, Hitler refused to accept it, as he had always done before. The reason for this, as given in a letter from the Reich Minister and Chief of the Reich Chancellery to the Defendant Frank, was that considerations of foreign policy had caused the Führer again to refuse this latest request of Frank to be allowed to resign. According to everything that has emerged from the evidence in this Trial it may be looked upon as certain that it was not only, and probably not even mainly, for such reasons that Hitler refused to accept Frank's resignation.

The decisive factor was obviously the consideration that it was better policy not to let the Security Police and Reichsführer SS Himmler's other organs fulfill their appointed task openly, but rather to let them continue their work under cover while maintaining a general civil administration under the Governor General.

Naturally this open breach between the Defendant Frank, on the one hand, and Hitler and the State Police system represented by Reichsführer SS Himmler and the Higher SS and Police Leader, East, on the other, could not fail to have repercussions on the position of the defendant in his capacity as Governor General. Still more than before the various Reich authorities now began to interfere in the administration of the Government General. Above all, however, it was quite clear from the summer of 1942 onward that the Higher SS and Police Leader, East, together with the organs of the Security Police and SD subordinated to him, took no more notice at all of any instructions issued by the Governor General and the general administration.

Both in the Government General and in the Reich itself legal institutions receded more and more into the background. The State was transformed into an unadulterated police state, and developments took the inevitable course which the Defendant Frank had foreseen and feared—the course which on 19 November 1941 he had outlined at a congress of the

principal section chiefs and Reich group leaders of the National Socialist Lawyers Association in the following words:

> "Law cannot be degraded to a position where it becomes an object of bargaining. Law cannot be sold. It is either there or it is not there. Law cannot be marketed on the stock exchange. If the law finds no support, then the State too loses its moral stay and sinks into the depths of night and horror."

THE PRESIDENT: We will begin again at 10 minutes past 2.

[*The Tribunal recessed until 1410 hours*.]

THE PRESIDENT: Dr. Pannenbecker.

DR. OTTO PANNENBECKER (Counsel for Defendant Frick): Mr. President, Gentlemen of the Tribunal:

The American Prosecution, through Dr. Kempner, has charged Defendant Frick with criminal actions according to Article 6, Items a, b, and c of the Charter. I should like first to examine the question as to whether Article 6 of the Charter, with its list of criminal acts, is to be considered as the authoritative expression of material penal law which would lay down, in a manner irrevocably binding on, and not subject to revision by the Tribunal, what actions are to be regarded as punishable; or whether Article 6 of the Charter concerns a rule of procedure defining the competence of this Tribunal for specific subject matters.

THE PRESIDENT [*Interposing*]: Perhaps it will be for the convenience of the interpreters if I say that we might, as it is now nearly half past 2, sit without a break until 4 o'clock, when we rise.

DR. PANNENBECKER: The latter interpretation was implied in the Prosecution's presentation of the case by Sir Hartley Shawcross' remark that although Article 6 of the Charter fills a gap in international penal procedure, the material penal law to be applied to the defendants has already been previously standardized by positive laws. Part II of the Charter, beginning with Article 6, is accordingly entitled: "Jurisdiction and General Principles," and it may be inferred therefrom that Article 6 is intended to establish a ruling as to the competence of this Tribunal as to procedure in specific groups of crimes.

Sir Hartley Shawcross' statements were directed against the objection that it is inadmissible and in contradiction with a basic legal principle to punish someone for an act which had not yet been forbidden at the time it was committed; an objection which has as a basis the conception that the Charter has created new material penal law with retroactive effect. It should be examined whether the prohibition of retroaction of penal laws is a legal principle of such importance that it should not be infringed. I need not state to this Court the reasons why this legal principle found general recognition in all civilized countries as a prerequisite and basic precept of justice.

In contrast to this, the Prosecution has in its speech charged the defendants with the fact that they themselves had continuously disregarded law and justice, and inferred from this that the defendants in this Trial could

not appeal to such a legal principle. I do not believe, however, that such an argument can be decisive in this Trial. The Prosecution has replied in the negative to the further question of whether it would not have been right to pay back in the same coin and not allow the defendants of this Trial any possibility at all to defend themselves in a proper legal procedure. Such a course of simply exercising the power of the victor over the defendants has purposely not been assumed by the signatory powers for reasons presented in detail by the Prosecution. On the contrary, Sir Hartley Shawcross has appealed to the Tribunal to apply in this procedure—I quote—"the undisputed principles of international custom."

If, however, it is intended to proceed in such a manner, then an examination must take place in keeping with the same principles of law, to determine the question whether the deeds with which the defendants are charged can be regarded as criminal acts for which punishment is possible according to the recognized principles of international custom. It is not, according to these principles, an argument if the use of a legal principle as fundamental as the prohibition of retroaction in penal law is in actual application to be made dependent on whether or not the defendants concerned themselves with law and justice. The decision of the signatory powers to subject, on the basis of considerations which have been seriously weighed, the conduct of the defendants to a proper trial recognizing all legal principles of international custom, therefore signifies not only the observance of legal procedure with all assurances of fair trial, but such a decision by the signatory powers also signifies adherence to the fundamental principles of a material guarantee of justice, of which the prohibition of retroactive penal laws is one.

In this connection I should like to point out that the decreeing of the retroactive validity of penal laws, when so ordered by the National Socialist Government for certain individual cases, to which Dr. Stahmer has already referred, shocked the entire civilized world. At that time, the violation of such a principle of law was generally condemned as a deplorable retrogression in civilization. I also ask the Tribunal to recall that one of the first measures taken by the occupation powers for deliverance from the National Socialist abuse of the law was to declare void any laws which had a retroactive effect on the material penal legislation.

In view of this situation there exist valid reasons, I believe, why Article 6 of the Charter should, in accordance with its heading, be regarded as a ruling on the jurisdiction of this Tribunal, all the more so as the signatory powers have already and with so much emphasis insisted on a renewed strict and uniform observance of the prohibition against retroactive penal laws.

On the basis of such an interpretation, whereby Article 6 establishes the jurisdiction of this Tribunal, it would be for the Tribunal by its own examination not only to determine whether the charges on which the Indictment is based are proved, but also to rule on the legal question as to whether, for the facts established in each case by the Prosecution, there exists a criminal law which makes punishment possible. To revert in this way to provisions of material criminal law in existence at the time the act was committed does not mean that it would be impossible for this Tribunal to call the accused to account for offenses which are punishable under all circumstances. There are, however, a number of restrictions resulting from this which in the opinion of the Defense it would be better to accept rather than violate a principle so essential to just procedure as is the prohibition of retroaction in criminal laws. I am therefore of the opinion that it is entirely possible, and not incompatible with the necessity for just expiation for war crimes, to interpret Article 6 in accordance with its heading as a ruling on the jurisdiction of this Court, but not as new material criminal law.[1] The next remarks concern themselves with the conspiracy, a matter which has been dealt with by Dr. Stahmer to such an extent that I can omit these pages. I continue now on Page 7 with the summary.

The Charter does not impose the interpretation that a defendant is responsible also for such acts of commission as exceed the measure of his participation in the common plan. The wording of the Charter, "in the execution of a common plan," does not contradict the interpretation that the Charter establishes liability for acts of commission which remained within the scope of the said plan. To that extent the assumption of liability for the actions of others complies with a demand of justice, but beyond that it would violate essential legal principles. The Defense therefore advocates the concept that, as far as the actions of others are concerned, for which a defendant is to be made liable, proof must be required that these actions, in the manner of their execution, corresponded to the intention of the defendant. To give an example:

The participation of a defendant in rearmament against the regulations of the Versailles Treaty does not in itself justify the assumption that that defendant also desired a war of aggression which was later on planned by others in the further plan of restoring military power to the German people.

I should now like to turn to the various categories of crimes of which the Defendant Frick is accused, taking first of all the assertion of the Prosecution that the defendant participated in the planning and preparation of wars of aggression. With regard to the problem as to whether a war of aggression is a criminal offense according to the concepts of law for the

period in question, I refer, in order to avoid repetition, to the statements of Professor Jahrreiss, with which, in behalf of the Defendant Frick, I fully concur.

By virtue of these convincing statements, there exists only one possibility of punishing co-operation in a war of aggression as a criminal offense capable of being perpetrated by individual persons, namely, when, contrary to the statement of Sir Hartley Shawcross, the Charter is applied as a standard of material penal law which has for the first time defined, with retroactive effect, a war of aggression as a criminal offense by individual persons. From the point of view of the other interpretation, which regards Article 6 of the Charter as a procedure regulating the jurisdiction of this Court, the Defense holds that the deduction is cogent that the Court is indeed declared competent to judge offenses against peace, but that the criminal guilt of the individual defendants is not proved therewith because one condition for this is lacking, namely, the possibility of establishing that the defendants have offended against a principle of generally valid international custom or a principle of national law which defined the war of aggression at the time it took place and declared it punishable as a crime of which a single individual could be guilty.

As it happens, the statesmen, during the period between the two World Wars, have neglected to establish adequate measures of general validity, by which it would have been made clear that anyone who, after the first wholesale slaughter of peoples, organized a second World War, would go about with a rope around his neck. The statements of the Prosecution, that such rules of international law are necessary, appear to be absolutely convincing, but the fact cannot be overlooked that such rules were nevertheless not created by the statesmen of that period at the right time. A missing rule of law, fashioned to fit a special case, cannot be replaced subsequently by an order of procedure or by the sentence of a Court whose task is to apply the general law, but not to create it for a single special case.

I shall now turn to the actual statements of the Prosecution concerning the participation of the Defendant Frick in the planning and preparation of wars of aggression.

The Prosecution sees such activity already in Frick's earliest co-operation with the Party, which he continued until the year 1933, in order to bring Hitler to power. The Prosecution appraises in a similar way the subsequent activity of Frick after the taking over of the Government by Hitler, when he helped to consolidate the power of the Party and its leaders through measures of domestic policy, especially by his participation in the legal measures by which armed forces were created, and finally by his

collaboration in measures by which direct preparations were made in case of war.

Proceeding from the interpretation that only deliberate participation by the defendant in the preparation of a war of aggression is of penal significance, I shall not take up the question as to whether the Prosecution has proved that Frick was aware that his collaboration in the advancement of the Party and its aims constituted a preparation for war, and intended it as such, and therefore helped to bring the war about.

In this connection the Prosecution has made the assertion that Hitler and his Party from the very beginning openly pursued the aim of bringing about a change in Germany's situation in foreign politics by means of war. On the basis of this statement the Prosecution has declared that no special proof is necessary that in working for Hitler and his Party each of the defendants also knowingly collaborated in the preparation of a war of aggression.

As proof of the fact that Hitler and his Party had from the beginning planned a war of aggression, the Prosecution refers to the Party Program, which names as one of its aims the abolition of the Treaty of Versailles. No word is said, however, in the Party Program that this aim should be achieved by force of arms. In the Party Program, as the testimony of the Defendant Von Neurath has also shown, among other things, there is nothing to prove an intention existing from the very beginning to wage a war of aggression. Nor is anything different found in the other official publications of the Party from the time previous to Hitler's assumption of the Government. Because as the Party did not, on the basis of its official publications, reveal any intention of bringing about the revision of the Versailles Treaty by force of arms, it was even before 1933 authorized outside the territory of the Reich, as for example in 1930 in Danzig, when it received the sanction of the then High Commissioner of the League of Nations and of the Polish Resident General.

From the time of his assumption of power on 30 January 1933 Hitler, as responsible head of the Government, adopted a quite unequivocal attitude with regard to the ways and aims of his foreign policy, both in official speeches and discourses as well as in private conversations. Unchangingly, and upon every occasion that presented itself after his assumption of power, he stressed his absolute desire for peace and his abhorrence of war, and he always defended this attitude with convincing reasons. He repeated again and again that he intended to obtain certain revisions of the Versailles Treaty by peaceful means only. I need not repeat the quotations to that effect from Hitler's speeches, which were read by the Prosecution to prove how Hitler

deceived the world, and the people he ruled, by his peace talks. And the world, including the German people, took these speeches which he, as responsible head of the Government, made again and again, quite seriously. In the face of that, warning voices which at an early stage were convinced that Hitler wanted war, remained a hopeless minority throughout the world.

The Prosecution has repeatedly alluded to this world belief which took Hitler's assertions of peaceful intentions seriously, and the best proof of this delusion about peace even among the foreign statesmen, who also knew the Party Program, would certainly appear to lie in the fact that these statesmen neglected to so vast an extent to arm against Hitler's war of aggression, in which nobody in Germany and in the world believed seriously except those who were directly initiated into Hitler's most secret plans. From the Party Program and from isolated wild speeches made before 1933 during the period of parliamentary opposition, it is not possible to prove a continuous preparation for a war of aggression since the twenties, which is alleged to have been discernible to anybody who took a glance at the Party Program.

The Prosecution contends further that even if the warlike intentions were not discernible in a general way at first, the intention of Hitler to prepare a war of aggression must have been clearly visible to the Defendant Frick on account of the duties which he had to fulfill after 30 January 1933 in his capacity as Reich Minister of the Interior. These duties included measures for the strengthening of the internal political power of Hitler and his Party. The Prosecution referred in this connection to the collaboration of Frick in the legal decrees by means of which the opposition against Hitler's system of government was destroyed in parliament and in the country; further, to the legislative measures which eliminated real self-government in the cities and communities, and to legislative and administrative decrees by which opponents of the National Socialist system were excluded from taking any part in the business of the State and in economic life.

The Prosecution has submitted that without these measures Hitler could not have conducted another war, for the beginning of which the complete destruction of opposition in the country was said to be a necessary prerequisite—particularly the establishment of Hitler's absolute dictatorship. Yet in all the measures I have enumerated, a direct connection with the preparation for war is lacking. For these measures had equal meaning and significance, unconnected with a subsequent war, merely as projects of a National Socialist domestic policy. It has not been proved that beyond that the Defendant Frick was informed of Hitler's more far-reaching plans, namely, after consolidating his power at home to pursue the aims of the Party's foreign policy not by peaceful but by military means.

By establishing retrospectively that the strengthening of Hitler's inner political authority was a necessary condition for his intentions for war as revealed later, nothing is achieved unless proof is forthcoming that Hitler had from the beginning aimed at power in the domestic sphere only as a first step toward the waging of wars, and that Frick was aware of this when he took part in the measures of domestic policy of which he is accused. Otherwise, as purely domestic measures, they do not come under the jurisdiction of this Tribunal according to the provisions of the Charter.

But there is no such evidence, and it is much rather to be assumed that Frick, as a typical official connected with domestic politics, considered his measures as absolutely independent acts which had nothing whatsoever to do with the solutions by force of questions of foreign policy. Nor can another view of the situation be derived from the measures dealing directly with Germany's rearmament, that is, the reintroduction of general conscription and the occupation of the demilitarized zone of the Rhineland. In his capacity as Reich Minister of the Interior, Frick issued the orders of the civil administration for the mobilization of men liable for military service, and consequently he himself also signed the Armed Forces Law.

Yet even these measures in themselves were not to be recognized as preparation for a war of aggression. The reintroduction of compulsory military service and the assumption of military sovereignty over the demilitarized Western Zone were explained by Hitler himself, to his collaborators and the world, by arguments whose soundness was then widely accepted, and after the first shock many foreign statesmen still believed in Hitler's well-founded assurances of peace, and advocated the opinion that there was no reason to fear any belligerent intentions on the part of Hitler.

To be sure, Hitler personally declared to his Commanders-in-Chief on 23 November 1939 that he had created the Armed Forces in order to make war. I refer to Document 789-PS; Exhibit Number USA-23. But Hitler previously cleverly obscured this intention by another argument which at that time still found credence in Germany and abroad, and—as proved by the evidence—even those collaborators in his own Cabinet who had not been initiated into his secret plans believed in it.

Thus it is that several defendants refer to the fact that they approved of the reconstruction of the German Armed Forces in the face of the provisions of the Versailles Treaty, but that they did not want a war and did not consider that by their collaboration they were participating in the planning of a war of aggression. As for the Defendant Frick, the view of the defense is that there is no proof that Hitler had informed him of his plans for war, and therefore his collaboration in the measures concerned with the reconstruction of the

German Armed Forces cannot be charged against him as intentional collaboration in the planning of wars of aggression. A similar situation arises with regard to the defendant's activity in organizing the civil administration in general for the eventuality of war, a task entrusted to the defendant as Plenipotentiary for Administration of the Reich by the second Reich Defense Law dated 4 September 1938.

I beg to point out again that the position of Plenipotentiary for Administration of the Reich was created only by this second Reich Defense Law of 4 September 1938, and thus was not included in the first Reich Defense Law of 21 May 1935.

To be sure, long before, even before 1933, experts from the various ministries held conferences dealing with the subject of Reich defense, meeting at irregular intervals after 1933 as the Reich Defense Committee, as shown in the documents submitted by the Prosecution. These meetings had nothing to do with an agreement to wage a war of aggression. They dealt with general questions of Reich defense, as is customary also in other countries. By the Reich Defense Law of 21 May 1935, the organization for Reich defense was more closely co-ordinated, particularly by the appointment of a Plenipotentiary for War Economy, and at his interrogation the Defendant Schacht explained in detail that the purpose in creating that position was not preparation for a war of aggression (according to the duties and regulations to be found in the first Reich Defense Law) but the organization of the economy for defense in the event of a war of aggression by other states.

The same holds true with regard to the position of Plenipotentiary for Reich Administration as created by the second Reich Defense Law of 4 September 1938, which was conferred on the Defendant Frick by virtue of his position as Reich Minister of the Interior. This position signified the co-ordinated establishment of the entire civil administration for the purpose of Reich defense. Regardless of whether, according to documents which have been submitted to the Tribunal, Hitler already wanted war at the time when he authorized the second Reich Defense Law, it is nevertheless relevant for the defense of the defendant whether Frick at that time was able to recognize the aggressive intentions of Hitler from the law itself and from his preliminary work thereon or from other evidence or information which was communicated to him then. From the law itself it cannot be discerned that Hitler's intention was to use it in the sphere of civil life as an instrument of preparation for a war of aggression.

The kind of tasks which were given to the Defendant Frick in his capacity as Plenipotentiary for Reich Administration had to do merely with

the concentration of domestic administration of Germany in case of a possible war or threat of war, and nothing else can be seen from Document Number 3787-PS (Exhibit Number USA-782), which was submitted subsequently.

The law is so formulated that it always refers only to the defense of the Reich in case of war. It speaks about the "state of defense" and mentions the case of a "surprise threat to the Reich territory," in the event of which certain measures must be taken. Beyond this the law does not vouchsafe any hint, which would be in keeping with Hitler's oft-repeated principle not to divulge any more of his plans than the person concerned had to know for his own work—a principle which he strictly adhered to even with his closest collaborators. In view of this principle it should not be assumed, nor has it been at all proved, that when the order for this law was given to the Ministry of the Interior any other information was imparted than the necessity for taking precautionary measures, by concentrating the full strength of the domestic administration of the country, against a surprise threat to Reich territory through a possible attack by other states.

It is not necessary for me to state in detail that such a measure cannot be considered as a premeditated preparation for a war of aggression when it had been explained to the competent authorities of the domestic administration that it was essential for the defense of the Reich against the threatening attack by another state. Hitler knew very well how to hoodwink all those who had no need to know about his secret plans, yet nevertheless should understand the reasons for the armament and the organization of the state ordered by him for the eventuality of war.

I will deal now very briefly with some further documents bearing on the activity of the Defendant Frick as Plenipotentiary for Reich Administration. Frick, in his speech of 7 March 1940, referred to this position—Document Number 2608-PS, Exhibit Number USA-714—and stated that the planned preparation of the administration for the possible event of war had been already effected during peacetime by the appointment of a Plenipotentiary for Reich Administration. This speech therefore merely confirms that which is already revealed by the text of the law. The same applies to Document 2986-PS, Exhibit Number USA-409, an affidavit by the defendant to the same effect. Therefore, according to this law, the position of the Plenipotentiary for Reich Administration, combined with the appointment of a Plenipotentiary for Economy and the post of Chief of the OKW, cannot be described as a "triumvirate" holding governmental authority in Germany. Nothing has ever become known either inside or outside Germany of a government by such a triumvirate, and the witness

Lammers has also referred to the strictly subordinate tasks performed by these persons by means of ordinances—tasks which had nothing to do with the preparation of a war of aggression.

Another field of the defendant's activity is likewise appraised by the Prosecution as participation in preparation for a war of aggression, namely, Frick's work for the Association for Maintaining Germanism Abroad. I refer to Exhibit Number Frick-14 and Document Number 3258-PS, the latter submitted as Exhibit Number GB-262. Both documents reveal that Frick supported the said association as a union for the fostering of German cultural relations abroad and promoted its cultural efforts. It cannot, however, be gathered from the documents that Frick engaged in any capacity whatsoever for the furtherance of the aims of a so-called "Fifth Column" abroad. Another document from which the Prosecution deduced the approval of the policy of aggressive war by Frick is the affidavit of Messersmith, Document Number 2385-PS, Exhibit Number USA-68. This affidavit has been characterized by several defendants as inaccurate, and the Defendant Schacht in particular showed at his examination that in essential points it cannot be correct at all. The Prosecution was not able to produce the witness for cross-examination. I object on behalf of Frick against any use of the affidavit, all the more so since an additional clarifying interrogation of the witness through a written questionnaire only led to the result that the witness, by using general phrases, avoided giving concrete answers to the questions put to him. The answers to the questionnaire show plainly enough that Messersmith cannot make concrete statements at all and that in his affidavit he obviously was considerably deceived himself as to the extent of his memory.

I do not believe that his affidavit, which has been refuted in essential points, can be made use of for passing legal judgment. As to the question whether the Defendant Frick participated in conscious preparation for a war of aggression, the Prosecution further submitted Document D-44, Exhibit Number USA-428. From this document it is seen that the Reich Ministry of the Interior is supposed in the year 1933 to have issued a directive that official publications were not to be drawn up in a form which might enable people abroad to infer an infraction of the Versailles Treaty from such publications. This document does not reveal whether by these directives actual treaty violations were to be masked or whether it was only a question of avoiding the appearance of treaty violations.

The same problem applies to Document 1850-PS, Exhibit Number USA-742. This contains the minutes of a conference between the Leadership of the SA and the Reich Defense Minister, who proposed to the SA in 1933

that budgetary funds of the Reich should be set aside by the Reich Ministry of the Interior for the military training of the SA. The document does not throw any light upon the attitude of the Reich Ministry of the Interior toward this proposal, and even if it had accepted it, this again would have proved only that the Reich Ministry of the Interior furthered the restoration of the Armed Forces, a fact which anyhow is already proved.

Thus, none of these documents furnishes proof that the Defendant Frick recognized as preparation for a war of aggression the measures ordered by Hitler as necessary for the defense of the Reich.

It is true that during the war, in 1941, a few days before the outbreak of the war with the Soviet Union, a conference took place between the Defendant Rosenberg and representatives of various ministries concerning measures in case of a possible occupation of parts of the Soviet Union. This is shown in Document 1039-PS, Exhibit Number USA-146, Rosenberg's report concerning these discussions, in which it is stated that negotiations took place with "Reich Minister Frick (State Secretary Stuckart)." This parenthesis means that the Reich Ministry of the Interior was represented in these negotiations by State Secretary Stuckart, therefore that Frick did not personally participate in the negotiations. As the negotiations took place only a few days before the beginning of the war in the East, it is not proved by the document that Frick himself was informed about the negotiation before the beginning of the war which, as it is generally known, was afterward proclaimed by Hitler as a necessary measure of defense against an imminent attack by the Soviet Union. It has been made clear by abundant evidence in this Trial how far Hitler kept his true aggressive intentions secret, and how well he knew how to cover up the true aim of all his political measures for years with thousands of convincing reasons to justify the individual measures of his policy of aggression.

There was a very small circle of collaborators whom Hitler informed about his war plans, but this circle was not selected according to the position of the person concerned in the Cabinet, or according to his position in the Party hierarchy, but exclusively from the point of view of whether it was necessary for the person concerned, with respect to his own tasks in the field of preparations for the war, to know the aggressive character of Hitler's general policy or even his detailed plans of aggression. Document 386-PS, Exhibit Number USA-25, shows how systematically the principle of secrecy was kept, even as regards the older members of the Party and the administrators of important departments in the Reich Cabinet. Whoever, such as the Minister of the Interior, had merely to carry out measures within the framework of preparations for war which could well be similar to tasks

of a purely defensive character was, in accordance with Hitler's principle, not informed of the latter's aggressive intentions. For this reason, the presence of the Defendant Frick is not shown in even a single one of these secret conferences in which Hitler informed a circle of selected men about his plans for foreign policy and his war aims. In the Document 386-PS just mentioned, Hitler especially emphasized and gave reasons for the exclusion of the Reich Cabinet as a body to which such plans should be made known.

In another record concerning a similar conference—Document L-79, Exhibit Number USA-27—the additional principle is laid down that no one should be told anything concerning the war plans who does not need to know these plans for his actual work.

Frick's name is not only missing from the list of those present at Hitler's conferences on his policy of aggression which took place before the war, but the same applies also to the numerous conferences concerning Hitler's further war aims and aggressive intentions which were held during the war. The Defendant Frick was no more informed of the later attacks or included in their preparation, as is shown by the list of those present at Hitler's lectures concerning his plans, which have in part been submitted here.

Frick, purely an expert in domestic administration who was not considered competent for military questions and questions of foreign policy, was deemed good enough to organize the civilian administration for the eventuality of any possible war, but in Hitler's opinion, his foreign policy and military plans were none of Frick's business. However, the Prosecution asserts further that after the conquest of foreign territories and their occupation, the Defendant Frick regulated the administrative policy in those territories and that he is responsible for it. The Prosecution considers this activity, of the defendant, according to Article 6, Letter (a) of the Charter, as "participation in the execution of wars of aggression." According to the submission of the Prosecution, Frick exercised an over-all control of the occupied territories, especially in his capacity as chief of the Central Office for the occupied territories. On the basis of the same function, he is deemed to be responsible for all War Crimes and Crimes against Humanity which were committed in the occupied and incorporated territories before and during the war, up to his dismissal as Reich Minister of the Interior on 20 August 1943.

It is a question of legal interpretation whether the activity in the administration of occupied territories, pursuant to Article 6, Letter (a) of the Charter, is to be considered as the "execution of wars of aggression," or whether criminality comes into consideration only under the point of view

of crimes against the rules of war or against humanity. In deciding this question it appears important to me that it is not one of the tasks of an official of a civil administration to examine, after the conclusion of military operations, whether it is a case of legal or illegal occupation according to the standards of international law. An obligation for such an examination would be an exaggerated demand to make of the department of the civil administration or the administrative chief, whose activity cannot be described as illegal on the grounds that the territory administered by him had been annexed a short or even long time ago in violation of the regulations of international law. There is no obligation for such examination in the practice of civil administration. The Charter moreover does not demand such an interpretation because, when naturally construed, the military operations themselves might be understood to constitute an execution of wars of aggression, but not the later civil administration of conquered territories.

The punishment of crimes which occurred in the administration of the occupied territories would not be made impossible through such an interpretation. In any case these crimes are subject to punishment as Crimes against Humanity or against the rules of war according to the Charter. And now mention must be made of those territories in particular for which the Defendant Frick bears a responsibility.

First of all there are the territories which were incorporated in accordance with constitutional law into the commonwealth of the German Reich, which are therefore called "incorporated territories." By their constitutional incorporation these territories came under the administration of the Reich, but only to that extent did they come under the authority of the Reich Minister of the Interior, in that the Defendant Frick bears the constitutional responsibility of a minister for the internal administration of these territories up to 20 August 1943. In the East, this mainly concerned the territories of West Prussia, Posen, and Danzig, in other words, the so-called returned Eastern territories which belonged, until the Versailles Treaty, to the commonwealth of the German Reich. In the East, the Memel district received the same constitutional treatment; in the West, the Eupen-Malmedy district; and in the Southeast, the Sudetenland. Furthermore the country of Austria was incorporated into the commonwealth of the German Reich. For all those territories Frick has a share in the laws and administrative measures brought about by the incorporation. He bears the usual responsibility of a Minister of the Interior for the domestic administration of these territories up to the time of his dismissal in August 1943. For the territory of Bohemia and Moravia on the other hand there existed a special Protectorate Government, which was described as autonomous in the decree concerning the

establishment of the Protectorate—Document 2119-PS—and was therefore not controlled by the Reich Ministry of the Interior. In a similar way, an administration not dependent on the Reich Ministry of the Interior existed in the Polish territories, which were collectively designated "Government General" and were put under the jurisdiction of a "Governor General." In contrast to the so-called "incorporated Eastern territories," the Reich Ministry of the Interior had no right to issue orders or to handle administrative matters in the Government General, as can be seen from Document 3079-PS which contains Hitler's decree concerning the administration of the occupied Polish territories. The same appears from numerous other documents, among them Document USSR-223, the Frank diary, in which he states that no Reich central offices are authorized to intervene in the government of his territory.

The same applied to all other occupied territories for which a special administration was established under any legal form. These separate administrations were not dependent on the corresponding departmental ministries in the Reich, but were under the jurisdiction of the administrative chief for the corresponding territories, who was himself directly subordinate to Hitler.

This applies to the occupied Soviet Russian territories, the entire administration of which was under the jurisdiction of a Reich Minister for the Occupied Eastern Territories. The same applies to Norway, where a Reich Commissioner was appointed. In a similar way, a Reich Commissioner was appointed for the Netherlands, who was also independent of the Reich Ministry of the Interior and was directly subordinate to Hitler. In Luxembourg, Alsace, and Lorraine, there were chiefs of civil administrations who were also not dependent on the Reich Ministry of the Interior, while in Belgium and northern France there was a military administration of which the same was true.

In the same way the administrative chiefs of the territories which were occupied in the Southeast of Europe were completely independent of the Reich Ministry of the Interior. For part of the occupied territories there exists, in the decrees issued at the time concerning the creation of a separate civil administration, a stipulation that the Reich Minister of the Interior was designated the central agency, and from this formulation the Prosecution has deduced a responsibility of the Defendant Frick for the administration of all the territories, as is Stated in the Indictment.

The actual tasks of the central agency can be seen from the order concerning the establishment of a central agency for Norway—Document 3082-PS, or Number 24 in the Frick document book. The witness Dr.

Lammers has given a further explanation of the tasks. At that time it was the primary task of the central agency to put personnel at the disposal of the chiefs of the civil administrations in the occupied territories on request. Therefore, if a civil official was needed for any district, the administration of the district concerned applied to the central agency in the Reich Ministry of the Interior, which then put some official from the Reich at the disposal of the chief of the civil administration. The Reich Ministry of the Interior was especially fitted for this, as it had at its disposal numerous officials of the domestic administration in Germany.

But the transfer of an official from his own department to another office, which will alone give orders to that official from that moment on, does not establish responsibility for the further activity of that official in his new department, to whom the Reich Ministry of the Interior could issue no orders whatsoever. To take as an example: If the Minister of Justice transfers one of his officials to the Foreign Minister, naturally only the Foreign Minister is responsible for the further activity of this official. This activity of the central agency therefore does not justify the assumption of responsibility by Frick for the administration of the occupied territories.

The requisitioning of officials for the occupied territories was concentrated in the Reich Ministry of the Interior. That is, as the examination of the witness Lammers indicated—and I quote from the above-mentioned Document 3082-PS—"the unified co-operation adapted to the needs of Norway, of the supreme Reich authorities with one another and with the Reich Commissioner."

In like manner, the hearing of evidence for the Defendants Rosenberg, Frank, and Seyss-Inquart, who functioned as chiefs of civil administrations in the occupied territories, has on no occasion revealed any co-operation of any kind with the Defendant Frick either in his capacity of Reich Minister of the Interior or Director of the Central Agency in this Ministry.

Now, the Prosecution has referred to several documents in order to prove that the Defendant Frick exercised extensive control over all occupied territories. Actually, however, those documents do not reveal an administrative activity of any greater extent than I have just stated. Document 3304-PS gives proof of an administrative activity for the incorporated Eastern Territories. This coincides with my statement that the incorporated Eastern Territories, in their internal administration, were subject to the Reich Ministry of the Interior by virtue of their constitutional incorporation into the German Reich. The document, however, bears no reference to the administration of the Occupied Eastern Territories, that is, the Government General or to the occupied Soviet Russian territories.

The other document submitted, 1039-PS, Exhibit Number USA-146, proves the transfer of administrative personnel from the department of the Reich Ministry of the Interior to the Reich Minister for the Occupied Eastern Territories, a typical task of the Central Agency which I have already discussed. The Prosecution has submitted further documents which reveal that the Reich Ministry of the Interior had a hand in the bestowal of German citizenship. Even this does not, however, prove any administrative authority of the Defendant Frick for the occupied territories, but merely a typical activity of a Minister of the Interior whose department is competent for the general regulations concerning German citizenship, including cases where persons living outside the Reich territory are involved. This activity of the Minister of the Interior can also furnish no proof of an extensive administrative policy and a general responsibility of the Defendant Frick for the administration of the occupied territories. In particular, in the occupied territories which were not incorporated into the Reich territory, Frick had no authority or competence whatsoever as far as the tasks of the Police were concerned.

Hitler directly commissioned Himmler to carry out police work in the occupied territories—see Document 1997-PS, Exhibit Number USA-319, Hitler's decree concerning police security measures for the Eastern Territories, for which Himmler was directly responsible. The same is revealed by Document 447-PS, Exhibit Number USA-315, a directive of the OKW dated 13 March 1941, to the effect that the Reichsführer SS in the Occupied Eastern Territories is charged with special duties in the execution of which he will act independently and on his own responsibility. The same applies to the police tasks in the other occupied territories, which were assigned either to the Reichsführer SS Himmler or to the SS and police leaders who took their orders only from Himmler, although in many cases they were ostensibly assigned to the civil administrative chief in question, such as for example the Governor General in Poland (see excerpt from Frank's diary in the Frick document book under Number 25, also USSR-223). In no case, therefore, were police tasks in the occupied territories under the Defendant Frick's jurisdiction. Consequently, the Defendant Frick bears no responsibility for crimes against the laws of war and against humanity in the occupied territories, since in these territories he could neither order crimes nor prevent them.

Concerning the territory of the German Reich I must now examine the claim of the Prosecution as to the responsibility of the Defendant Frick for all the police measures, including the Gestapo, as well as for the establishment and administration of concentration camps. May I first refer to

the documents submitted by me in evidence, which reveal that the Police, including the political police, was in 1933 still the concern of the individual states within the Reich, such as Prussia, Bavaria, *et cetera*.

In Prussia, the Secret State Police (Gestapo) and the concentration camps were established and administered by Göring in his capacity as Prussian Minister of the Interior. The tasks of the political police were then transferred by a Prussian law, dated 30 November 1933, to the office of the Prussian Prime Minister, which was also administered by Göring. So when the offices of the Reich and the Prussian Minister of the Interior were merged, in the spring of 1934, Frick did not assume the tasks of the political police which still remained incumbent upon Göring in his capacity as Prime Minister.

A similar regulation prevailed in the other states, where Himmler was gradually given the duties of special deputy for the political police. During this period, the Reich Minister of the Interior had only the right of so-called "Reich supervision" over the states, which Frick made use of for the enactment of general instructions and legal ordinances; and this is the only point where Frick, as Minister of the Reich, could exercise any influence on the affairs of the political police and concentration camps.

Frick made use of this possibility, in accordance with his basic attitude as confirmed by the witness Gisevius, to prevent and repress arbitrary actions by the political police as far as was in his power in the circumstances then prevailing. He endeavored, by the enactment of provisions of law and procedure, to restrict the arbitrary practices of the political police in the states.

I refer to Document 779-PS, submitted by me as Exhibit Number Frick-6. This is a decree dated 12 April 1934, containing restrictive provisions of this sort under a significant preamble—which I quote: "In order to remedy abuses occurring in the infliction of protective custody." This is followed by directives to the governments of the states forbidding the application of preventive custody in numerous cases where it had previously been improperly ordered by the Gestapo. In this struggle of Frick against arbitrary actions by the political police in the states, the police had, it is true, ultimately come out better because they were under the direction of Göring and Himmler, with whom the "bureaucrat" Frick—as Hitler disdainfully called him—could not compare as regards influence in the Party and State. For that reason the political police in the states in practice frequently disregarded Frick's ordinances. But Frick did not stand by idly as long as there was reason to hope that through his intervention the unrestrained practices of the political police in the states could be directed into orderly

and legally regulated channels. I refer to Document 775-PS, Exhibit Number Frick-9, a memorandum from Frick to Hitler which clearly and unequivocally calls a spade a spade, mentioning legal insecurity, unrest, and embitterment, and severely criticizing individual cases of misuse of the right to order protective custody by the political police of the states. Here I would insert that the same document also proves that in the struggle over the churches, the defendant clearly took their side. This is also proved by Exhibit Number Neurath-1.

In his testimony the witness Gisevius refers to an additional memorandum which he himself drew up for Frick as a further attempt to restrain through severe criticism and by suggestions for legal control the arbitrary practices of the political police in the states. All of these attempts failed because Frick's political influence was too insignificant and he could not assert himself against Göring and Himmler, and because at the time Frick himself could not yet see that the practices of Göring and Himmler were essentially in harmony with what Hitler actually wanted himself. Thus the documents submitted by the Prosecution, taken in conjunction with the evidence offered by the Defense, show that in the domain of the political police and in ordering protective custody, Frick had a certain competency at a time when the police was still a service administered by the individual states. This evidence also shows that during that time Frick's jurisdiction was very limited and it further shows that Frick, acting within the bounds of his competency, took action solely in order to intervene against the terror and arbitrary actions of the Gestapo through general instructions and through repeated complaints in individual cases, so that the conclusion is not justified that Frick in any way actively participated in the Gestapo's measures of terror and violence.

At a later period the legal situation changed. With Hitler's decree of 17 June 1936—Document 2073-PS, Document Book Frick Number 35—police tasks for the entire Reich were combined and uniformly transferred to Himmler, whose department was formally made a part of the Ministry of the Interior under the title "Reichsführer SS and Chief of the German Police in the Reich Ministry of the Interior."

The question now is whether this new regulation conferred on Frick, in his capacity as Reich Minister of the Interior, any authority of command or any right to issue instructions which could be enforced with regard to the political police, its offices and its functionaries. When Himmler, in accordance with his own wish, which he could gratify because of his influence on Hitler, was appointed Police Chief for the entire Reich, there did not exist in Germany a police or security ministry, properly speaking.

This is the reason why the uniform direction of the police through Himmler in person was formally attached to the Reich Ministry of the Interior. But Himmler wanted to be more than a department chief in the Ministry of the Interior. Therefore a position entirely novel in German administrative law was created for him and his purposes. The entire sphere of the police was separated from the rest of the activities of the Ministry of the Interior and placed under Himmler's special jurisdiction under a newly created title of office which, as a government office, contained the words "Reichsführer SS," thereby making it possible for Himmler to carry out political police tasks under a title of office characterizing him as Reichsführer SS and in that capacity giving him independence from any instructions issued by a minister of state.

In order to accentuate further the independence of his office within the bureaucratic hierarchy as well, Himmler was given the additional right from the very beginning to represent police matters before the Cabinet independently and on his own responsibility, like any Reich minister; this is also shown in the decree concerning his appointment, Document 2073-PS. This decree is a typical example of the overlapping of competencies which Hitler favored to excess in his government system. Himmler became part of the Ministry of the Interior and, as an official of the Ministry of the Interior, was formally bound to abide by instructions of the Minister. However, he was also an independent Chief of Police with the right to represent before the Cabinet on his own responsibility matters pertaining to the Police, thus excluding Frick in that respect. In addition to that, his orders simultaneously carried the authority of the Reichsführer SS, in which Frick had no authority at all to interfere.

In actual effect this involved arrangement also enhanced the tremendous influence of Himmler on Hitler. In keeping with his convictions, and to safeguard a well-ordered state apparatus, Frick repeatedly tried to intervene through general instructions intended to restrain the arbitrary acts of the political police. As late as 25 January 1938 he tried through a decree to curtail the admissibility of protective custody and he forbade it in a number of cases of improper application. I refer to Document 1723-PS, Exhibit Number USA-206, an extract of which under Number 36 appears in the Frick document book. He prohibited protective custody in lieu of, or cumulative to, a legal penalty, forbade its application by police authorities of the intermediate or subordinate levels, and gave orders that the accused should be heard before arrest. He decreed periodical examination of the reasons for the continuance of confinement and on principle forbade the

protective custody of foreigners, whom the Police had authority only to expel from the Reich in case of acts endangering the State.

An obvious argument is that the Gestapo in practice disregarded all these instructions of Frick and that Himmler and his subordinates maintained an absolute reign of terror and violence. This is correct and has been confirmed in detail by the witness Gisevius. But something else appears of importance to me in the defense of Frick: To show that Frick himself disapproved of such arbitrary acts and that he tried to do all in his power to prevent them. Finally, however, Hitler forbade even this. He informed him through Lammers—as confirmed by the latter as witness—that he was not to concern himself with police matters, that Himmler could manage that better by himself and that the Police was doing well under Himmler.

Thus Himmler finally got complete control of the Police, and he gave outward expression to this by later dropping, with Hitler's consent, from his official title, the words "in the Reich Ministry of the Interior," simply referring to himself as "Reichsführer SS and Chief of the German Police," which is also shown in the testimony of the witness Lammers.

I believe that, in view of the circumstances, the problem of the Defendant Frick's criminal responsibility for the political police and their arbitrary measures is not established by the fact that the entire Police was formally incorporated in the Reich Ministry of the Interior after the year 1936, since it has been proved! that Frick himself did not participate in arbitrary acts, but on the contrary tried again and again to intervene against such arbitrary practice with all the power he possessed, which however was no match for the personality of Himmler and his influence with Hitler.

In order to insure fair judgment, I request that the actual situation as to power of command and authority, and not the purely superficial circumstances of a formal incorporation of the tasks involved in the Reich Ministry of the Interior, be taken into account.

I insert the following here: The Prosecution, during their presentation on 3 July 1946, submitted Document D-181, Exhibit GB-528, and stated in connection with that document that it proved that the political police were not only formally incorporated in the Ministry of the Interior, but that Frick was in fact responsible for the measures of the Police. Actually the document shows only that Frick as Minister of the Interior was officially contacted in the matter of the sterilization of those suffering from so-called hereditary diseases. The document has nothing to do with any measures of the Police, least of all with any measures of the political police. Moreover

there is no information in it regarding Himmler's position in the Ministry of the Interior.

Now I will continue with my plea: In this connection, I must briefly deal with the reference of the Prosecution to the fact that Hitler's decree concerning the appointment of Himmler as Chief of the German Police—Document 2073-PS—had been countersigned by Frick himself.

I believe that the relationship between Frick and Himmler, as well as their divergent relations to Hitler, are sufficiently clear to justify the conclusion that the appointment of Himmler simply amounted to an agreement between Hitler and Himmler, to which Frick would have objected in vain. We are confronted with the same problem which applies to so many defendants, namely, that of the formal countersigning of an order issued by Hitler, which was then signed as a matter of form by the head of a department, although that department head had no influence on the order and could not have prevented it, especially as it would have had full constitutional effect as a Führer decree without the minister's additional signature.

I now have to deal with several documents which the Prosecution consider to have a bearing on actual activity by the Defendant Frick within the sphere of tasks of the political police. I have already dealt with Document 3304-PS, to which the Prosecution referred in this connection. It concerns an ordinance on the assignment of a Higher Police Leader to the Reichsstatthalter (Reich Governor) in the Eastern territories which were incorporated into the commonwealth of the German Reich, and hence deals with the administrative organization of the Reich Governor's office in a part of the Reich. This decree therefore falls within the scope of the general competence of the Ministry of the Interior, and accordingly does not furnish proof of any specific police activity. Moreover, this decree has nothing to do with any arbitrary acts of the Gestapo.

On the same lines in the decree of 20 September 1936—Document 2245-PS—concerning the appointment of police experts in the Prussian provincial administrations, which were also subordinate to the Reich Ministry of the Interior as offices of the general internal Reich administration, the assignment of a police expert to the office of general administration in the province is a measure of internal Reich administration. This measure, too, had no connection with arbitrary acts of the Gestapo, and more particularly it does not prove that the defendant issued any instructions to the Gestapo.

The situation is no different with respect to the documents which have been appraised by the Prosecution as demonstrating the participation of the

defendant in the establishment and administration of concentration camps, or as a sign of approval of terror methods used by the Gestapo. In their statement of 22 November 1945, the Prosecution referred to Document 2533-PS as proof of the approval of these arrangements by the Defendant Frick. I need not go further into the contents of the document; it represents an article by the Defendant Frank in the journal of the Academy of German Law, of which Frick has erroneously been called the author by the Prosecution.

A further document does not, in the opinion of the Defense, contain sufficient evidentiary value to be utilized in giving legal judgment. I have in mind Document 2513-PS, Exhibit Number 235, which contains an excerpt from a speech which Frick allegedly made in the year 1927. But the excerpt is taken from a provincial Social Democrat newspaper, a small paper opposed to Frick, the reporter thus having no authentic copy of the speech at his disposal—and we all know what mistakes and misunderstandings are apt to be contained in such short reports, the wording of which cannot be checked by the speaker himself. Thus this document, according to which Frick is said to have stated that history is written not only with the ballot, but with blood and iron, is not a reliable source.

The Prosecution refers to dealings concerning the expropriation of land in order to extend the grounds of the Auschwitz Concentration Camp. The general domestic administration is competent for expropriation matters, and for this reason an official from the Ministry of the Interior was called into negotiations, who stated, however—Page 2 of the English translation of the document—that he was not authorized to dispose of the freehold of the land. Thus one cannot from this document either construe any political police activity on the part of the defendant, or an approval of the concentration camp system. Finally, in this connection the Prosecution states that the Defendant Frick personally visited the Oranienburg and Dachau Concentration Camps. The defendant does not deny the visit to Oranienburg in 1938, about which witness Hoess testified. At that time, as witness Hoess himself testified, the outward aspect of the camps was still generally that of a military training area. In any case, an official visitor to a camp at that time could not observe any indication of murder, ill-treatment, or similar crimes, so that such a visit is not a decisive argument for knowledge of crimes in the concentration camps.

On the other hand, Frick never visited the Dachau Concentration Camp, contrary to the testimony of the witness Blaha. I refer to the testimony of Gillhuber in regard to this, who as the constant companion of Frick must have known about such a visit if it had taken place. I take the liberty of

pointing out that the two other constant companions of Frick were also named by me as witnesses, but in agreement with the Prosecution were considered by the Tribunal as unnecessary on the grounds that one of the companions would be sufficient as a witness.

Before concluding this chapter, I still have to go into the matter of an allusion made by the Prosecution which described Frick at one time as the Chief of the Reich Security Main Office. I beg to refer to the testimony of the witness Ohlendorf, who stated to the Court that the Reich Security Main Office (RSHA) was a creation of Himmler, who combined in this office his state police tasks and his functions as Reichsführer SS, with which Frick had no connection of any kind, much less any powers of command. The sole chief of this office was thus Himmler himself.

I must go further into the charges which are made against the Defendant Frick with respect to the persecution of members of the Jewish race. Frick did collaborate in legal measures, particularly the Nuremberg Laws, and in administrative measures which he regarded as an expression of a National Socialist racial policy. On the other hand there is no proof that Frick himself shared in or knew of the measures of physical extermination which, on Hitler's direct orders, were carried out by Himmler and his organizations and kept absolutely secret from those who themselves had no part in these frightful events. Further, in his capacity as Minister of the Interior, the defendant is also accused of collaboration in the killing of the sick and insane. Hitler's basic order is contained in Document 630-PS, Exhibit Number USA-342. This document shows that Hitler did not give an order for this to any government office but to two separate individuals, namely, Bouhler and Dr. Brandt, so that this was quite outside the ministries' authority. Moreover, contrary to all rules, Hitler did not sign this order himself in an official capacity as Führer and Reich Chancellor, but used private stationery with the heading "Adolf Hitler." This shows, a fact that the witness Lammers has confirmed, that Hitler did not give an order for these measures to the Ministry of the Interior or some other government office, but to two of his Party comrades, and the Party emblem is the only sign on this stationery. On the other hand, the documents submitted by the Prosecution prove that complaints were made which also reached the Ministry of the Interior, but they do not prove that, in contradiction to Document 630-PS, Frick personally was contacted on the subject of measures for the killings, or that he could have prevented them.

After his dismissal as Minister of the Interior on 20 August 1943 Frick was appointed Reich Protector of Bohemia and Moravia. Here he was given a task which from the start was definitely limited in its competence.

I refer to Document 3443-PS, which is also included as USSR-60 and under Number 29 in the Frick document book, and to 1366-PS, submitted by me as Exhibit Number Frick-5a. Furthermore, I refer to the testimony of the witness Lammers. The office of the Reich Protector was originally the unified representation of Reich authority in the Protectorate. In actual practice, however, its authority passed more and more to Frank, the Reich Protector's State Secretary at that time.

With the appointment of Frick in August 1943 through a Führer decree which was not made public, the executive authority was now formally transferred to Frank, who from that date received the official title of "The German Minister of State in Bohemia and Moravia." From that time on the Reich Protector retained essentially the right of representation and the right of pardon, improper use of which by Frick has been neither maintained nor proved by the Prosecution. On the other hand Frank, as "German Minister of State" according to the above-mentioned Führer decree, derived his executive authority directly from Hitler by whom he had been directly appointed, and from whom he received his instructions without Frick's interpolation, Frick being in no way competent to exercise any influence thereon. Considering this state of affairs, the Defendant Frick cannot be incriminated by Document 3589-PS, Exhibit Number USA-720.

I now come to the Prosecution's charge that Frick, by his membership in certain organizations, is responsible for certain criminal actions. The SS was one of these organizations mentioned by the Prosecution, to which, however, Frick never belonged. Thus he was never a general in the SS, as stated by the Prosecution. I would assume this to be merely an error on the part of the Prosecution. In any case, the Prosecution did not submit any form of proof. Frick was likewise never a member of the SA, as shown—probably by mistake—in the chart indicating the defendants' membership in various organizations. For this too, there is no proof.

The Prosecution has further charged Frick with being the supreme head of the Gestapo, and therefore designated him as a member of this organization, with the argument that since the appointment of Himmler in 1936 as Chief of the German Police the Gestapo has been formally incorporated into the Reich Ministry of the Interior. But the Gestapo had its own chief in the person of Himmler, from whom alone it took orders, and Himmler's formal subordination to the Minister of the Interior does not make the latter a member of that organization, which was exclusively under Himmler's orders.

The Defendant Frick is further charged, in his capacity as Reichsleiter, with membership in the Political Leadership Corps. My colleague, charged

with the defense of this organization, will in his turn deal with the character of this organization. As to the Defendant Frick, I have only to point out that he held the formal position of a Reichsleiter in his role as chairman of the Reichstag faction of the NSDAP. The Reichstag itself having lost all political importance after 1933, which requires no further explanation, this position of Frick's was in practice equally unimportant and could not be compared with the position of a Reichsleiter who administered important political departments.

Finally Frick, as Reich Minister, was a member of the Reich Cabinet. With regard to the character and the authority of this organization I also refer first of all to the statements, which are yet to follow, of my colleague who has been appointed defense counsel for this organization.

I refer here only to the testimony of Lammers and Gisevius, and further to the excerpt from the book of this latter witness, which I have submitted as Exhibit Number Frick-13 as evidence of the position and authority which the Reich Cabinet had with respect to the dictatorial practices of Hitler. From all this, the Defendant Frick appears as a person who certainly took action politically to bring Hitler to power, and who temporarily exercised a decisive influence on internal policy after his goal had been achieved. All his measures, however, had inner political aims; they were not intended to have anything to do with the foreign political aims of a war of aggression, much less with Crimes against Peace or against the rules of warfare—and, as also specified by Article 6 of the Charter, only in such cases would this Court have jurisdiction, as stated by the Prosecution itself.

When Frick realized later that the policy was taking a course of which he could no longer approve, he tried to exert all his influence to bring about a change. But he had perforce to find out more and more clearly that Hitler would not listen to his remonstrances and complaints. On the contrary, he was forced to realize that these complaints destroyed Hitler's confidence in him, and that he preferred to be advised by Himmler and similarly minded persons, so that finally, after the year 1937, Frick was no longer received by Hitler when he wanted to present complaints. Frick then gave up such hopeless attempts to bring about a change in the situation. Things would not have been altered by his resignation either, which the evidence has shown he repeatedly tendered in vain. Thus his tragedy lies in his entanglement in a system, in the first steps of which he had participated enthusiastically and the development of which he had imagined would be quite different. In any case, it appears important to me, in judging his personality and his actions, that even this presentation of evidence, which has gone on for months, has

not given any proof of the personal participation of the defendant in any crime.

It is not without reason that John Gunther in his book *Inside Europe*, which I have presented to the Tribunal as evidence, describes precisely the Defendant Frick as "the only honest Nazi." At the same place Gunther goes on to call him a "bureaucrat through and through." Hitler himself kept calling him the "pen pusher" ("Paragraphenschuster") because Frick—which was typical of him—did not become acquainted with him at some public meeting, but in his office in the police department in Munich in the year 1923.

This man felt enthusiasm for Hitler's suggestive power, so lacking in himself, a Hitler who with big words appealed to his heart, his honor, and his patriotism. It was Hitler who made him proud of being able to participate in the reconstruction of a German nation which, through powerful armed forces, was to be in a position to play a peaceful yet active role in world politics.

And it was again Hitler who knew how to make his program appear to the bourgeois official Frick as the only way to forestall Bolshevik rule in Germany—this and many more superficial truths, twisted statements, and devices of propaganda which fooled so many people who fell for the suggestive power of Hitler, not realizing in time that they had subordinated themselves to the hypnotic will of a criminal, who was prepared to overthrow the pillars of civilization for his aims and who finally would leave Germany a monstrous spiritual and material field of rubble, for the removal of which I pray that this Trial may also contribute through a sentence in accordance with law and justice.

THE PRESIDENT: Dr. Marx.

DR. HANNS MARX (Counsel for Defendant Streicher): Gentlemen of the Tribunal, Mr. President.

I begin the speech for the defense of Julius Streicher.

When in May of the past year the final battles of the greatest and most horrible war of all time came to an end, the Germans were slow to rise again from the stupor in which they had, for the most part, spent the last months of the war. Like all the peoples of Europe they had suffered unspeakably for years. The last months in particular, with their hail of bombs, had brought so much misery to both the country and the people that it almost surpassed human endurance. This terror was increased by the knowledge that the war was lost, and by the fear of the uncertain fate which the occupation period would bring. And when finally the period of first anxiety had passed, when

the German people were slowly beginning to breathe again, paralyzing horror spread once more.

Through the press and radio, through newspapers and motion pictures, knowledge was spread of the atrocities which had taken place in the East, on the steppes and in the concentration camps. Germany learned that people, men of its own blood, had slaughtered millions upon millions of innocent Jewish people. Most people felt instinctively that these deeds would necessarily be the greatest of all the accusations the world had to level against Germany.

The question of whether the German people in its totality had known and approved of these actions was, and is, the truly fateful question. It is the touchstone by which the decision must be made as to whether or not Germany will ever be able to return again as a nation with equal rights into the common cultural and spiritual sphere of the world. As in every case of guilt, there immediately arose here also the question as to who was responsible, and the search for that individual. Who had ordered these atrocities, who had carried them out, and how could such inconceivable things have happened at all, the like of which cannot be found in history even in the earliest days?

During all this asking and guessing, the news arrived that the former Gauleiter of Franconia and publisher of Der Stürmer, the present Defendant Julius Streicher, had fallen into the hands of the American troops. From the echo this news aroused in the press, which was exclusively directed and published by the occupying power, as well as in the radio news, it was to be gathered that the world was of the opinion that in the person of Julius Streicher not only had one of the numerous anti-Semitic propaganda agents of the Third Reich been taken prisoner, but in short Enemy Number One of the Jews.

Throughout the rest of the world the opinion evidently prevailed that in the person of Julius Streicher not only the most active propaganda agent for the persecution and extermination of the Jews had been seized, but that he had also participated to the highest degree in carrying out these acts of extermination. He was said to have been, as one heard, not only the greatest hater of the Jews and the greatest preacher of extermination of the Jews, but also the person to whose direct influence one could trace back the extermination of European Jewry.

It is only from this angle that it can be explained why the Defendant Streicher should sit here in the dock, together with the other defendants, among those chiefly responsible for the National Socialist system. For neither by virtue of his personality nor measured by his offices and positions

does he belong to the circle of leaders of the NSDAP or to the Party's decisive personalities. This view was probably also held in the beginning by the Prosecution, but was abandoned by them at an early stage, for the written Indictment already no longer charged the Defendant Streicher with any personal and direct part in the abominable mass murders. Rather did it state that there was less guilt with which he would be charged than in the case of any of the other defendants; only his propaganda, his activities by the written and spoken word, were made the subject of the accusation against him.

As far as particulars are concerned, the Counts of the Indictment against the Defendant Streicher were summed up as follows:

I. Support of seizure of power and consolidation of power of the NSDAP after the latter's entry into the Government.

II. Preparation of aggressive wars by propaganda aimed at the persecution of the Jews.

III. Intellectual and spiritual preparation and education to encourage hatred against the Jews,

(a) in the German people,

(b) in the German youth, and

(c) in the active extermination of Jewry.

Without Julius Streicher, no Auschwitz, no Mauthausen, no Maidanek, no Lublin—thus the Indictment may be summed up briefly.

As far as Count One of the Indictment is concerned, the defendant does not deny that as regards the Party's later seizure of power he supported and promoted it with all his might from its earliest inception. His support went to the extent of placing a whole movement which he had built up personally in Franconia at the disposal of Adolf Hitler's Party which was small after the first World War, as one can imagine, and limited to southern Bavaria only. Furthermore, after Hitler's release from the fortress of Landsberg, he immediately joined him again and subsequently championed his ideas and goals with the greatest determination.

THE PRESIDENT: I think this is a good time to break off. The Tribunal will adjourn.

[*The Tribunal adjourned until 12 July 1946 at 1000 hours.*]

NOTES

[1] Proceeding from this interpretation of the Charter there arises the need for a discussion on how the Indictment is to be construed with respect to the conspiracy charged therein. This construction is based on the legal concept of Anglo-American law which determines the responsibility of a plurality of persons differently and in a more far-reaching way than the German penal code, which contains the principles of law to which the accused were subject at the time when they committed the deed. The German penal code also provides that a person can be held responsible for offenses committed by others provided he participated in a common plan which was later carried out by others. But the German penal code places decisive weight on determining the extent to which the acts committed at a latter date correspond to the common plan. Since in the serious crimes which are being prosecuted before this Court the determination of the form of guilt in the original plan is necessary in order to permit punishment, later acts of commission by others can be charged against a defendant only to the extent to which they corresponded to arrangements to which the defendant deliberately agreed. A defendant who participated in certain plans cannot be held responsible for subsequent plans of a wider scope, or for acts of commission which far exceeded the original plans without his co-operation.

Responsibility for subsequent plans and acts of commission can be established according to German law only if it can be proved that the defendant, without participating in those subsequent plans and actions, at the time of his original participation recognized and approved this manner of development and execution and, in other words, deliberately encouraged it.

To revert to the example of the Prosecution:

He who participates' in the plan for robbing a bank is responsible if this plan is carried out, even though he does not personally participate in the execution. But a person does not at the same time become guilty of premeditated murder if the active members subsequently and without his participation discuss murdering the guard or in case one of the members should shoot one of the guards without prior agreement, because the latter has caught him in the act.

Nobody can be convicted of premeditated murder if he did not participate in a plan to commit murder, unless it can be proved that when he participated in the plan for robbing the bank such killing of a guard was already contemplated and that in spite of this he approved the plan

for the bank robbery. In that case he, too, would have deliberately contributed to the murder. In other words, according to the provisions of German substantive criminal law there does not exist a liability for so-called excesses of the immediate culprits or for an unforeseen development of plans not originally conceived on such a wide scope, so that a more far-reaching interpretation in line with the concept of conspiracy in Anglo-American law, which at the time when the accused committed their deed did not exist, would violate the principle which prohibits retroactive application of penal laws.

ONE HUNDRED AND SEVENTY-SEVENTH DAY

Friday, 12 July 1946

Morning Session

THE PRESIDENT: The Tribunal will adjourn today at 4 o'clock.

DR. MARX: Mr. President, with the permission of the Tribunal I shall now continue with the presentation of the final plea for the Defendant Streicher. Yesterday I had come to the point where the individual accusations against Streicher had been summarized, and I had taken liberty of explaining that these accusations are subdivided into three different paragraphs:

1. Support of seizure of power and consolidation of the power of the NSDAP after its entry into the Government.

2. Preparation of aggressive wars by propaganda aimed at the persecution of the Jews.

3. Intellectual and spiritual preparation and education of the German people and German youth to effect the destruction of Jewry and to encourage hatred of the Jews.

With respect to Count One of the Indictment, the defendant does not deny that, with regard to the Party's later seizure of power, he supported and promoted it with all his might from the very beginning. His support went to the extent of a whole movement which he had built up personally in Franconia and which he put at the disposal of Adolf Hitler's Party, which was quite small after the first World War and limited to Southern Bavaria only. Furthermore, after Hitler's release from the fortress of Landsberg he immediately joined him again and subsequently championed his ideas and aims with the greatest determination.

Until 1933 the defendant's activity was limited to propaganda for the NSDAP and its aims, particularly in the field of the Jewish question. Nothing criminal can be seen in this attitude of the defendant as such. Participation in a party within a state which allows such an opposition party can be regarded as criminal only if, first of all, the aims of such a party are

objectively criminal and if, subjectively, a member of such a movement knows, approves of, and thereby supports, these criminal aims.

The foundation of the entire charges against all the defendants lies in this very fact that the NSDAP is accused of having had criminal aims from the very beginning. According to the assertion of the Prosecution, the members of this Party started out with the plan of subjugating the world, of annihilating foreign races, and of setting the German master race above the whole world. They are accused of having harbored the will to carry out these aims and plans from the very outset by means of aggressive wars, murder, and violence. If, therefore, the Defendant Streicher's mere participation in the NSDAP and his support of it are to be ascribed to him as a crime, it must be proved that the Party had such plans and that the defendant knew and approved of them.

The gentlemen who spoke before me have already demonstrated sufficiently that a conspiracy with such aims did not exist. Therefore I can save myself the trouble of making further statements on this subject and I can refer to what has already been set forth by the other defense counsel. I have only to deal with the point that the Defendant Streicher did not in any case participate in such a conspiracy, if the latter should be considered by the High Tribunal to have existed.

The official Party Program strove to attain power in a legitimate way. The aims advocated therein cannot be considered as criminal. Thus, if such aims did actually exist, they could only—by the very nature of a conspiracy—be known in a restricted circle.

The Party Program was not kept secret but was announced at a public meeting in Munich, so that not only the whole public of Germany but also that of the entire world could be informed about the aims of the Party. Therefore that element supplied by secret agreement towards a common aim, which is usually the characteristic sign of a conspiracy, is not present.

The evidence too, has shown nothing to the effect that already at that time there existed a plan for a war of revenge or aggression connected with the previous or simultaneous extermination of the Jews. If, nevertheless, a conspiracy should have existed, the latter would have confined itself to the restricted circle which revolved exclusively around Hitler. But the Defendant Streicher did not belong to that circle. None of the offices he occupied provides the least proof of that. As an old Party member he was just one among many thousands. As honorary Gauleiter, as honorary SA Obergruppenführer, he was also only an equal among equals. Thus one cannot find in any of the offices he held any connection or complicity with the innermost circle of the Party. It is also impossible to discern after the end

of 1938 any personal relations with the leading men of the Movement, either with Hitler himself or with the Defendant Göring, or with Goebbels, Himmler, or Bormann.

The Prosecution did not offer any evidence on this point, nor did the proceedings produce any proof to that effect. Of all the material presented during all these months of the Trial, nothing can be taken as even a shadow of proof that the Defendant Streicher was so closely connected with the supreme authority of the Party that he could have, or even must have, known its ultimate aims.

In the Jewish question too the final aims of the Party—the effects of which were manifest in the concentration camps—were not, before the seizure of power and for several years after, formulated and determined as they appeared in the end. The Party Program itself provided for Jews to be placed under aliens' law, and so the laws issued in the Third Reich followed this line. Only later on, it may be added, the program in this as in many other points became more radical and finally went haywire altogether under the influence of the war. But any proof that the Defendant Streicher knew other aims than those of the official Party Program has not been offered. Consequently it has not been proved that the defendant supported the seizure of power of the Party in cognizance of its criminal aims; and only on such a basis could a penal charge be brought against him.

The fact that the defendant, as Gauleiter, further endeavored to increase and maintain the power of the Party after the seizure of power is not disputed by him. But here, too, the defendant's conduct can only be considered punishable if he knew at that time the objectionable aims of the Party. As a matter of actual fact it must be said here that the Defendant Streicher, in contrast to almost all the other defendants, did not remain in his position until the end, not even until the war. Officially he was dismissed in 1940 from his position of Gauleiter, but actually and practically he had been without any influence and power for more than a year before that time. But as long as he could still work within the modest framework of his capacity of Gauleiter, no criminal plans of the NSDAP were recognizable. In any case not for anybody who, like the Defendant Streicher, was outside the close circle surrounding Adolf Hitler.

Count Two of the Indictment brought against the Defendant Streicher, namely, the persecution of Jews as a means of preparation for a war of aggression, can be included here. Up to 1937 the existence of a plan for a war of aggression was in no way recognizable. In any case, if Hitler had had any intentions in that direction, he did not allow them to be recognized from the outside. If, however, anybody had been taken into his confidence at that

time, it would have been the leading men in politics and the Armed Forces, who belonged to the closest circle around him. To those, however, the Defendant Streicher by no means belonged. It is especially significant here that at the outbreak of the war Streicher was not even appointed Wehrkreiskommissar (Commissioner of Military Administrative Headquarters) of his Gau. The individual conferences from which the Prosecution derives the evidence for the planning of the war which broke out later in no case ever saw the Defendant Streicher as participant. His name does not appear anywhere, neither in any written decree, nor in any minutes. Consequently no proof has been offered that Streicher knew of such alleged plans for waging war. This does away with the accusation that he preached hatred against the Jews in order to facilitate thereby the conduct of the war planned for some later time.

In this connection I should add that one of the main points in the program of the NSDAP was the slogan, "Get rid of Versailles!" The defendant adopted this point of the program which, however, does not mean he envisaged a repeal of the treaty by means of war.

Even the former democratic German governments, in the course of their negotiations with their former opponents in the World War, stressed the fact at all times that the Versailles Treaty presented no proper basis for permanent world peace and particularly for economic adjustment. Not only in Germany but everywhere in the rest of the world clear-thinking economic circles were against the Versailles Treaty. We may point especially to the United States of America as an example of this.

Almost all political parties in Germany, irrespective of their other aims, agreed that the Treaty of Versailles should be revised. Neither was there any difference of opinion over the fact that such revision was possible only on the basis of an agreement. Even to consider any other possibility of solution would have seemed Utopian, for the German Reich lacked all military power. The NSDAP also strove, at any rate as far as could be seen from outward signs, to find a solution to the problem in this way. To support such an aim, however, cannot be looked upon as a violation of treaty obligations and, therefore, cannot be made the object of a charge against the defendant. No proof has been offered that he thought of warlike complications or that he desired them.

I now come to the matter of the defendant's attitude in the Jewish question. He is accused of having incited and instigated for decades the persecution of the Jews and of being responsible for the final extermination of Europe's Jewry. It is clear that this accusation constitutes the decisive point of the Indictment against Julius Streicher and perhaps the decisive

point of the total Indictment, for in this connection the attitude of the German people to this question must be tried and judged as well. The Prosecution takes the point of view that there is just as little doubt as to the responsibility of the defendant as there is doubt about the guilt in which the German people are involved. As evidence of this the Prosecution put forward:

(a) The speeches by Streicher before and after the seizure of power, particularly one speech in April 1925, in which, he spoke about the extermination of the Jews. Herein, in the prosecutor's opinion, is the first evidence to be seen regarding the final solution of the Jewish question planned by the Party, namely, the extermination of all Jews.

(b) Active assertion of the person and authority of the defendant, especially on "Boycott Day," 1 April 1933.

(c) Numerous articles published in the weekly paper, *Der Stürmer*, among them especially those dealing with ritual murder and with quotations from the Talmud. He is said to have knowingly and intentionally described therein the Jews as a criminal and inferior race and created and wished to create hatred of these people and the wish to exterminate them. The defendant's reply to these points is as follows:

He states that he worked merely as a private writer. His aim was to enlighten the German people on the Jewish question as he saw it. His description of the Jews was merely intended to show them as a different and a foreign race and to make it clear that they live according to laws which are alien to the German conception. It was far from his intention to incite or inflame his circle of listeners and readers. Moreover, he always only propagated the idea that the Jews, because of their alien character, should be removed from German national and economic life and withdrawn from the close association with the body of the German people.

Further, he always had in mind an international solution of the Jewish question; he did not favor a German or even European partial solution and rejected it. That was why he suggested, in an editorial in *Der Stürmer* in the year 1941, that the French island of Madagascar should be considered as a place of settlement for the Jews. Consequently, he did not see the final solution of the Jewish question in the physical extermination of the Jews but in their resettlement.

It cannot be the aim of the Defense to go into further details of the defendant's actions as a writer and speaker, particularly with regard to *Der Stürmer* and his reply to the accusations raised against him. His ideology and convictions shall not be explained, excused, or defended, nor his manner of writing and speaking either. Examination and judgment in this respect rest

with the Tribunal alone. This much only shall be said, that between the defendant's actions and the expressions frequently employed by him there is an antithesis which cannot be bridged. It may be stated that the defendant never, when in charge of an anti-Jewish undertaking, had coercive measures used against the Jewish population, as might necessarily be expected of him if the accusations made by the Prosecution were true.

I consider it my duty as defense counsel to broach and examine the question as to whether the Defendant Streicher with his speeches, his actions and his publications, not only strove towards the result alleged by the Prosecution but actually attained it. The question therefore should be examined as to whether Streicher actually educated the German people to a degree of anti-Semitism which made it possible for the leadership of the German nation to commit such criminal acts as actually occurred. Furthermore, it must be examined whether the defendant filled German youth with hatred against the Jews to the extent that is charged by the Prosecution. Finally, the question must be examined whether Streicher actually was the man who spiritually and morally prepared the executive organs for their active persecution of the Jews.

At the beginning of this exposition it appears important to point out that a great many of *Der Stürmer* articles, from which the Prosecution endeavors to deduce an incitement to stamp out and annihilate the Jews, were not written by Streicher himself, but by his collaborators, especially by the Deputy Gauleiter, Karl Holz, who was well known for extremely radical tendencies. Even though the Defendant Streicher bears formal responsibility for these articles, which responsibility he expressly assumed before the Tribunal, this aspect nevertheless appears very important for the extent of his criminal responsibility.

Further it may be said in this connection that, according to the unrefuted statement of the defendant, the most caustic articles were written in reply to articles and writings in the foreign press, which contained very radical suggestions for the destruction of the German nation—also, no doubt, due to the existing war psychosis.

The Defendant Streicher—and this cannot be denied and shall not be defended—continually wrote articles in *Der Stürmer* and also made speeches in public which were strongly anti-Jewish and at least aimed at the elimination of Jewish influence in Germany. During the first years Streicher found a comparatively favorable soil for his anti-Jewish tendencies. The first World War ended with Germany's defeat, but wide circles did not wish to admit the fact of a military victory of Germany's opponents of that time. They attributed this defeat exclusively to a breakdown of national defense

and resistance from within and depicted Jewry as being the main culprit for this inner undermining. In doing this they intentionally overlooked the mistakes which had been committed by the Government of that time before and during the war with respect to domestic and foreign policy, as well as the errors of strategy. A scapegoat was sought on which to lay the blame for the loss of the war, and it was thought to have been found in the Jews. Jealousy, envy, and also disregard of personal shortcomings accomplished the rest in influencing feelings unfavorably toward the Jewish population. In addition to that came the inflation and in the following years the economic depression with its steadily increasing misery which, as experience shows, makes any nation ripe for any form of radicalism.

On this ground and in this setting *Der Stürmer* developed. For these reasons it first met with a certain amount of interest and attracted a considerable number of readers. But even in the last years before the seizure of power it did not have great influence; its distribution hardly went beyond Nuremberg and its close vicinity. By means of attacks on persons known locally in Nuremberg and in other places, it managed to arouse in these localities, from time to time, a certain amount of interest and thereby to extend its circle of readers. Certain parts of the population were interested in the propagation of such scandal and for that reason subscribed to *Der Stürmer*.

But criminal action can only be seen here—and this is presumably the opinion of the Prosecution also—if this type of literary and oral activity led to criminal results. Now, was the German nation really filled with hatred for the Jews by *Der Stürmer* and by Streicher's speeches in the sense and to the extent asserted by the Prosecution?

The Prosecution submitted the evidence on this point in a very brief manner. It draws conclusions, but it has not produced actual proof. It alleges the existence of results, but cannot produce evidence for that assumption. The prosecutor has maintained that without Streicher's incitements over a number of years the German people would not have sanctioned the persecution of the Jews and that Himmler would not have found among the German people anyone to carry out the measures for the extermination of the Jews. If, however, the Defendant Streicher is to be made legally responsible for this, then not only must it be proved that the incitement as such was actually carried through and results achieved in this direction; but—and this is the decisive point—conclusive proof must be produced that the deeds which were done can be traced back to that incitement. It is not the question of the result obtained which must primarily and irrefutably be proved but the causative connection between incitement and result. Now,

how is the influence of *Der Stürmer* upon the German people to be estimated, and what picture unfolds in the handling of the Jewish problem during the years between 1920 and 1944?

It is easy to recognize here three stages of development. The first period comprises the time of the defendant's activity between 1922 and 1933; the second that between 1933 and 1 September 1939, or February 1940; the third, the time from 1940 to the collapse.

With regard to the first period, it would show a considerable lack of appreciation of the tendencies which had already existed in Germany for a long time and thereby a completely groundless exaggeration of Streicher's influence, if no mention were made of the fact that long before Streicher there was already a certain amount of anti-Semitism in Germany. For instance a certain Theodor Fritsch had touched on the Jewish question in his journal *Der Hammer* long before Streicher's time, referring especially to the alleged menace offered by the immigration of Jewish elements from the East, which might overflow the country and acquire too much control in it.

Immediately after the end of the first World War the so-called "German National Protective and Defensive League" (Deutsch-Völkischer Schutz- und Trutzbund) appeared on the scene, which in contrast to *Der Stürmer* and the Movement brought into being by Streicher, extended over the whole of Germany, setting as its aim the repression of Jewish influence. Anti-Semitic groups existed in the South as well as in the North long before Streicher. In comparison with these large-scale efforts, *Der Stürmer* could only have a regional importance. This alone explains why its influence was never at any time or in any place of great importance.

It is a decisive fact, however, that the German nation in its totality did not let itself be influenced by all these groups either in its business relations or in its attitude towards Jewry and that even during the last years before the NSDAP came to power no violent actions against the Jews were committed anywhere by the people. However, when towards the end of the second decade after the first World War a considerable increase of the NSDAP became noticeable, this was not due to anti-Semitic reasons but to the fact that the prevailing confusion in the various parties had been unable to point to a way out of the ever-increasing economic misery. The call for a strong man became ever more urgent. The conviction became more and more firmly rooted among the broad masses that only a personality who was not dependent on the change of majorities would be able to master the situation.

The NSDAP knew how to exploit this general trend for its own ends and to win over the nation, sunk in despair, by making promises in all

directions. But never did the masses think, when electing the NSDAP at that time, that its program would produce developments as we have witnessed.

With the seizure of power by the NSDAP in 1933, the second epoch was introduced. The power of the State was exclusively in the hands of the Party and nobody could have prevented the use of violence against the Jewish population. Now would have been just the right moment for the Defendant Streicher to put into effect the baiting the Prosecution has alleged. If by that time wide circles of the population, or at least the veteran members of the NSDAP, had been trained to be radical Jew haters, as stated by the Prosecution, acts of violence against the Jewish population would necessarily have taken place on a greater scale due to that feeling of hatred. Pogroms on the largest scale would have been the natural result of a truly anti-Semitic attitude of the people. But nothing like that happened. Apart from some minor incidents, evidently caused by local or personal conditions, no attacks on Jews or their property took place anywhere. It is quite clear that a feeling of hatred for the Jewish people did not prevail anywhere at least up to 1933, and the charge brought by the Prosecution against the defendant that ever since the very outset of his fight he successfully educated the German people to hate the Jews can thus be dropped.

The year of the seizure of power by the NSDAP also put *Der Stürmer* to a decisive test. Had *Der Stürmer* been considered by the broad masses of the German people as the authoritative champion against the Jews and therefore indispensable for that fight, an unusually large increase in the circulation would have followed. No such interest was, however, shown. On the contrary, even in Party circles demands were made that *Der Stürmer* should be discontinued entirely; or at least that its illustrations, style, and tone should be altered. It became more and more clear that the already small interest in Streicher's Jewish policy was steadily declining. It must be added that with the seizure of power by the Party the total press apparatus came under the control of the Party, which immediately undertook to co-ordinate the press, that is, to direct it from a central office in the spirit of the National Socialist policy and ideology. This was done through the Minister of Propaganda and the Reich Press Chief via the official "National Socialist Correspondence." Particularly Dr. Goebbels, the Minister of Propaganda, described by various witnesses such as Göring, Schirach, Neurath, and others as the most bitter advocate of the anti-Semitic trend in the Government, is said to have given each week to the entire German press several anti-Jewish leaders, which were printed by more than 3,000 dailies and illustrated papers. If in addition we take into account that Dr. Goebbels

was making broadcasts of an anti-Semitic nature, we need no further explanations for the fact that the interest in a one-sided anti-Semitic journal should diminish and that is what actually happened.

It is particularly significant that at that time it had been repeatedly suggested that *Der Stürmer* should be suppressed altogether. This is brought out clearly in the testimony given by Fritzsche, on 27 June 1946, who stated in addition that neither Streicher nor *Der Stürmer* had any influence in the Ministry of Propaganda and that he was considered so to speak as nonexistent. It may have been for the same reason that *Der Stürmer* was not even declared a press organ of the NSDAP and was not even entitled to show the Party symbol. It was looked upon by the Party and State administration, in contrast to all papers which were considered to be of any importance, as a private paper belonging to a private writer.

The firm which published *Der Stürmer*, and which belonged at that time to a certain Härdel, was not inclined, however, to accept so quietly the dwindling of its circle of readers, for it was now aided by the fact that Streicher had become the highest leader in Franconia; and it knew how to make the most of this circumstance. Already at that time pressure was exerted on many sections of the population to prove their loyal political attitude and trustworthiness by subscribing to *Der Stürmer*. The witness Fritzsche also has alluded to this circumstance, stating that many Germans only decided to subscribe to *Der Stürmer* because they thought it would be a means of paving the way for their intended membership in the Party.

So as not to give a false impression of the circulation figures of *Der Stürmer* during the years between 1923 and 1933, the following analysis will show the different stages of its development.

In the years 1923 to 1933 *Der Stürmer* was able to increase its circulation from some 3,000 to some 10,000 copies, and this in turn went up to some 20,000 shortly before the seizure of power. On the average, however, between 1923 and 1931 the circulation was only some 6,000 copies. Following the seizure of power, by the end of 1934 it had reached an average of some 28,000 copies. It was not until 1935 that *Der Stürmer* became the property of the Defendant Streicher who, according to his statement, bought it from the widow of the previous owner for 40,000 RM—a not very considerable sum. From 1935 on the management of the business was taken over by an expert, who succeeded by clever canvassing in increasing the circulation to well over 200,000 copies; and this figure was later increased still further until it more than doubled. The relatively low circulation figures for *Der Stürmer* up to the beginning of 1935 show that, despite the Party's rise to power, popular interest in *Der Stürmer* existed

only to a small extent. The extraordinary increase in the circulation which began in 1935 is to be traced to the adroit canvassing methods already mentioned which were carried out by the new director Fink. The use of the Labor Front, as explained by the proclamation of Dr. Ley in Number 36 of *Der Stürmer*, 1935—which copy, Mr. President, I have taken the liberty of submitting as an exhibit—and the acquisition thereby of many thousands of forced subscribers must be ascribed to the personal relations of the manager Fink with Dr. Ley.

In that connection I further refer to a quotation from the *Pariser Tageblatt* of 29 March 1935 reproduced in *Der Stürmer* of May 1935. Here, too, it is stated that the increase of *Der Stürmer's* circulation cannot be ascribed to the desire of the German people for such kind of spiritual food. It is neither presumable nor probable in any way that the compulsory subscription to *Der Stürmer*, forced on the members of the Labor Front in such a manner, could have actually turned subscribers into readers of *Der Stürmer* and followers of its line of thought. On the contrary, it is known that bundles of *Der Stürmer* in their original wrappings were stored in cellars and attics and that they were brought to light again only when the paper shortage became more acute.

When, therefore, the Defendant Streicher wrote in his paper in 1935—Document Number GB-169—that the 15 years' work of enlightenment of *Der Stürmer* had already attracted to National Socialism an army of a million of "enlightened" members, he claimed a success for which there was no foundation whatsoever. The men and women who joined the Party after 1933 did not apply for membership as a result of the so-called enlightenment work of *Der Stürmer* but either because they believed the Party's promises and hoped to derive advantages from it or because by belonging to the Party they wanted, as the witness Severing expressed it, to insure for themselves immunity from political persecution. The sympathy for the Party and its leadership very soon decreased in the most marked manner. Thus the Defendant Streicher, too, lost authority and influence to an ever-increasing extent even in his own district of Franconia, at least from 1937 on. The reasons for this are sufficiently known.

Toward the end of 1938 he saw himself deprived of practically all political influence, even in his own district. The controversy between him and Göring ended with the victory of the latter. Hitler, when pressed to do so by the Defendant Göring, had dropped Streicher completely, as the Commander-in-Chief of the Luftwaffe at that time was naturally more important and far more influential than the Gauleiter, Streicher. The defendant even had to submit to Aryanization as carried out in the district of

Franconia with its correctness being checked by a special commission sent by Göring. In the course of the year 1939 Streicher was completely pushed aside and was even forbidden to speak in public. At the outbreak of the war, in contrast to all other Gauleiter, he was not even appointed to the position of Wehrkreiskommissar of his own district.

During the last phase, in the war years, the Defendant Streicher had no political influence whatsoever. As from February 1940 he was relieved of his position as a Gauleiter and lived on his estate in Pleikershof, cut off from all connections. Even Party members were forbidden to visit him. Since the end of 1938 he had no connections whatsoever with Hitler, by whom he had been completely cast off from that time on.

In what way now did *Der Stürmer* exert any influence during the war period? It can be said that during the war *Der Stürmer* no longer attracted any attention worth mentioning. The gravity of the times, the anxiety for relatives on the battlefield, the battles at the front, and finally the heavy air attacks completely diverted the German people's interest from questions dealt with in *Der Stürmer*. The people were weary of the continuous repetition of the same assertions. The best proof of how little *Der Stürmer* was desired as reading matter can be seen in the fact that in restaurants and cafés *Der Stürmer* was always available for perusal, whereas other papers and magazines were permanently being read. The circulation figures decreased steadily and unceasingly in those years. Certainly the influence of *Der Stürmer* in the political sphere no longer amounted to anything.

During the periods mentioned *Der Stürmer* was rejected by large circles of the population from the very outset. Its crude style, its often objectionable illustrations, and its one-sidedness aroused widespread displeasure. There can be no question of any influence being exercised by *Der Stürmer* upon the German people or even the Party. Although the German people for years had been deluged with Nazi propaganda, or rather because of that very fact, a journal such as *Der Stürmer* could exert no influence upon its inner attitude. Had the German people—as maintained by the Prosecution—actually been saturated with the spirit of fanatical racial hatred, other factors certainly would have been far more responsible for it than *Der Stürmer* and would have contributed far more essentially to a hostile attitude towards the Jews.

But nothing of such nature can be established. The general attitude of the German people was not anti-Semitic, at any rate, not in such a way or to such a degree that they would have desired, or approved of, the physical extermination of the Jews. Even official Party propaganda with regard to the Jewish problem had exerted no influence upon the broad masses of the

German people, neither had it educated them in the direction desired by the State leadership.

This is shown by the fact that it was necessary to issue a number of legal decrees in order to segregate the German population from the Jewish. The first example of this is the so-called Law for the Protection of German Blood and German Honor of September 1935, by the provisions of which any racial intermingling of German people with the Jewish population was subject to the death penalty. The passing of such laws would not have been necessary if the German people had been predisposed to an anti-Semitic attitude, for they would then of their own accord have segregated themselves from the Jews.

The law for the elimination of the Jews from German economic life, promulgated in November 1938, was along the same lines. In a people hostile towards the Jews, any trade with Jewish circles would have necessarily ceased and their business would have automatically come to a standstill. Yet in fact the intervention of the State was needed to eliminate Jewry from economic life.

The same conclusion can be drawn from the reaction of the greater part of the German populace to the demonstrations carried out against the Jews during the night of 9-10 November 1938. It is proved that these acts of violence were not committed spontaneously by the German people but that they were organized and executed with the aid of the State and Party apparatus upon instructions of Dr. Goebbels in Berlin. The result and the effect of these State-directed demonstrations—which in a cynical way were depicted for their effect abroad as an expression of the indignation of the German people at the assassination of the Secretary of the Embassy in Paris, Vom Rath—were different from that visualized by the instigators of this demonstration.

These acts of violence and excesses based upon the lowest instincts found unanimous condemnation, even in the circles of the Party and its leadership. Instead of creating hostility towards the Jewish population they roused pity and compassion for their fate. Hardly any other measure taken by the NSDAP was ever rejected so generally. The effect upon the public was so marked that the Defendant Streicher in his capacity as Gauleiter found it necessary in an address in Nuremberg to give a warning against exaggerated sympathy for the Jews. According to his statement he did not do this because he approved of these measures but only in order to strengthen by his influence the impaired prestige of the Party.

Previously, as appears from the testimony of the witness Fritz Herrwerth examined here, he refused SA Obergruppenführer Von Obernitz's

request to take part personally in the demonstration planned and called it useless and prejudicial. He publicly expressed this point of view later also, during a meeting of the League of Jurists at Nuremberg. In doing so he risked placing himself in open opposition to the official policy of the State.

All these facts show that despite the anti-Jewish propaganda carried on by the Government, actual hostility against the Jewish population did not exist among the people themselves. Thus it is as good as proved that neither Streicher's publications in *Der Stürmer* nor his speeches incited the German people in the sense maintained by the Prosecution. Therefore the general attitude of the German nation provides no proof of incitement to hatred of the Jews having been successfully carried out by the Defendant Streicher and leading to criminal results. The Prosecution, however, has further supported its accusation by the specific assertion that only a nation educated to absolute hatred of Jews by men like the defendant could approve of such measures as the mass extermination of Jews. Thereby the charge is made against the whole of the German people that they knew about the extermination of the Jews and approved of it; the severity and consequences of such a charge on the whole future of the German nation is impossible to estimate.

But did the German nation really approve of these measures? A fact can only be approved of if it is known. Therefore should this assertion of the Prosecution be considered as proved, then logically it must also be considered as proved that the German nation actually had knowledge of these occurrences. However, evidence in this respect has shown that Reichsführer SS Himmler, who was entrusted by Hitler with the mass assassinations, and his close collaborators shrouded all these events in a veil of deepest secrecy. By threatening with the most severe punishments any violations of the rule of absolute silence which was imposed, they managed to lower before the events in the East and in the extermination camps an iron curtain which hermetically sealed off those facts from the public.

Hitler and Himmler prevented even the corps of the highest leaders of the Party and State from gaining any insight and information. Hitler did not hesitate to give false information to even his closest collaborators, like Reich Minister Dr. Lammers, who was heard here as a witness, and to make him believe that the removal of the European Jews to the East meant their settlement in the Eastern Territories but by no means their extermination. However much the statements of the defendants may diverge on many points, in this connection they all agree so completely with one another and with the statements of other witnesses that the veracity of their testimonies simply cannot be questioned. If it was not possible for even the Defendant

Frank in his capacity as Governor General of Poland to get through to Auschwitz, because without Hitler's special consent even he was denied entrance, then this fact speaks for itself.

If even the leading personalities of the Third Reich, with the exception of a very small circle, were not informed and if even they had at best very vague information, then how could the general public have known about it? Under these circumstances the possibilities for finding out what was going on in the camps were extremely slight.

For the majority of the people, foreign news did not exist as a source of information. Listening to foreign radio stations was punishable with the heaviest penalties and therefore did not take place. And if it did, the news broadcast by foreign radio stations concerning events in the East, although, or rather because, it corresponded to facts, was so crass, so horrible beyond any human understanding, that it was bound to appear to any normal individual, as in fact it did, as intentional propaganda. Germany could only gain factual knowledge of the extermination measures against the Jews from people who either were working in the camps themselves or came in contact with the camps or their inmates or from former concentration camp inmates.

There is no need to explain that members of the camp personnel who were concerned with these happenings kept silent, not only because they were under stringent orders to do so, but also in their own interest. Furthermore, it is known that Himmler had threatened the death penalty for information from the camps and for spreading news about the camps and that not only the actual culprit but also his relatives were threatened with this punishment. Finally, it is known that the extermination camps themselves were so hermetically sealed off from any contact with the world that nothing concerning the events which took place in them could penetrate to the public.

The prisoners in the camps who came into contact with fellow-workers in their work kept silent because they had to. People who came to the camps were also under the threat of this punishment insofar as they could obtain any insight into things at all, which was all but impossible in the extermination camps. From these sources, therefore, no knowledge could come for the German people.

But the order for absolute silence was compulsory to a still greater measure for every concentration camp inmate who had been released. Hardly anybody ever came back to life from the actual murder camps; but if, once in a while, a man or woman was released, in addition to the other threatened punishments the threat of being sent back to the camp hung over

them if they violated the order for silence. And this renewed detention would have meant gruesome death.

It was therefore nearly impossible to learn from released concentration camp prisoners positive facts concerning the occurrences in the camps. If this was the case with regard to normal concentration camps in Germany, it applied in a still greater measure to the extermination camps. Every lawyer who, as I did, defended people before detention in a concentration camp and who was visited by them again after their release, will be able to confirm that it was not possible, even in such a position of trust and under the protection of professional legal secrecy, to get former concentration camp inmates to talk.

If men such as Severing, who testified here—a Social Democrat of long standing, who was highly trusted by his party comrades and who was, because of this, in touch with many former concentration camp inmates—came to know of the real facts connected with the extermination of the Jews only very late and even then to a very restricted extent, then such considerations must apply even more to any normal German.

It can be derived with absolute certainty from these facts that the leaders of the State, that Hitler and Himmler, wanted under all circumstances to keep secret the extermination of the Jews; and this forms the base for another argument—in my opinion, a cogent one—against the anti-Semitism of the German people asserted by the Prosecution. If the German people had indeed been filled with such hatred of Jewry as the Prosecution affirms, then such rigorous methods for secrecy would have been superfluous.

If Hitler had been convinced that the German nation saw in the Jews its principal enemy, that it approved of and desired the extermination of Jewry, then he would obviously have published the planned and also the effected extermination of this very enemy. As a sign of the "total war" constantly propagandized by Hitler and Goebbels, there would indeed have been no better means to strengthen the faith in victory and the will of the people to fight than the information that Germany's principal enemy, these very Jews, had already been annihilated.

So unscrupulous a propagandist as Goebbels certainly would not have failed to use such a striking argument if he could have based it on the necessary presupposition, that is, the German people's absolute determination to exterminate the Jews. However, the "final solution" of the Jewish question had by all possible means to be kept secret even from the German people who had for years been subjected to the heaviest pressure by

the Gestapo. Even leading men in the State and the Party were not allowed to be told of it.

Hitler and Himmler were evidently themselves convinced that even in the midst of a total war, and after decades of education and gagging by National Socialism, the German nation—and above all its Armed Forces—would have reacted most violently on the publication of such a policy against the Jews. The policy of secrecy followed here cannot be explained by any considerations of the enemy nations. In the years 1942 and 1943 the whole world was already engaged in a bitter war against National Socialist Germany.

An intensification of this struggle seemed hardly possible, at any rate not by the mere publishing of facts which had long since become known abroad. Apart from this, considerations of making a still worse impression on the enemy countries could hardly influence men such as Hitler, Goebbels, and Himmler.

If they had expected to achieve even the slightest tangible results by proclaiming to the German people the extermination of the Jews, they would certainly not have omitted to proclaim it. On the contrary, they would have tried in every way to strengthen by this means the German people's faith in victory. The fact that they did not do this is the best proof that even they did not consider the German people radically anti-Semitic, and it is also the best proof that there can be no question of such anti-Semitism on the part of the German people.

I may therefore sum up by saying that all this stands in contradiction to the Prosecution's assertion that the Defendant Streicher brought up the German people to hate the Jews to an extent which made them approve of the extermination of Jewry. Therefore, even if the defendant by means of his proclamations had aimed at achieving such an end he was not successful.

In this connection, light must also be thrown upon the part attributed by the Prosecution to the Defendant Streicher, namely that he had educated German youth in the spirit of anti-Semitism and had inculcated the poison of anti-Semitism so deeply into their hearts that these pernicious effects would be felt long after his death.

The main reproach made against the defendant in this connection is based on the fact that young people, as a result of Streicher's education in hatred toward the Jews, are supposed to have been ready to commit crimes against Jews which otherwise they would not have committed, and that youth thus educated might be expected to perpetrate such crimes in the future too. Here the Prosecution relies mainly on the juvenile literature

published by Der Stürmer and some announcements addressed to youth which appeared in this paper.

Far be it from me to gloss over these products or to defend them. Evaluation of them can and must be left to the Tribunal. In accordance with the basic principle of the Defense, the only question to be taken up here will be whether or not the defendant in any way influenced the education of youth in a manner to promote criminal hatred of Jews.

As for the books which have been mentioned here, it must be said that German youth scarcely knew of their existence—much less did they read them. No evidence has been produced in support of the Prosecution's assumption to the contrary. The healthy common sense of German youth refused such stuff. German boys and girls preferred other reading material. It may be emphasized in this connection that neither the text nor the illustrations in these books could attract youth in any way. They were, on the contrary, bound to be shunned.

Of special importance in regard to this point is the fact that, Defendant Baldur von Schirach, the man responsible for educating the whole body of German youth, testified under oath that the afore-mentioned juvenile books published by this company were not circulated by the Hitler Youth Leadership and did not find a circle of readers among the Hitler Youth. The witness made the same assertions in regard to *Der Stürmer*. One of his closest co-workers, the witness Lauterbacher, stated in this connection that *Der Stürmer* was actually banned for the Hitler Youth by the Defendant Von Schirach. It is clear that the very style and illustrations of *Der Stürmer* were ill-adapted to attract the interest of young persons or to offer them ethical support. The step taken by the Reich Youth Leadership is therefore quite understandable.

Although some of *Der Stürmer* articles submitted by the Prosecution seem to indicate that *Der Stürmer* was read in youth circles and produced a certain effect there, it must be borne in mind that these were typical commissioned articles, that is, commissioned for propaganda purposes. There is no evidence whatsoever to support the Prosecution's assertion that German youth harbored criminal hate toward Jews. Therefore, neither the German people nor its youth ...

THE PRESIDENT: Dr. Marx, perhaps this would be a convenient time to break off.

[*A recess was taken.*]

DR. MARX: One might now be tempted to assume that *Der Stürmer* exercised a particularly strong influence upon the Party organizations, the SA and SS; but this was not the case either. The SA, the largest mass organization of the Party, rejected *Der Stürmer* just as did the mass of the people. Its publications were *Der SA-Führer* and *Die SA*. The mass of the SA took these as the foundation of their ideology. These publications do not contain even one article from the pen of the Defendant Streicher. If the latter had really been the man the Prosecution believes him to be, the most authoritative and influential propagandist of anti-Semitism, he would of necessity have been called upon to collaborate in these publications, which were issued to instruct the SA on the Jewish question. A publication intended to provide ideological instruction could never have dispensed with the collaboration of such a man.

The fact that not one word by Julius Streicher himself ever appeared in these papers demonstrates afresh that the picture drawn of him by the Prosecution does not correspond in any way with the actual facts. The Defendant Streicher could gain no influence over the SA through his paper and the columns of *Der SA-Führer* and *Die SA* were closed to him. Even the highest SA leaders refused to advocate his ideas. The SA Deputy Chief of Staff, SA Obergruppenführer Jüttner, testifying before the commission on 21 May 1946, made the following statement in this connection:

> "At a leader conference, the former SA Chief of Staff, Lutze, stated that he did not want propaganda for *Der Stürmer* in the SA. In certain groups *Der Stürmer* was even prohibited. The contents of *Der Stürmer* disgusted and repelled most of the SA men. The policy of the SA with regard to the Jewish question was in no way directed at the extermination of the Jews; it aimed only at preventing a large-scale immigration of Jews from the East."

The ideology of *Der Stürmer* was thus rejected on principle by the individual SA man as well as by the SA leaders, and there is therefore no question of Streicher's having influenced the SA.

Not only was the Defendant Streicher not asked to collaborate in SA publications, but his articles did not appear in any other newspapers and publications. He was given no chance of contributing either to the *Völkischer Beobachter* or to other leading organs of the German press, although the Propaganda Ministry intended enlightenment on the Jewish question to form one of the noblest tasks of the German press.

The Defendant Streicher was given no opportunity, either by the State leadership or by the Propaganda Ministry, of impressing his ideas upon a wider circle. The Defendant Fritzsche, the man who shared the decisive authority in the Propaganda Ministry, testified that Streicher never exerted any influence upon propaganda and that he was completely disregarded. In particular, he was not entrusted with radio talks, although talks given over the radio would have had much greater effect on the masses than an article in *Der Stürmer*, which necessarily reached only a limited circle. The fact that even the official propaganda of the Third Reich made no use of the Defendant Streicher makes it clear that no results could be expected from his activities, and that, in fact, he had no influence at all. The official leaders of the German State recognized Streicher for what he actually was, the insignificant publisher of an entirely insignificant weekly. It must be stressed once more as clearly as possible that the fundamental attitude of the German people was no more radically anti-Semitic than that of German youth or the Party organizations. Success in instigating and inciting to criminal anti-Semitism is, therefore, not proven.

I now come to the last and decisive part of the accusation, that is, to the examination of the question: Who were the chief persons responsible for the orders given for the mass-extermination of Jewry; how was it possible that men could be found who were ready to execute these orders; and whether without the influence of the Defendant Streicher, such orders would not have been given or executed.

The main person responsible for the final solution of the Jewish question—the extermination of Jewry in Europe—is without doubt Hitler himself. Though this greatest of all trials in world history suffers from the fact that the chief offenders are not sitting in the dock, because they are either dead or not to be found, the facts ascertained have nevertheless resulted in cogent conclusions concerning the actual responsibility.

It can be considered as proved beyond any doubt that Hitler was a man of unique and even demoniacal brutality and ruthlessness who, in addition, later lost all sense of proportion and all self-control. The fact that his chief characteristic was ruthless brutality became apparent for the first time in its force when the so-called Röhm Putsch was suppressed in June 1934. On this occasion Hitler did not hesitate to have his oldest fellow combatants shot without any kind of trial. His unrestrained radicalism was further revealed in the way in which the war with Poland was conducted. He ordered the ruthless extermination of leading Polish circles merely because he feared an antagonistic attitude toward Germany on their part. The orders which he gave at the beginning of the Russian campaign were still more drastic. At

that time he already ordered partial operations for the extermination of Jewry:

These examples show beyond doubt that respect for any principle of humanity was alien to this man. Furthermore the proceedings, by the depositions of all the defendants, have clearly established the fact that in basic decisions Hitler was not open to any outside influence.

Hitler's basic attitude toward the Jewish question is well known. He had already become an anti-Semite during the time he spent in Vienna in the years before the first World War. There is, however, no actual proof that Hitler from the very beginning had in mind such a radical solution of the Jewish question as was finally effected in the annihilation of European Jewry. When the Prosecution declares that from the book *Mein Kampf* a direct road leads to the crematories of Mauthausen and Auschwitz, this is only an assumption; and no evidence for it has been given. The evidence rather suggests the fact that Hitler also wanted to see the Jewish problem in Germany solved by way of emigration. This thought, as well as the position of the Jewish part of the population under the laws governing aliens, formed the official State policy of the Third Reich. Many of the leading anti-Semites considered the Jewish question as settled after the laws of 1935 had been promulgated. The Defendant Streicher shared this opinion. The stiffening of Hitler's attitude to the Jewish question cannot be traced back beyond the end of 1938 or the beginning of 1939. Only then did it become apparent that in case of war—which he believed was propagated by the Jews—he was planning a different solution. In his Reichstag speech on 30 January 1939 he predicted the extermination of Jewry should a second World War be let loose against Germany. He expressed the same ideas in a speech made in February 1942, on the occasion of the 20th anniversary of the day on which the Party was founded. And, finally, his testament, too, confirms his exclusive responsibility for the murdering of European Jewry as a whole.

Though Hitler had adopted an increasingly implacable attitude on the Jewish question ever since the beginning of the war, there is nothing to show that he visualized the extermination of the Jews in the early stages of the war. His final resolution to this effect was undoubtedly formed when Hitler, probably as early as 1942, saw that it was impossible to secure a victory for Germany.

It can be assumed almost with certainty that the decision to exterminate the Jews originated—as did almost all of Hitler's plans—exclusively with himself. It cannot be ascertained with certainty how far others who were closely attached to Hitler brought their influence to bear on him. If such influence did exist, it can only have come from Himmler, Bormann, and

Goebbels. It can at least be stated beyond any doubt that during the decisive period from September 1939 to October 1942 Streicher did not influence him, nor, under the circumstances, could he have done so. At that time Streicher was living—deprived of all his offices and completely left in the cold—at his farm at Pleikershof. He had no connection with Hitler either personally or by correspondence. This has been proved beyond all doubt by the statements made by the witnesses Fritz Herrwerth and Adele Streicher, and by the statement under oath of the defendant himself. It cannot, however, be maintained in earnest that his reading of *Der Stürmer* moved Hitler to give orders for wholesale murder. This should make it clear that the Defendant Streicher had no influence whatever on either the man who made the decision to exterminate Jewry, or on the orders issued by him.

In October 1942 Bormann's decree ordering the extermination of Jewry was issued (Document 3244-PS). It has been established beyond all question that this order came from Hitler and went to Reichsführer SS Heinrich Himmler, who was charged with the actual extermination of the Jews. He for his part charged the Chief of the Gestapo, Müller, and his commissioner for Jewish affairs, Eichmann, with the final execution of the order. These three men are the three who are chiefly responsible, next to Hitler. It has not been proved that Streicher had any possibility of influencing them, or that he did actually influence them. He states—and there is no proof to the contrary—that he never knew either Eichmann or Müller, and that his relations with Himmler were slight and far from friendly.

Casually it might be mentioned that Himmler was one of the most radical anti-Semites of the Party. From the beginning he had advocated a merciless fight against the Jews; and in any case, judging by what we know of him, he was not the man to allow himself to be influenced by others in matters of principle. Apart from that, however, a comparison of the two personalities shows that Himmler was in every way the stronger and superior man of the two, so that for this reason alone the exertion of any influence by the Defendant Streicher on Himmler may be ruled out. I believe I may refrain from further illustration of this point.

I now come to the question of whether the activity of the Defendant Streicher had a decisive influence on the men who actually carried out the orders; that is, on members of the Einsatzgruppen on the one hand, and on the execution Kommandos in the concentration camps on the other; and whether any spiritual and intellectual preparation was necessary to make these men willing to execute such measures.

In his speeches in Nikolaev, Posen, and Kharkov—which have often been mentioned here—the Reichsführer SS stated unequivocally not only

that he besides Hitler was responsible for the final solution of the Jewish question, but also that the execution of the orders was only made possible by the employment of forces which he himself had selected from among the SS. We know from Ohlendorf's testimony that the so-called Einsatzgruppen consisted of members of the Gestapo and the SD, companies of the Waffen-SS, members of the police force with long service records, and indigenous units.

It must be stated as a matter of principle that the Defendant Streicher never had the slightest influence on the ideological attitude of the SS. The extensive evidence material of this Trial contains no shadow of proof that Streicher had any connections with the SS. The alleged Enemy Number One of the Jews, the great propagandist of the persecution of the Jews—as he has been pictured by the Prosecution—the Defendant Streicher never had the opportunity of writing for the periodical *Das Schwarze Korps* or even for the *SS Leithefte*. These periodicals alone, however, as the official mouthpieces of the Reichsführer SS, determined the ideological attitude of the SS. These SS periodicals also determined their attitude toward the Jewish question. In these circles *Der Stürmer* had just as small a public; it was rejected, just as it was in other circles. Himmler himself rejected Streicher ironically as an ideologist. Therefore the Defendant Streicher could not have had any influence on the ideology of the SS members of the Einsatzgruppen, much less on the old members of the Police, and least of all on the foreign units. Nor could he dictate the ideology of the execution squad's in the concentration camps. Those men originated for the most part from the Death's Head Units, that is the old guard units, of whom the above statement is true to a greater degree. Added to this is the fact that the experienced members of the Police, as well as the SS men with long service records, were trained in absolute obedience to their leaders. Absolute obedience to a Führer command was a matter of course for both.

Even those experienced police force members, however, accustomed as they were to absolute obedience, even the veteran SS men, could not simply be charged by Himmler with carrying out the executions of the Jews. Rather did he have to select men whom he trusted to lead these execution squads and to make them personally responsible for their assignments, pointing out explicitly that he would take all responsibility and that he himself was only passing on a definite order from Hitler.

Even these men, whom the Prosecution alleges to have been the elite of Nazism, were so far from being enemies of the Jews in the meaning of the Indictment, that the entire authority of the head of State and Führer, and of his most brutal henchman, Himmler, was required to force upon the men

responsible for carrying out the execution orders the conviction that their order was based on the will of the authoritarian head of the State; an order which, according to their conviction, had the power of a fundamental State law and therefore was above all criticism.

The men charged to carry out the annihilation, therefore, obeyed their orders not for ideological reasons and not because they were incited to do so by Streicher, as the Prosecution contends, but solely in obedience to an order from Hitler transmitted to them through Himmler, and knowing that disobedience to a Führer order meant death. In this respect, too, therefore, Streicher's influence has not been proved.

The accusations brought against the defendant by the Prosecution are herewith exhausted. But, in order to reach a conclusion and to form a judgment of the defendant which will take the actual findings fully into account, it seems advisable to give once more a short account of his personality and his activities under the Hitler regime.

The Prosecution considers him to be the leading anti-Semite and the leading advocate of a ruthless determination to annihilate Jewry. This conception, however, does justice neither to the part played by the defendant and the influence actually exercised by him, nor to his personality. The manner of the defendant's employment in the Third Reich and the way in which he was called upon to co-operate in the propagation and final solution of the Jewish question shows the Prosecution's conception to be false. The only occasion on which the defendant was called upon to take an active part in the fight against Jewry was in his capacity as chairman of the Action Committee for the Anti-Jewish Boycott Day on 1 April 1933. His attitude on that day is in direct opposition to his violent utterances in *Der Stürmer* and makes it evident that the passages in his paper which have been attacked were pure propaganda. Although on that day he could have drawn upon the whole power of State and Party against Jewry, he was content to order that Jewish places of business be marked as such and put under guard. In addition, he gave explicit instructions that any molestation of the Jews or acts of violence, or any damage to Jewish property, was forbidden and would be punished. In the later stages no further use at all was made of the defendant. He was not even consulted on the ideological basis for the settlement of the Jewish question. He was unable to voice his ideas in the press or over the air. He was not asked to write on the clarification of the Jewish question either in the *Schulungsbriefe* of the Party or the periodicals belonging to the organizations.

Not he but the Defendant Rosenberg was charged by Hitler with the ideological training of the German people. The latter was responsible for the

Institute for Research into the Jewish Question, set up in Frankfurt, and not the Defendant Streicher; in fact, the latter was not even considered as a collaborator in this institute. The Defendant Rosenberg was commissioned with the arrangement of an Anti-Jewish World Congress in 1944. It is true that this assembly did not take place, but it is significant that the plans made for it did not include the participation of the Defendant Streicher.

The whole of the anti-Jewish laws and decrees of the Third Reich were drafted without his participation. He was not even called in to draft the racial laws proclaimed at the Party rally in Nuremberg in 1935. The Defendant Streicher did not take part in a single conference on even moderately important questions in either peace or wartime. His name does not appear on any list of participants or on any minutes. Not even in the course of the discussions themselves is one single reference made to his name.

The fight against Jewry in the Third Reich grew more and more embittered from year to year, especially after the outbreak of war and during its course. In contrast to this, however, the influence of the Defendant Streicher yearly grew weaker. Already by 1939 he was almost entirely pushed aside and had no relations with Hitler or other leading men of State and Party. In 1940 he was relieved of his office as Gauleiter and after that he played no further part in political life.

If the Defendant Streicher had really been the man the Prosecution believes him to be, his influence and his activity would have increased automatically with the intensification of the fight against the Jews. His career would not have ended, as it actually did, in political powerlessness and banishment from the scene of action, but with the commission to carry out the destruction of Jewry.

It cannot be denied that by writing *ad nauseam* on the same subject for years in a clumsy, crude, and violent manner, the Defendant Streicher has brought upon himself the hatred of the world. By so doing, he has created a strong feeling against himself which led to his importance and influence being rated far higher than they actually were, for which he now runs the risk of having the extent of his responsibility similarly misjudged.

The defense counsel, who in this case had a difficult and thankless task, had to limit himself to presenting those aspects and facts which allow the true significance of this man and the role he played in the tragedy of National Socialism to be recognized. But it cannot be the task of the Defense to deny indisputable facts and to defend acts for which absolutely no excuse exists.

The fact remains, therefore, that this defendant took part in the demolition of the main synagogue of Nuremberg, and thus allowed a place

of religious worship to be destroyed. The defendant states as an excuse that his aim in so doing was not the demolition of a building meant for religious worship, but the removal of an edifice which appeared out of place in the Old Town of Nuremberg, and that his opinion had been shared by art experts. The truth of this was proved by the fact that he left the second Jewish house of worship untouched until it finally, and without his connivance, went up in flames during the night of 9 to 10 November. However that may be, the defendant shows the same lack of scruple here as he does in his other actions. He must account here for his actions in this connection alone; the Defense cannot shield him. But here, too, the fact that the population of Nuremberg disapproved of these actions clearly and unmistakably must be stressed. It was clear to any impartial observer that the people viewed such actions with icy detachment and that only brute force could compel them to tolerate such measures and to look on at such senseless proceedings.

It is just as impossible for the Defense to express any opinion on the revival of the ritual murder myth. No interest whatsoever was taken in these articles; but their tendency is obvious. The only point in the defendant's favor, apart from the good faith with which we must credit him, is the fact that the author of these articles was not himself, but Holz; he must, however, put up with the charge that he allowed it to happen.

It must appear incomprehensible that the defendant continued to play a part in the publication of *Der Stürmer* long after he had been politically crippled and vanished from the scene of action. This very fact reveals his one-track mind better than anything else.

When the Prosecution accuses the defendant of having aimed at the physical annihilation of the Jews and prepared the way for this later result by means of his publications, I would like to refer to the statements given by the defendant under oath at his interrogation, to which I am here referring in their entirety.

The defendant claims that in the long series of articles published by *Der Stürmer* since its foundation there were none demanding actual deeds of violence against the Jews. He also claims that among the issues, of which there were over one thousand, only about 15 were found to contain expressions which could form the basis for a charge against him in the meaning of the Indictment.

On the contrary, the defendant argued that his articles and speeches had always shown an unmistakable tendency to achieve a solution of the Jewish problem in its entirety throughout the world, since any kind of partial solution would serve no useful purpose and failed to reach the heart of the

problem. Basing himself on this very point of view he had always expressed himself unequivocally as opposed to any kind of violence, and he would never have approved of an action such as that finally carried out by Hitler in such a gruesome manner.

This must raise serious doubts as to whether the defendant can be proved to have agreed with the mass murders practiced on Jewry, and I leave this decision to the Tribunal. In any case, he himself refers to the fact that he had no reasonably certain knowledge of these wholesale murders until 1944, a fact corroborated by the statements of the witnesses Adele Streicher and Hiemer.

He considered the articles published in the *Israelitisches Wochenblatt* as propaganda and consequently did not believe them. In this connection, the fact that up to the autumn of 1943 he did not in any article express satisfaction concerning the fate of Jewry in the East is in his favor. Although he did write then on the disappearance of the Jewish reservoir in the East, there is nothing to show that he had any reliable source of information at his command. He might, therefore, very well have believed that this process of disappearance was not identical with physical annihilation but might represent the evacuation of the Jewish population assembled there to neutral countries or the territory of the Soviet Union. As no evidence has been presented to show that the defendant had received hints from any quarter in regard to the intended extermination of Jewry, he could not have conceived of such a diabolical occurrence which appears to be utterly inconceivable to the human mind. And it certainly cannot be assumed that the mental capacity of the defendant should have enabled him to foresee a solution of the Jewish question such as could only have originated in the brain of a person who was no longer in his right senses.

The defendant describes himself as a fanatic and seeker of truth. He professes to have written nothing and to have expressed nothing in his speeches which he had not taken from some authentic source and properly confirmed.

There is no doubt that he was a fanatic. The fanatic, however, is a man who is so possessed or convinced of an idea or illusion that he is not open to any other consideration, and is convinced of the correctness of his own idea and no other. A psychiatrist might regard it as a sort of mental cramp. Fanaticism of any kind is not far removed from maniacal obsession. As a rule it goes along with considerable overestimation of oneself and overevaluation of one's own personality and its influence on the world around it.

Not one of the defendants here on trial shows such a wide discrepancy between fact and fancy as does the Defendant Streicher.

The Prosecution showed him as he appeared to the outside world. What he really was—and is—has been shown by the Trial. But only actual facts can form the basis for the judgment. Base your judgment also, Gentlemen, on the fact that the defendant in his position as Gauleiter of Franconia also showed many humane characteristics—that he had a large number of political prisoners released from concentration camps, which even caused criminal proceedings to be started against him. It should also be borne in mind that he treated the prisoners of war and the foreign laborers working on his estate very well in every respect.

Whatever the judgment against the Defendant Streicher may be, it will concern the fate of a single individual. It seems to be established, however, that the German people and this defendant were never in agreement on this essential question. The German people always disapproved of the aims of this defendant as expressed in his publications, and retained its own opinion of and attitude toward the Jews.

The Prosecution's assumption that the tendentious articles in *Der Stürmer* found an echo or a ready acceptance among the German population, or even produced an attitude which would readily accept criminal measures, is herewith fully refuted.

The overwhelming majority of the German nation preserved their sound common sense and showed themselves disinclined toward all acts of violence. The nation may therefore claim to be declared free of all moral complicity in, and co-responsibility for, those crimes before the public tribunal of the world, so as to be able again to take its place in the ranks of the nations.

I leave the decision on the guilt or innocence of this defendant in the hands of the High Tribunal.

THE PRESIDENT: I call on Dr. Sauter for the Defendant Funk.

DR. FRITZ SAUTER (Counsel for Defendant Funk): Gentlemen of the Tribunal, I have the task of examining the case of the Defendant Dr. Walter Funk. That is to say, I am to deal with a topic which unfortunately is especially dry and prosaic. May I first make a short statement.

I shall on principle refrain from making any statements on legal, political, historical, or psychological matters which may be too general, although the temptation to make such general statements, particularly within the framework of these proceedings, may be considerable. General statements of the kind have already been made in abundance by my

colleagues and will probably be still further supplemented. Therefore, I shall limit myself to examining and presenting to you from the point of view of the Defense the picture which the evidence in this Trial shows of the personality of the Defendant Funk, his actions, and their underlying motives.

Gentlemen of the Tribunal, the entire course of this Trial and the particular evidence offered in his own case have shown that the Defendant Funk did not play a decisive part in the National Socialist regime at any time and in any of the cases indicted here.

Funk's authority of decision was always limited by the superior powers of others. The defendant's statement, made during his personal examination, that he was allowed to come up to the door, but was never permitted to enter, has been shown by the evidence to be quite correct.

Funk was entrusted with tasks by the Party—as distinct from the State—only during the last year prior to the seizure of power, that is, in 1932. These, however, were of no practical significance, as they were of very short duration. Funk was never appointed to any Party office after the seizure of power. He was never a member of any Party organization—SS, SA, or Corps of Political Leaders. Funk was a member of the Reichstag for only a little more than 6 months shortly before the seizure of power. Consequently he was not a member of the Reichstag when the fundamental laws for the consolidation of National Socialist power were passed. The Reich Cabinet passed the laws for which Funk is held responsible, in particular the Enabling Act, at a time when Funk had not yet been made a member of the Cabinet. At this, it will be remembered, he did not become a member until the close of 1937 by virtue of his appointment as Minister of Economics, that is, at a time when no further Cabinet sessions were held. As Press Chief of the Reich Cabinet Funk had neither a seat nor a vote in the Cabinet and could exert no influence whatsoever upon the contents of the bills drafted. I refer to Lammers' statement in this connection. The same applies to the racial laws, the so-called Nuremberg Laws.

Funk's relations with the Führer only became closer for a period of 18 months during which he had to give regular press reports to Hitler in his capacity as Press Chief of the Reich Cabinet, that is, from February 1933 to August 1934, up to the death of Reich President Von Hindenburg. Later, Funk reported to Hitler only on very rare occasions. In this connection the witness Dr. Lammers makes the following statement:

> "Later he (Funk) only visited Hitler in his capacity of Reich Minister of Economics on very rare occasions. He was frequently not invited to attend conferences—even those to which he should

have been invited. He complained to me about this frequently. The Führer often raised objections, saying that there were various reasons against Funk and that he himself viewed Funk skeptically and did not want him."

That is the testimony given by Dr. Lammers on 8 April 1946. When asked whether Funk had often complained to him about his unsatisfactory position as Reich Minister for Economics and about the anxiety caused him by conditions generally, Dr. Lammers replied:

"I know that Funk was very much worried and that he wanted an opportunity to discuss his anxieties with the Führer. He was extremely anxious for an opportunity of reporting to the Führer in order to obtain information, at least, about the war situation." (That was in 1943 and 1944). And Lammers continues: "With the best intentions in the world, Funk could not obtain an audience from the Führer, and I was unable to get him to the Führer."

Funk explains the striking fact that he was invited to attend only four or five Führer conferences during the whole of his ministerial activity by saying that Hitler did not need him. Up to 1942 Hitler issued his instructions in economic affairs to Göring, who in his capacity of Delegate for the Four Year Plan was responsible for the entire economy. From the beginning of 1942 Hitler also issued instructions to Speer, who as Armament Minister had special authority to issue directives to all branches of production and from 1943 personally directed the entire production. Funk therefore never played the principal part in the economy of the National Socialist Reich, but always only a subordinate role. This was specifically confirmed by his Codefendant Göring in his statement on 16 March:

"Naturally, in view of the special powers delegated to me (Göring) he had to follow my directives in the field of economy and the Reichsbank. The responsibility for the directives and policy of the Minister for Economics and President of the Reichsbank Funk is entirely mine."

In the session of 20 June the Defendant Speer also testified that in his capacity as Armament Minister he reserved to himself from the very beginning any authority of decision in the most important economic spheres such as coal, iron and steel, metal, aluminum, and the production of machinery. Prior to Speer's commission at the beginning of 1942, electric power and building were entirely under the jurisdiction of Armament Minister Todt.

For the greater part, the evidence submitted by the Prosecution in the case of the Defendant Funk does not relate to acts personally committed by Funk or instructions issued by him, but rather to the various and widely differing positions which he occupied. On Page 29 of the trial brief the Prosecutor himself declares that the argument offered against Funk may be described as inferential. The Prosecution starts from the assumption that judging by the positions which he had held Funk must have had knowledge of the various events which form the subject of the accusation. Generally speaking, the Prosecution refers to instructions and directives issued by Funk personally only in the case of the application instructions which he issued in November 1938 in connection with the Four Year Plan decrees for the elimination of Jews from economic life. I shall deal with this chapter separately at a later stage.

Finally, Funk was not invited to attend political and military conferences. His position was that of a technical minister with very limited power of decision.

As Reich Minister for Economics Funk was subordinated to the Four Year Plan, that is, to Göring. Later on, the Armament Minister became Funk's superior. And finally, as was shown by the testimony of Göring, Lammers, and Hayler, the Ministry of Economics became a regular trade ministry, which dealt mainly with the distribution of consumers' goods and with the technicalities of foreign trade. Similarly in the case of the Reichsbank the Four Year Plan determined the use of gold and foreign currency. The Reichsbank was deprived of its right to decide on the credits to be granted to the Reich for the internal financing of the war when Funk took over office as its President. Funk is thereby exonerated of any responsibility for the financing of the war. The responsible agency so far had always been the Reich Minister of Finance: In other words, not Funk. Finally, as Plenipotentiary for Economics, Funk's sole task in August 1938 was to co-ordinate the civil economic resources for such measures as would guarantee a smooth conversion from peace to wartime economy. These consultations resulted in the proposals presented by Funk to Hitler on 25 August 1939 in the letter which has been several times quoted under Document Number 699-PS. At his examination Funk stated that this letter did not portray matters with complete accuracy, since it was a purely private letter, a letter of thanks for birthday congratulations received from Hitler. This point will have to be taken up again later, as the Prosecution particularly emphasized Funk's position as Plenipotentiary for Economics. The evidence shows that his position as Plenipotentiary General was Funk's most disputed position, but also his weakest.

With regard to the occupied territories Funk had no decisive authority whatsoever. All the witnesses interrogated on the point testified to this. But all witnesses also confirmed that Funk always opposed the spoliation of the occupied territories. He fought against German purchases in the black markets; he opposed the abolition of the foreign exchange relations with Holland, a measure intended to facilitate German purchases in Holland; and, as we have heard from the witness Neubacher, he organized exports to Greece from Germany and the eastern European states, and even sent gold there. He also repeatedly opposed the financial overburdening of the occupied territories especially in 1942 and 1944, and the raising of the occupation costs in France. He defended the currency of the occupied countries against reported attempts at devaluation. In the case of Denmark he even succeeded in raising the value of the currency, in spite of all opposition. Furthermore, Funk fought against the arbitrary stabilization of exchange when currency arrangements were made with occupied countries. Germany's clearing debt was always recognized by Funk as a true commercial debt even with regard to the occupied countries. This is shown especially by his proposal, mentioned here, to commercialize this clearing debt by a loan to be issued by Germany for subscription in all European countries. Funk was also opposed to the overworking and especially to the compulsory employment of foreign labor in Germany.

The Defendant Sauckel has already testified to this at his interrogation here. The witnesses Hayler, Landfried, Puhl, and Neubacher, and the Codefendant Seyss-Inquart, have all confirmed that these measures taken by Funk had favorable results for the occupied countries. According to these statements Funk always strove to keep order in the economic and social life of the occupied territories and to preserve it as far as possible from disintegration. He always disapproved and opposed radical and arbitrary measures and favored agreements and compromises. Even during the war Funk was always thinking of peace. This statement was made by the witnesses Landfried and Hayler, who added that Funk was repeatedly reproached for his attitude by the leading State and Party offices. The Defendant Speer also testified at his interrogation that during the war Funk had employed too many workers in the manufacture of consumers' goods and that it was for this reason that Funk had to hand over the management of the consumers' goods production in 1943.

That Funk revolted against the horrible "scorched earth" policy just as Speer did has been proved to the Court by Speer himself, as well as by the witness Hayler on 7 May 1946. This witness declared that he had seldom seen Funk so much upset as he was when informed of this order for

destruction. Hayler testified that Funk, in his capacity of Reich Minister of Economics and President of the Reichsbank, gave orders that existing stocks should be protected from destruction as decreed, in order to insure a supply of consumers' goods necessary for the population and to safeguard currency transactions in the German territory which had been abandoned.

The aim of Funk's economic policy—one might call it the mainspring of his life work—was the formation of a European economic community based on a just and natural balance of interest of the sovereign states. Even during the war he relentlessly pursued this goal, although the exigencies of war and the restraints imposed on development by the war naturally impeded these efforts at every turn. Funk has given a graphic description of the economic Europe which he envisaged and strove to attain in some major speeches on economic policy. Extracts from some of these speeches, many of which received a hearing even in neutral and enemy countries, are included in the document book.

In judging the acts of the Defendant Funk, his whole personality must naturally be taken into consideration to some extent in investigating the motives from which he acted. Funk was never looked upon by the German people—as far as he was known at all—as a Party man capable of participating in brutal outrages, using methods of violence and terror or amassing fortunes at the expense of others. He inclined rather toward art and literature, which preference he shared with—for instance—his friend Baldur von Schirach. Originally, as you have been told, he wanted to study music, and in later years he preferred to have poets and artists in his house rather than, men of the Party and the State. In professional circles he was known and respected as an economist and a man with a wide theoretical and historical knowledge, who had risen from journalism and had been a brilliant stylist. His position as chief editor of the distinguished *Berliner Börsenzeitung* was on a sound economic basis; by accepting the office of Press Chief in the Reich Cabinet at the beginning of 1933, after Hitler's assumption of power, he even incurred a financial loss. Therefore, he was not one of those desperados who were glad to get into a well-paid position through Hitler. On the contrary, he made a financial sacrifice when he took over the State office offered him, and it therefore seems perfectly credible that he did this out of patriotism, out of a sense of duty toward his people, and in order to put himself at the service of his country during the hard times of distress.

In judging the personality and character of the Defendant Funk, it is also significant that he never held or tried to obtain any rank in the Party. Other people who took over high State offices in the Third Reich were given

the title of an SS Gruppenführer, or were given, for instance, the rank of SA Obergruppenführer. Funk, on the contrary, was only a plain Party member, from 1931 until the end of the Third Reich, who carried out his State functions conscientiously, but made no effort to obtain any honors within the Party.

The only incident with which the Defendant Funk was reproached in this connection was the fact that he accepted an endowment in 1940, on his fiftieth birthday. In itself, of course, that is not a punishable act; but the Tribunal evidently evaluated it as a moral charge against the defendant. Therefore, we shall briefly define our position with regard to this. We remember how this endowment came about: The President and Board of the Reich Chamber of Economics (Reichswirtschaftskammer), as the highest representatives of German economic life, presented him on his fiftieth birthday with a farmhouse in Upper Bavaria and about 110 acres of ground. This farmhouse, of course, existed for the time being only on the paper of the presentation document and had still to be built. This presentation was expressly approved by the head of the State, Adolf Hitler; therefore it was not made secretly to the Reich Minister of Economics, but quite officially, without any suppression or secrecy in the matter.

The gift subsequently turned out to be an unfortunate one for Funk, as the building proved much more expensive than had been expected and Funk was required to pay a very high donation tax. Funk, who, up to that time, had never incurred debts and whose finances had always been well regulated, now found himself plunged into debt through this "gift" of a farmhouse. Göring heard of it and came to Funk's assistance with a generous sum. When Hitler heard of Funk's financial difficulties through Minister Lammers, he had the cash necessary to settle Funk's financial troubles transferred to him in the form of a gift. With this Funk was able to pay his taxes and his debts. He used the remainder to create two public endowments, one for dependents of officials of the Reichsbank killed in action, the other to the same end for the staff of the Ministry of Economics. The farm was also to become an endowment at some later date. Funk's treatment of the matter shows his delicacy in this respect too. Even though such an endowment could not be legally disputed, he felt that it was better to avoid such endowments and to make them over to the public, since he could not refuse to accept a gift from the head of the State.

Mr. President, I now turn to a new subject. I would propose to have a recess now.

THE PRESIDENT: The Court will adjourn now.

[*A recess was taken until 1400 hours*.]

Afternoon Session

THE PRESIDENT: The Tribunal proposes to go until 4 o'clock without a break, if that is convenient.

DR. SAUTER: Gentlemen of the Tribunal, I have so far defined the position of the Defendant Funk in general statements; I am now going to deal with the criminal responsibility of the Defendant Funk on the separate charges made against him.

The first point of the Indictment deals with the support of the seizure of power by the Party, that is, the Defendant Funk's Party activities from 1931 up to the end of 1932. The Defendant Funk is alleged to have helped the conspirators to seize power. This charge deals with the activities of the Defendant Funk from the date of his joining the Party in June 1931 up to the seizure of power on 30 January 1933. The Prosecution maintains that Funk's activities on behalf of the Party during that period furthered the seizure of power by the National Socialists. That is correct. The Defendant Funk himself, when interrogated on 4 May, gave a detailed explanation of his reasons for considering the National Socialist seizure of power the only possible way of delivering the German people from the grave intellectual, economic, and social distress of that time. The economic program of the Party was, in his opinion, vague and mainly intended for propaganda. He himself wanted to gain recognition for his own economic principles in the Party, in order to work through the Party for the benefit of the German people. Funk gave a detailed description of these principles during his examination. They are based on the idea of private property, which is inseparable from the conception of the varying capability of a human being.

Funk demanded the recognition of private initiative and of the independence of the creative businessman, added to free competition and the leveling of social extremes. He aimed at the elimination of Party and class warfare, at a strong Government with full authority and responsibility, and at the creation of a uniform political will among the people. His conversations with Adolf Hitler and other Party leaders convinced him that the Party entirely accepted his principles and ideas. In Funk's opinion he cannot be blamed for his support of the Party in its struggle for power. Funk believes that the discussions in this Trial furnish absolute proof that the Party came to power quite legally. But even the methods used by Funk to assist the Party cannot, in his opinion, be condemned. In any case the role attributed to him by the Prosecution does not fit the facts. The importance of Funk's activities

is at times greatly overestimated by them; in many other instances their judgment of these activities is completely false.

The evidence offered by the Prosecution consists mainly of references and extracts from reference books, and especially from a book by Dr. Oestreich, *Walter Funk—A Life for Economy*, which was submitted to the Tribunal as Document Number 3505-PS, USA-653. The core of this evidence is a "Program for Economic Reconstruction" by the Defendant Funk, which is printed on Page 81 of this book and which the Prosecution calls "the official Party declaration in the economic field" and "the economic bible for the Party organization." This so-called "Program for Economic Reconstruction" forms the basis for the incorrect accusation made by the Prosecution on Page 3 of the trial brief, to the effect that the Defendant Funk assisted "in the formulation of the program which was publicly proclaimed by the Nazi Party and by Hitler."

This "Program for Economic Reconstruction," which was read word for word during the hearing of the Defendant Funk, actually did not contain anything unusual, let alone revolutionary, or anything which was in any way characteristic of the National Socialist ideology. The program indicates the need for providing work, creating productive credits without inflationary consequences, balancing public finances, as well as the need for protective measures for agriculture and urban real estate, and a redirection of economic relations with foreign countries. It is a program which, as Funk said in his testimony, might be advocated by any liberal or democratic party and government. The Defendant Funk only regrets that the Party did not fully subscribe to these principles. Later on his economic viewpoint involved him in constant difficulties and disputes with various Party offices, especially with the German Labor Front and the Party Chancellery, and with Himmler and most of the Gauleiter. This is also confirmed by the witness Landfried, who described these differences between Funk and the Party in detail in his interrogatory. Funk had the reputation in the Party of being mainly a liberal and an outsider. During that time, that is mainly in 1932, he established relations between Hitler and some of the leading personalities of German economic life. He also worked to promote understanding for National Socialist ideas and to gain support for the Party by trade and industry. By virtue of these activities he was frequently described as Hitler's economic adviser. But that was not a Party office or a Party title.

In Document EC-440, USA-874, Funk states that Keppler, who was later appointed State Secretary, was considered the Führer's economic adviser for many years before himself. By this reference Funk intended to

show that the designation "Economic Adviser to the Führer" was given by the public to other persons also.

The period during which Funk was given Party assignments was a very short one. That these activities were never of decisive importance may be deduced from the fact that after the assumption of power Funk's Party activities ceased completely. In other fields, such as food and agriculture, finance, and so forth, the Party incumbents who entered the civil service as ministers or state secretaries, *et cetera*, retained their Party office, which usually acquired greater importance. The elimination of the sole Defendant Funk from every Party office as soon as the assumption of power was complete shows clearly that the Party leaders did not attach much value to Funk's work in the Party.

In cross-examining the Defendant Funk the Soviet Russian Prosecution showed him an article which had appeared on 18 August 1940 in the magazine *Das Reich* on the occasion of his fiftieth birthday (USSR-450). In this article the author, an economist by the name of Dr. Herle, emphasizes that Funk "as intermediary between the Party and economic circles had become a pioneer working toward a new spiritual attitude in German economic life."

In this connection we may say that Funk never denied that he regarded it as his task to construct an economic system with an obligation toward state and community on the one hand, yet based on private ownership and private initiative and responsibility on the other. Funk always acknowledged and adopted the political aims and ideals of National Socialism. The majority of the German people embraced these goals and ideologies, as was proved by several plebiscites. Funk himself did not suspect that all the good intentions and idealistic aims, so often emphasized by Hitler when he came into power, would later crumble in the blood and smoke of war and sink to such an inconceivable inhuman level. Funk testified explicitly that he considered the authoritative form of government—by which he meant the strong state, a responsible cabinet, the social community, and an economic system with social obligations—a prerequisite in order to overcome the grave intellectual and economic crisis through which the German people were then passing. He always expressly acknowledged that politics must have precedence over economics.

On 30 January 1933, as Press Chief of the Reich Government, Funk took up the State office of a Ministerial Director in the Reich Chancellery. Six weeks later, however, the direction of press policy passed into the hands of Dr. Goebbels, when the latter became Reich Minister for Public Enlightenment and Propaganda; and the press department of the Reich

Government, which Funk was to have directed, was merged in the newly established Ministry for Propaganda. For the time being he retained only the right to make his press report personally to Reich President Von Hindenburg and Reich Chancellor Adolf Hitler—until Hindenburg's death. Then this activity also came to a complete standstill, so that the Office of Press Chief of the Reich Government existed only on paper. This was also expressly confirmed by the Defendant Fritzsche during his examination as a witness on 28 June.

The guilt of the defendant is inferred mainly from the fact that he was a State Secretary in the Ministry of Propaganda. The hearing of evidence has shown, however, that as State Secretary, Funk had nothing whatsoever to do with actual propaganda work. He made no radio speeches, nor did he speak at public meetings. Press policy, on the other hand, was dictated by Dr. Goebbels in person even at that time.

Even at that time, however, Funk gave particular attention to the wishes and complaints of the journalists. He protected the press against misuse by official departments and made every effort to safeguard the individuality of the press and to enable it to work in a responsible manner.

All this has been established by a number of witnesses to whom I refer on Pages 17 to 24; in particular by the witnesses Amann, Kallus, Fritzsche, Oeser, and Roesen. The two latter witnesses have indeed confirmed the fact that Funk as State Secretary in the Ministry of Propaganda also worked energetically on behalf of Jews and such persons as were oppressed and hindered in their spiritual and artistic work by the legislation and cultural policy of the National Socialists. Funk did so much on behalf of such people that he jeopardized his own official position to such an extent that the Ministry actually considered him politically unreliable.

As to defendant's activity in the Reich Ministry of Propaganda, the Prosecution charges him as follows:

> "By means of such an activity in the Ministry of Propaganda the Defendant Funk participated in establishing the power of the conspirators over Germany, and is particularly responsible for the persecution of 'political dissenters' and Jews, for the psychological preparation of the people for war, and for the weakening of the strength of and will for resistance of the victims selected by the conspirators."

Also in this point of the accusation, the guilt of the Defendant Funk has been derived almost exclusively from the fact that he occupied the position of a state secretary in the Ministry of Propaganda. The hearing of evidence, however, has shown that Funk had nothing to do with actual propaganda activity in his position as State Secretary. Funk did not deliver any speeches, either through the radio or in public meetings. The press policy was directed by Dr. Goebbels in person ever

since the Ministry had been established. However, Funk took care, to a large extent, of the wishes and complaints of the journalists. He protected the press against trespassing by Government offices and tried to secure for the press an individual look and an activity conscious of its responsibilities. This is expressed by the digest from the book written by Dr. Paul Oestreich: Walter Funk — A Life for Economy, Document 3505-PS, Exhibit USA-653, Document Book Funk Number 4b.

Some of Funk's wordings from that period of his activity in the Ministry of Propaganda, as for example, the sentence "the press is no barrel organ" and the saying "the press should not be the scapegoat of the government" later have become all but household words.

As State Secretary Funk had, on the whole, only organizational and economic tasks, he managed the financial side of the activity of the numerous organizations and institutes which were controlled by the Ministry of Propaganda, such as, particularly, the Reich Broadcasting Company, further the German Trade Publicity Council (Werberat der deutschen Wirtschaft), the State-owned film combines, the State-owned theaters and orchestras and the State-owned press agencies and newspapers. As to art, and according to his artistic tastes, he occupied himself with music and theater. In the direction of the Ministry of Propaganda, a complete separation between political tasks on the one hand and organizational and economic tasks on the other hand took place. This has been stated in unison by all witnesses examined on this point. Minister Dr. Goebbels in person directed the propaganda policy, exercising complete, absolute and exclusive control. His assistants herein were, not his State Secretary Funk, but his old collaborators from the propaganda organization of the Party, who, for the most part, were taken over by him in a personal union into the newly created Ministry of Propaganda. Funk, however, did not belong to the propaganda department of the Party, neither before nor after the Ministry was established. The assertion of Mr. Messersmith in his affidavit, submitted under Document 1760-PS, according to which Goebbels had incorporated Funk into the Party organization, is erroneous, and can obviously be attributed to the fact that Messersmith had, as an outsider, no insight into the division of work within the Ministry of Propaganda, and moreover, apparently identified readily the propaganda activity of the Party with the propaganda of the State Ministry. This has been confirmed by the questionnaire submitted by Messersmith, as asked for by the Defendant Funk, on May 7th, 1946, (Document Book Funk, Supplement Number 5). This questionnaire shows that Messersmith cannot even state whether he had a conversation with the Defendant Funk a few times or only once; furthermore, that he does not remember any more what topic was discussed at that time, nor in what capacity Funk was present at this meeting. With such vague and unreliable statements of a witness nothing, of course, can be proven.

As a proof of the fact that Funk had nothing to do with the actual propaganda activity and—as the Defendant Göring has asserted here as a witness—did not play any important part at all in comparison to Goebbels, I refer to the affidavit of the former Reichsleiter for the press, Max Amann, of April 17th, 1946 (Document Book Funk, Exhibit 14). At first, the Prosecution has submitted an affidavit sworn by this witness, of December 19th, 1945 (Document 3501-PS); the statements contained therein have been, in the new affidavit of April 17th, 1946, supplemented and corrected in essential points. In this new statement, submitted to the Prosecution and to the Defense, the witness Amann gives evidence that also, according to his knowledge, Funk, as State Secretary in the Ministry

of Propaganda, had nothing to do with the actual propaganda activity. For the rest, the witness confirms the statements of the Defendant Funk, namely, that he (Amann) did not know in person the distribution of activities and the interior management of the Ministry, and that his statements are exclusively based op information by other persons. The witness Heinz Kallus, on the other hand, worked for some years as an official of the Ministry of Propaganda. Kallus, too, confirms under oath in the answers, in the questionary addressed to him (Exhibit Number Funk-18), that on the whole Funk was engaged in administration and financial questions, and the same was testified by the Defendant Hans Fritzsche during his examination as a witness before this Tribunal on June 27th and 28th.

In the trial brief of the Defendant Funk, Page 9—Document 3566-PS—the Prosecution submitted the notes of an SS-Scharführer Sigismund as evidence for the importance of the position which Funk is supposed to have held in the Ministry of Propaganda. An official of this Ministry, by the name of Weinbrenner, is supposed to have declared to that SS-Scharführer that it was impossible to know whom Minister Goebbels would entrust with the office of radio superintendent, as Goebbels took most of the important decisions only in agreement with Under Secretary Funk. Now, Dr. Goebbels did not as a matter of course undertake the appointment to the leading post in broadcasting without getting in touch with Funk, the chairman of the administrative board of the Reich Broadcasting Corporation (Reichsrundfunkgesellschaft); this, however, does not prove anything concerning the nature and the significance of the activity of the Defendant Funk nor of the aims he pursued thereby. After all, the Prosecution has been able to submit but one single document bearing the signature of Funk as Under Secretary, namely, the fixing of a date for the coming into force of a decree for the execution of a law concerning the Reichskulturkammer, of November 9th, 1933 (Document 3505-PS); hereof the Prosecution deduces a responsibility or, at any rate, a co-responsibility of the Defendant Funk for the entire legislation for the control and co-ordination of the cultural professions (Kulturberufe).

This conclusion appears to be wrong; quite apart from the fact that the point in question is the fixing of a date for a decree concerning execution, therefore a purely formal act, it must be emphasized that this law was decided by the Reich Cabinet of which the Defendant Funk at that time was not a member.

Funk stated in his examination that, during the entire duration of his activity in the Ministry of Propaganda, he hardly gave his signature more than three times representing Dr. Goebbels. For the rest, the Defendant Fritzsche testified here as a witness, on June 28th, 1946, that the position of Dr. Goebbels' long-time collaborator and personal advisor Hanke, who later on became Under Secretary and Gauleiter, corresponded far more to the usual position of an under secretary in the Ministry, than the one of the Defendant Funk. It was Hanke, too, who maintained the liaison of Minister Goebbels with the section heads and advisers of the Ministry, a task adhering otherwise to the under secretary in a ministry, but which was never entrusted to the Defendant Funk, although he was an under secretary.

It is proven by the affidavit of the former editor-in-chief of the Frankfurter Zeitung, Albert Oeser (Exhibit Number Funk-1), and of the attorney-at-law Dr. Karl Roesen (Exhibit Number Funk-2), as well as by the affidavits of the witness Heinz Kallus (Document Funk-18), that the

Defendant Funk, in his position as an under secretary of the Ministry of Propaganda, energetically undertook to help Jews and other persons who were oppressed and thwarted in their intellectual or artistic activities by the National Socialist legislation and cultural policy, and that he did this under heavy risks to his own position.

Among the persons for whom Funk interceded were not only Jewish editors, but also many prominent German artists, and the witness Kallus (cf. his questionnaire in the Document Funk-18) mentions in this connection the Jewish proprietors of a big Berlin directory publishing firm, whom Funk had given permission to carry on with their business, against considerable resistance of the competent section of the Ministry and of the German trade publicity council (Werberat der deutschen Wirtschaft). The witness Kallus stated further, that, owing to this attitude toward the Jewish cultural workers, Funk was "suspect" to Dr. Goebbels and to the chief of the press section, Berndt, who was known to be particularly radical. Editor-in-chief Oeser explicitly states, as a witness, in his affidavit (Document Book Funk Number 1) that he has made his statements voluntarily to prove the "human attitude" of the Defendant Funk, and gives the names of eight Jewish editors of the Frankfurter Zeitung, whom Funk had given permission to carry on with their profession. In this connection, Oeser further remarks: "He (Funk) herewith proved his human understanding. Indeed, I have never heard from him (Funk), in the course of our conversations, any inhuman utterances. Owing to his (Funk's) concessions, the endangered people obtained, in part repeatedly, the possibility to hope and to work anew with us and to prepare, without loss of income, their change of profession and their emigration." Oeser, a well-known economic journalist, who always kept completely aloof from the Party, explicitly states that Funk, without any doubt, exposed himself by his attitude toward the Jews.

In the cross-examination of the Defendant Funk the Prosecution referred to an affidavit, produced by the Prosecution, of an editor called Franz Wolf; this witness expressed—Document 3954-PS, Exhibit USA-377—the opinion that Funk may well have given those exceptional permissions not out of human sentiments, but rather in order to maintain the high standard of the Frankfurter Zeitung. By the way, the author of the affidavit was actually one of the Jewish editors who were given permission to further exercise their profession by Funk. The assumption of the witness Wolf is in direct contradiction to the positive statements of the witness Oeser. The Defendant Funk, too, opposed this interpretation and has pointed out that at that time such considerations were of no importance to him. In later years, when the Frankfurter Zeitung was to disappear, he had, so he said, used his influence in order to insure the further publishing, out of material considerations too, as this newspaper was, as an economic paper, highly esteemed abroad and was the best commercial newspaper of the country. However, this does not alter the fact that Funk had, at that time, used his influence repeatedly and with success in favor of Oeser and his collaborators, for purely humanitarian reasons.

The witness Kallus finally declared in his questionnaire (Page 3 of Document Funk-18) that he remembers several occasions where Funk made possible the emigration of Jewish people under tolerable conditions. Kallus confirms hereby the statements of the witness Luise Funk (Document Book Funk, Exhibit Number 3), according to which the Defendant Funk often received, in the years when he was Under Secretary of State in the Ministry of Propaganda, letters of thanks from Jews who

had emigrated at that time from Germany and who thanked Funk for having given them facilities for liquidating their businesses and for having procured them permission to take along abroad considerable parts of their fortunes.

Evidence concerning this second part of the Indictment has accordingly shown that Funk is guilty in the sense of this part of the Indictment neither in his official capacity nor by his actions. He has helped, as far as it was within his power, many Jews and many individuals who were endangered and hindered in their cultural work, out of their material and spiritual distress, although by doing so he jeopardized his own position.

Now, Gentlemen of the Tribunal, I turn to another subject—the charge appearing under Point 4 of my brief, Page 24 onward, namely, that he participated in the preparation of wars of aggression; a point which is dealt with by Figure 4 of the Indictment. The accusation against the Defendant Funk is: "that with full knowledge of the aggressive plans of the conspirators he participated in the planning and preparation for such wars."

As evidence of this, the Indictment first of all points out that Göring's Ministry of Economics was brought under the Four Year Plan as the "high command of the German war economy," and was placed under Funk's command. The Indictment also states that according to the Law for the Defense of the Reich of 4 September 1938 Funk, in his capacity as Plenipotentiary for Economics, was explicitly charged with the mobilization of German economy in case of war.

The Prosecution's assertion that the Reich Ministry of Economics was brought under the Four Year Plan before it was handed over by Göring to Funk is quite correct, but the so-called "high command of the German economy" was not in the hands of the Reich Minister of Economics, Funk, but entirely in those of the Delegate for the Four Year Plan—that is, the Codefendant Göring. Göring has confirmed the fact that Funk was obliged to follow his instructions. In addition, the most important branches of production were managed—as we have already shown—by special plenipotentiaries of the Four Year Plan, who were under the control of Göring and received their instructions from Göring—not from Funk. The Reich Ministry of Economics itself was merely the office which carried out the directives of the Four Year Plan. The Defendant Funk has testified that some offices were only formally under his supervision and functioned in reality as autonomous institutions of the Four Year Plan.

Funk's position as Plenipotentiary for Economics was vigorously disputed from the beginning. When the Defendant Funk was cross-examined, Document EC-255 was submitted, a letter from the Reich War Minister, Von Blomberg, to the Delegate for the Four Year Plan, Göring, dated 29 November 1937, wherein Blomberg proposes that the Defendant

Funk, who had just then, on 27 November 1937, been appointed Reich Minister of Economics, should also be appointed Plenipotentiary for War Economy. This was not, however, done.

Göring himself took over the Reich Ministry of Economics to begin with, and only handed it over to the Defendant Funk in February 1938, 3 months afterward. Then the High Command of the Armed Forces—more especially the Army Economic Staff under General Thomas, whose name has been mentioned repeatedly—requested that the Plenipotentiary for War Economy should be bound in the future to follow the directives of the High Command in all questions concerning supplies for the Armed Forces. In this Document, EC-270, USA-840, the Economic Staff of the High Command of the Armed Forces claims a right to direct the Plenipotentiary for War Economy in nearly all his fields of activity.

The Defendant Funk tried by means of a conversation with Reich Marshal Göring and a letter to Reich Minister Dr. Lammers to clarify his position as Plenipotentiary for War Economy, and as such claimed to be placed under the direct command of Hitler and not bound to abide by the directives of the High Command of the Armed Forces. Göring and Lammers concurred with Funk's opinion. It must, however, be emphasized most strongly that this did not affect Funk's subordination to Göring, for all the other supreme Reich offices and ministers directly subordinate to Hitler's command were also bound by the directives of the Delegate for the Four Year Plan, that is, by Göring's directives.

It is a remarkable fact that according to the Reich Defense Law of 4 September 1938—the Second Reich Defense Law—the Defendant Funk did not become Plenipotentiary for War Economy, but Plenipotentiary for Economics, without the word "War," and that this act explicitly stated that Funk was bound to comply with the demands of the OKW. The OKW, therefore, won its battle against Funk in the end.

But the individual economic departments, which according to the Reich Defense Law were under the direction of the Plenipotentiary for Economics for his special assignments, were equally unwilling to recognize him. In an interrogatory by the former State Secretary Dr. Hans Posse, Funk's deputy as Plenipotentiary for Economics (Document 3819-PS, USA-843) which was produced during the cross-examination of the Defendant Funk, Posse states that the Plenipotentiary for Economics "never really exercised any function." The ministers and state secretaries of the individual economic departments of finance, agriculture, transport, *et cetera*, did not, according to Posse, wish to be placed under Funk's control, and even protested against it. Posse also mentions the disputes which Funk had with the Four Year Plan.

He calls these conflicts "the struggle for power," which in this connection simply means the authority to make decisions concerning the other economic departments. This was not a dispute between Göring and Funk; that is untrue because obviously Funk as Plenipotentiary for the Economics was still subordinate to Göring. Actually, this was a quarrel among state secretaries. The individual economic departments declared that they were subordinate to the Delegate for the Four Year Plan and refused to recognize the right of the Plenipotentiary for Economics to give them directives, since Funk himself was under the direction of the Four Year Plan. The state secretaries of the Four Year Plan supported the departments in their interpretation, and this lack of clarity and the overlapping of competencies caused the authority to issue directives to pass formally from the hands of the Delegate of the Four Year Plan a few months after the outbreak of the war.

Questioned by the Prosecution as to whether he had been in the habit of discussing important matters with Funk, the above-mentioned State Secretary Posse replied: "Yes; but these discussions did not produce results." Posse confirms that the authority given to Göring was much more extensive and that Göring finally dissolved the office of the Plenipotentiary for Economics. According to Funk this happened as early as December 1939, a few months after the outbreak of the war. Funk retained only the formal right to issue decrees. This has also been confirmed by Lammers. Therefore, the Codefendant Göring's statement that he was also of the opinion that Funk's position as Plenipotentiary for Economics could be described as having existed only on paper is quite correct.

Naturally the office of the Plenipotentiary for Economics worked in continuous business relations with the other economic departments, with the Four Year Plan, with the staff of the department for defense economics of the German Supreme Command, and with the Plenipotentiary for Administration, that is to say, the Reich Minister of the Interior. As proof the Prosecution presented various documents showing that at the meetings of the Deputy Plenipotentiary for Economics and his staff, questions of finance, war production, labor, and others were discussed. In this connection the office of the Plenipotentiary once also treated the question of employing prisoners of war in the industry, but this was an entirely theoretical discussion (Document Number EC-488, USA Exhibit Number 842).

Why this General Staff economy work, which had to be done in times of peace for the eventuality of war, should be incriminating for the Defendant Funk is not clear. Besides, until August 1939 he personally did not take any interest in the details of these questions. All this work of the Plenipotentiary for Economics consisted of general preparations in case of war and did not apply to any special war. However, when Funk's proposition for changing over from peacetime to wartime

economy was worked out in co-operation with the other economic departments in August 1939, the danger of war with Poland was already pressing.

Nowhere in the material presented by the Prosecution is there a single indication of the fact that the Defendant Funk knew anything about military and political conversations and preparations which had as their object the planning of war—in particular, a war of aggression to be waged by Germany. Funk was never invited to take part in any conversations of this kind. He was, in particular, not present at the well-known discussion with Göring on 14 October 1938, which was treated exhaustively by the Prosecution on Page 24 of the trial brief. According to the Prosecution, Göring during that meeting referred to an order issued by Hitler for an unusual increase in armaments, especially weapons of attack. The Prosecutor declared during the session of 11 January 1946 that at that meeting Göring addressed words to Funk which were described as "the words of a man already at war." Several documents included in the Funk document book and submitted to the Tribunal prove, however, beyond doubt that the Defendant Funk did not attend that meeting at all, as he was in Sofia at the time in order to conduct economic negotiations with Bulgaria. This exhibit, which the Prosecution obviously intended to use as a main exhibit, is thereby invalidated. On 25 August 1939, the date of Funk's letter to Hitler to which I referred this morning, the German and Polish armies were already completely mobilized and stood face to face with each other. He was, therefore, compelled to act in that particular manner, and by that time he was no longer able to cancel any of the preparations. All this is corroborated by the diary kept by the witness Kallus and submitted in the Funk document book under Number 18. The Defendant Funk stated here on the witness stand:

> "It was naturally my duty as Plenipotentiary for Economics to do all I could to prevent the civilian section of the economy from being shattered in the event of war, and it was also my duty as president of the Reichsbank to increase as much as possible the Reichsbank's reserves of gold and foreign currency."
>
> He goes on to say:
>
> "That was necessary on account of the general political tension at the time, and it was also necessary in case no war would come about but only economic sanctions which, in view of the political situation at the time, one could and must expect."
>
> Funk likewise says:

"It was also my duty as Reich Minister of Economics to increase production."

That is an exact quotation from the Defendant Funk's testimony. On this subject the witness Puhl, who was vice president of the Reichsbank, states in his interrogatory of 1 May, which is in the hands of the Tribunal, that the position of the Reichsbank in the last 7 months of Funk's presidency before the outbreak of the war had not been materially strengthened, and that very little business had been done in the exchange of foreign assets for gold since January 1939. The Reichsbank's cautious policy in regard to gold and foreign currency, according to this witness, was in line with its customary practice.

Puhl's statement is important for the correct understanding of the reference made by Funk, in his letter to Hitler of 25 August 1939, to the conversion of foreign assets into gold. During the period of Funk's presidency of the Reichsbank the transactions to which he alludes were no longer of any importance. The exaggerated phrases used by Funk in his letter to Hitler make the contents appear much more important than they actually were.

Funk explained this fact during his examination by saying that this letter was a private letter of thanks, that in those days every German was under a very great strain owing to the tense political events throughout Europe, and that he wanted to inform his Chancellor at this moment when the country was in danger of war, that he, Funk, had also done his duty. This was the first and only occasion on which Funk actively exercised his functions as Plenipotentiary for Economics.

Here I must insert something which is based upon some minutes which the Prosecution did not submit until the hearing of evidence had been concluded; Document 3787-PS. These are the minutes of the second meeting of the Reich Defense Council held on 23 June 1939. Funk, as Plenipotentiary for Economics, attended that meeting of the Reich Defense Council, which took place about 2 months before the beginning of the war. The text of the minutes, however, leaves no doubt whatever that they concern general, and therefore mainly theoretical, preparations for any war. Furthermore, to appreciate this document it must be remembered that during the war which broke out 3 months later the whole of the Defendant Funk's assignments in connection with the distribution of labor was transferred to the Four Year Plan, since the main functions of the Plenipotentiary for Economics were formally and completely abolished, as I have previously shown, shortly after the outbreak of war.

To continue with my brief—the Defendant Funk has explained in detail during his examination that up to the very end he did not believe that war would come, but that on the contrary he thought that the Polish conflict would be settled by diplomatic means. The accuracy of this statement is also confirmed by the witnesses Landfried, Posse, and Puhl, the defendant's three closest co-workers, in interrogatories submitted to the Court (Exhibit Numbers Funk-16 and 17 and Document 3849-PS). The danger of war with Russia came to Funk's knowledge for the first time when he heard of Rosenberg's appointment as plenipotentiary for the unified treatment of eastern European problems in April 1941. We remember that at that time Lammers and Rosenberg gave the Defendant Funk the same explanations, generally speaking, as those stated to the Tribunal here by all the witnesses heard on this question. He was told that the reason for the preparations for war against Soviet Russia was that the Soviet Russians were massing considerable forces along the entire border, that they had invaded Bessarabia, and that Molotov, in his discussions on the subject of the Baltic Sea and the Balkans, had made demands which Germany could not fulfill. As Rosenberg stated that the assignment given him by Hitler also included economic measures, Funk placed a ministerial director, Dr. Schlotterer, at Rosenberg's disposal as liaison official. Schlotterer later took over the direction of the economic section of the Rosenberg Ministry and joined the Economic Operations Staff East of the Four Year Plan. The Ministry for Economics itself and Funk had practically nothing to do with economic questions in the occupied East and concerned themselves merely with questions bearing on German internal economy. The Ministry for Economics had no authority whatever to make decisions in the Occupied Eastern Territories. During his cross-examination the Defendant Funk was shown an extract from an interrogation of 19 October 1945, dealing with the subject "Preparations for War against Russia" (Document Number 3952-PS, USA-875). In this interrogation Funk stated that the Defendant Hess asked him at the end of April 1941 whether he, Funk, had heard anything about an impending war against Russia. Funk replied: "I have not heard anything definite, but there seems to be some discussion along that line."

The explanation of this conversation at the end of April 1941 between two men who were not informed of the facts may well be that at that time Funk did not yet definitely know the reason for Rosenberg's assignment, but knew only of suspicions and rumors.

On 28 May 1941 Rosenberg had a meeting with Funk (Document 1031-PS). In this meeting, as you may recall, they discussed the question of how the monetary problem in the East might be regulated in the event of war

against Russia and the occupation of those territories by German forces. Gentlemen, in my opinion it is quite natural that in view of an impending war, even a war of defense, the authorities responsible for money matters should discuss the question of the handling of these matters in case enemy territory should be occupied. Funk was opposed to any solution likely to give rise to speculation; and he described the suggested rate of exchange for marks and rubles as entirely arbitrary. He agreed with Rosenberg that the Russian territory should have its own national currency as soon as conditions permitted. For the rest he demanded further investigation of these problems, especially since the matter could not be decided in advance.

Here too, therefore, Funk approached matters with his characteristic caution and endeavored to find a solution which would create stable conditions from the very start. If the necessity for printing ruble bills to meet the most urgent demands for currency was mentioned in the discussion with Rosenberg—though not by Funk—Funk did not see anything either unusual or criminal therein. If the currency of a country has been depleted, it is absolutely necessary for fresh money to be provided by the power responsible for maintaining a stable monetary system. Who made the banknotes was of no importance to Funk; the essential point for him was by whom the banknotes were issued and in what quantity. Moreover, the production of a new banknote requires months of preparation, so that the execution of such a plan—which, as I said, was in any case not Funk's—could not have taken place until much later.

A few weeks after this discussion the war actually broke out. Funk knew that there was danger of war with Russia. That Germany had long been preparing for such a war was however as little known to him as the fact that Germany would attack and thus wage a preventive war. Funk was informed neither of the march into Austria nor of the negotiations in regard to the Sudetenland—in September and October 1938 he was not even in Germany—nor was he informed of the seizure of the remainder of Czechoslovakia. In the case of Poland, he knew that the conflict was acute, but nothing more; of Russia the same thing was true. But in both cases he was informed even of this only a short time before the actual outbreak of war. As far as wars with other countries were concerned, Funk received no information whatsoever before the opening of hostilities; he was only informed afterward.

All the facts I have mentioned form a clear indication that Funk knew nothing of Hitler's intentions with regard to foreign policy, and that he had no knowledge whatsoever of the fact that Hitler was planning wars of aggression. In the summer of 1939 Funk certainly devoted particular

attention to the conversion of German economy from a peacetime to a wartime basis. But as an official of the Reich, Funk considered it to be not only his right but also his duty to prepare the German people for a defensive war and to take the necessary economic measures.

However, the Prosecution believes that it can eliminate all these doubts by describing the Reichsregierung or the National Socialist Party as a criminal organization which conspired against other nations, and whose sole task was to plan and wage wars of aggression, to subjugate and enslave foreign nations, and to plunder and Germanize other countries. This deduction is erroneous, since those plans were devised and executed only by Hitler himself and a few of the men closest to him, of the type of Goebbels, Himmler, and Bormann. According to the evidence we have heard, there can be no doubt that even the highest officials of the State and the Armed Forces —and in particular Funk—were not informed of these plans, but that these plans were concealed from them by a cunning system of secrecy.

Any comparison with the secret societies mentioned by the Prosecution, which in other countries banded together in criminal organizations, as for example the Ku Klux Klan in America, is impossible for a further reason. The Ku Klux Klan was organized from the start as a secret society for the purpose of terrorizing and committing crimes. In 1871, after scarcely 6 years of existence, it was expressly forbidden by the North American Government through a special law, known as the Ku Klux Klan Act. At that time the Government even imposed martial law on it and fought it with every possible means. It was an organization with which the Government and Congress of the United States never had any dealings. A man like Funk would, of course, never have joined a secret society, a criminal organization against which the Government was fighting. However, the National Socialist Party in Germany was never a secret organization, but was a party recognized by the Government and considered lawful. The unity between this Party and the State was even declared in a special Reich law. Since 1934 the leader of this Party was at the same time the elected head of the Reich, and this head of the State and his Government have been constantly and officially recognized as a government by the entire world from 1933 on. It was due precisely to this international recognition of Hitler by every foreign country—a recognition which continued to be extended in part even during the second World War—that Funk and millions of other Germans never doubted the legality of the Government and that such doubts, if they ever entered their minds, were immediately dispelled. Millions of German officials and German soldiers assumed, just as Funk did, that they

were only doing their duty in not withholding from the head of the State the recognition accorded to him by every country in the world.

The foreign countries, their statesmen as well as their general staffs, the press as well as the intelligence service of other countries, were certainly better informed about the German situation and also about the true aims of German politics than the German citizen who had no access to foreign newspapers, who was not permitted to listen to foreign radio stations if he did not want to land in jail or on the scaffold, who for years lived as isolated as in jail and could not even trust his neighbors and friends—not even his relatives—and dared not talk things over with anybody. Even ministers knew no more about Hitler's true plans than any other fellow citizen and even of major State affairs they mostly learned only afterward through the newspapers or the radio. Who could have ever conceived the thought that foreign states would maintain diplomatic relations with a criminal organization and that official persons of foreign countries should recognize and call upon a man in whom they saw the head of a band of conspirators?

As already mentioned, Funk has never denied that in his plans and directives he naturally took into account the possibility of wars which might some day have to be waged by Germany, just as it is part of the duty of every general staff in the world to take such possibilities into consideration. At that time Funk had every reason to do so in his capacity as Minister of Economics and Reichsbank president; for the world situation since the first World War had been so tense, and the conflicting interests of individual nations had frequently appeared insurmountable to such a degree that, unless he wanted to be accused of neglecting or betraying the interests of his own people, every statesman had to make the preparations necessary for waging war. A preliminary activity of this kind is, therefore, not in itself of criminal significance; and Funk has no doubt that during those years the ministers of economics and bank presidents of other countries also made—and had to make—similar preparations for the event of war. In the case of Funk it is of no importance whether or not he for his part ordered such preparations, but only whether or not he knew that Hitler was planning aggressive wars and intended to wage such aggressive wars in violation of existing treaties and in disregard of international law.

But Funk, as he declared under oath, did not know this, nor did he act on this premise. Hitler's constant affirmations of peace prevented such a possibility from entering his mind. Today, of course, we know on the basis of the actual events that followed and on the basis of the facts established by these proceedings, that those peace assertions of Hitler's, which were still on his lips when he committed suicide, were in reality only lies and deception. But at that time Funk regarded Hitler's protestations in favor of peace as perfectly genuine. It never occurred to him at that time that he himself and the whole German nation could be deceived by Hitler; he believed Hitler's

words just as did the entire world, and thus he was the victim of that deception just as was the entire world. If no blame attaches to foreign statesmen and generals who believed Hitler's protestations, although they certainly were better informed on Germany's rearmament than was Funk, the faith which he himself had in the head of the State cannot be called a crime.

Gentlemen of the Tribunal, I have now examined the Prosecution's accusation that Funk had planned wars of aggression; and I turn to another point of the Indictment, which concerns Funk's activities in the occupied territories and the charge of forced labor.

The Prosecution offered very little evidence against Funk on the subject of forced labor or the slave-labor program. In the main he is held responsible for the compulsory employment of foreign workers on the grounds that he was a member of the Central Planning Board from autumn 1943 on. The first session of the Central Planning Board at which he was present took place on 22 November 1943, that is to say, at an advanced stage of the war, and after that he very rarely attended meetings. The Defendant Speer testified to this, and it is also evident from the minutes of the Board, which were very carefully kept. And I should like to emphasize the fact that Funk never had anything to do with the employment of labor either in his capacity as Minister of Economics or as president of the Reichsbank. He was on principle opposed to taking in too many workers from the occupied territories, especially by force, because this interfered with the economic and the social life of these territories. The Codefendant Sauckel and the witnesses Landfried and Hayler have confirmed this, and it is also shown by the remarks made by Funk himself at the meeting held in Lammers' office on 11 July 1944 (Document 3819-PS), which was frequently quoted in Court. Here, for instance, Funk expressed disapproval of ruthless raids to recruit foreign workers.

If Funk sent representatives to the Central Planning Board, he did so only to insure that the necessary raw materials were allocated to the industries engaged in manufacturing consumer's goods and goods for export, but never to deal with questions of foreign labor, in which he was not at all interested. Although the Prosecution, in cross-examining the witness Hayler, on 7 May 1946, confronted him with a statement by Funk during the preliminary interrogation of 22 October 1945, Document Number 3544-PS, to the effect that he had "not racked his brain" over these labor problems, it must also be stated on the part of the Defense that in the next sentence of these minutes—in the same breath, so to speak—Funk declared that he had always done his utmost to prevent workers being taken away from their

homeland, in this case France. This second sentence, although not quoted by the Prosecution, seems to be of special importance because it clearly reveals Funk's disapproval of the compulsory measures used in connection with the utilization of foreign labor. The Defendant Speer, however, testified before the Tribunal on 20 June that the Central Planning Board made no plans at all for the utilization of labor. Only occasional discussions on questions concerning the utilization of labor took place here. The records containing the actual results of the negotiations and decisions of the Central Planning Board have not been introduced by the Prosecution. It has been shown that Funk, who attended only a few of the meetings of the Central Planning Board, never received the full notes but only the minutes, which revealed nothing. Before Speer was responsible for decisions on war production, and before Sauckel became Plenipotentiary General for the Allocation of Labor —that is, before 1942—the question of recruiting labor for production was dealt with by the Four Year Plan, that is, by Göring and not by Funk. Later on applications for workers required, as Speer has testified, were usually made by the industries directly to the offices controlling the allocation of labor. While Funk was still in charge of production in the Reich Ministry for Economics and working in accordance with the directives of the Four Year Plan, questions concerning the allocation of labor were not dealt with by the Reich Ministry for Economics at all, but by the Plenipotentiary General appointed under the Four Year Plan for the various branches of industry—that is, by Göring—by means of direct negotiation with the Plenipotentiary General for the Allocation of Labor. Speer clarified this in connection with Document Sauckel Number 12. He also clarified the fact that several branches of industry, such as overground and underground construction not falling within the competency of the Reich Minister of Economics, were cited in this document as belonging to it.

Some other items had been rectified previously already by Sauckel's defense counsel. The various economic offices (Wirtschaftsämter) likewise did not request manpower from the Reich Ministry of Economics. They were, however, not offices of the Reich Ministry of Economics, but were incorporated in the so-called intermediate instance, that is, in the provincial authorities, or in the Gauleitungen.

An important point in this connection is the establishment of the fact that up to 1943, that is, up to the time in which Funk was at all competent in questions of production, foreign workers came to Germany through recruitment solely upon the basis of a voluntary decision. With respect to this, I refer to the decree of the Reich Minister for Labor promulgated on 30 July 1940, presented in Funk's book of documents under Number 12, in which the conformity with obligations internationally agreed upon is specifically pointed out.

Finally it must be stated that Funk, at the time when he joined the Central Planning Board, no longer had any production assignments and could therefore no longer claim workers, so that in consequence he had no further interest in this aspect of the Central Planning Board's activities.

Regarding Funk's attitude toward the economy of occupied territory, and measures taken by him to insure the maintenance of orderly economic conditions and especially of stable conditions of currency, I refer to the questionnaires Landfried (Exhibit Number Funk-16) and Puhl (Exhibit Number Funk-17), as well as to testimony of the witnesses Hayler, Neubacher, and Seyss-Inquart. I will refer only to Document 2263-PS, introduced by the Prosecution during cross-examination of the Defendant Funk, a letter from the Under Secretary of the Ministry of Economics to the Armed Forces High Command of 6 June 1942, in which the transfer of 100 million Reichsmark from occupation money is requested for purchases by Roges Raw Material Incorporated (Rohstoffhandelsgesellschaft) on the black market in France.

Here we deal with the purchases in occupied territories mentioned before, resulting from instructions by the Four Year Plan. These, however, represent exactly those purchases against which Funk protested. His protests finally culminated in the decision of the Delegate for the Four Year Plan (Göring) to prohibit any such further purchases. As is known, Funk personally had no authority to issue instructions for the occupied territories. Moreover such controlled purchases by authorities must be looked upon in a different light from the uncontrolled purchases of the various State, Party, and Armed Forces agencies, against which Funk fought time and again (Questionnaire Landfried, Document Book Number Funk-16).

Summarily it must be said that the evidence submitted has proved beyond doubt that the Defendant Funk took a great many measures to prevent the exploitation of occupied territories and that the fact that he succeeded in preventing the devaluation of currency in occupied countries was in itself enough to protect them from suffering damage to an extent which cannot be evaluated in detail.

With that, Gentlemen of the Tribunal, I leave this point of the Indictment against Funk and turn to a further charge against him, namely, his participation in the elimination of Jews from economic life in November and December 1938, which forms Point 3 of the Indictment against him.

Gentlemen, the charges which the Prosecution has made against Funk contain many details with which, in view of the time at my disposal, I am unable to deal fully. With regard to such details I shall refer to statements made by Funk himself in this connection. First of all, however, I must deal more fully with what seems to me the most important of all the charges made against Funk, namely, that of playing a part in the persecution of the Jews. The Defendant Funk considers this to be the most important factor in his trial.

Gentlemen, no one in Germany has ever asserted that Funk was one of those fanatical anti-Semites who took part in the pogroms against the Jews or who approved of these proceedings and profited by them; Funk always condemned such actions. This can be explained not only by his natural disposition and the environment in which he grew up, but also by his years of work as a journalist, mainly in connection with that section of the press which dealt with economic policy and consequently kept him in continuous touch with the Jewish circles of importance to economic life. Experts in that field know, and still have respect for, Funk who even at that time showed an attitude that was free of all anti-Semitism, and friendly toward the Jews rather than hostile.

It is tragic to a certain extent that in spite of this the name Funk, of all names, has been repeatedly connected in this Trial with the decree of November 1933, as a result of which the Jews were eliminated from economic life. Whether he liked it or not, all questions concerning the treatment of Jews in the economic life of Germany were under the jurisdiction of his department as Minister for Economics. As an official it was his duty to issue the necessary executive instructions.

This was certainly particularly difficult for Funk, in view of his tolerant attitude. At that time he had already been a civil servant of the Reich Propaganda Ministry and the Ministry for Economics for 8 years, and yet, during all that time, the Prosecution could not cite a single instance of any display of anti-Semitism on Funk's part or any evidence of his having urged or approved of the use of force, terrorism, or injustice against the Jews. On the contrary, we know from the statements of various witnesses that Funk repeatedly interceded for his Jewish fellow citizens in the course of these years; that he looked after them and tried in their interests to alleviate hardships, to prevent encroachments on their rights, and to spare the lives and careers of human beings, even if they were Jews or political opponents of his own.

It is, therefore, not surprising that this man, with his wide experience in the economic field, this man of far-reaching knowledge, with his frankly tolerant views, was most painfully affected when on 10 November 1938 he had to witness the destruction of Jewish homes and shops in Berlin, and when he received one report after another confirming the fact that Goebbels and his clique, exploiting the indignation of the populace over the assassination of a German by a Jew, were organizing such pogroms throughout Germany, and that these outrages were leading not only to the destruction of Jewish property, but also to the murder of many Jews and to the persecution of many thousands of innocent citizens.

The affidavit of this assistant, Ministerialrat Kallus (Document Book Number Funk-15) of 9 December 1945, and that of Frau Luise Funk of 5 November 1945 (Funk Document Book Number 3), prove clearly that Funk condemned such excesses most severely, that he was incensed to the extent of calling them filthy outrages even when addressing Dr. Goebbels himself, and that he threatened to resign in the event of a repetition. Even at that time he told the mighty Goebbels to his face that one should be ashamed of being a German.

All this, Gentlemen, expressed the justified indignation of a man who for years had made every effort to insure moderation toward Jews and political opponents and had received many a letter of gratitude for so doing —a man who had fought for years to prevent terrorism, to secure for all his fellow citizens the rights to which they were entitled, and to raise the standard of German economic life—and who now saw all his efforts frustrated in a single night by the brutal fanaticism of a Dr. Goebbels.

Funk himself, during his interrogation, gave us a vivid description of how, ever since he entered office as Minister of Economics in February 1938, he had been subjected to continuous pressure by Goebbels and Dr. Ley to eliminate the Jews from the economic life of the country in the same way as they had been eliminated in 1933 from its cultural life.

The witness Dr. Hayler stated here that Himmler also found fault with Funk for this. Funk himself testified to the difficulties which again and again occurred during those years with workers stirred up by propaganda, who were sometimes no longer willing to work under Jewish managers, or did not dare to do so; and how, in these oppressive conditions, numerous Jewish owners sold their businesses—frequently at cut prices—to people who seemed to Funk as the Minister of Economics entirely unfit to acquire or manage such businesses. Funk tried again and again to stem this overwhelming development. He made continual efforts to put a brake on this process of Aryanization; to provide for a reasonable and just settlement for Jewish owners of businesses; and to allow them to emigrate from Germany with their property. But Funk realized more and more clearly every day that he was too weak to stop this movement and that the radical elements around Dr. Goebbels and Dr. Ley were gaining the upper hand, in which they were unfortunately able to rely on Hitler's authority. Hitler had allowed himself in the course of time to be won over more and more to the policy of radical treatment of the Jewish question by a few irresponsible advisers who are not sitting in the dock today.

The events of 9 November 1938 burst like a bombshell into this fight between Funk and other considerate people on the one side, and Goebbels

and Ley on the other. As Dr. Goebbels himself admitted later to Fritzsche, they were aimed directly at the person of the Defendant Funk, who was thus to be confronted with a *fait accompli*. As the witness Landfried testified, Dr. Goebbels did in fact attain his ends through this operation of November 1938. Goebbels was able to refer later to Hitler's own order for the Jews to be completely excluded from the economic life of Germany, although Funk, as the minister concerned, repeatedly made allusion to the relations with foreign countries upon which the German Reich and its economy depended.

The orders necessary to carry out this program were given by Göring in his capacity of Delegate for the Four Year Plan, on the direct orders of Hitler. Funk never had any doubt that in this particular affair Göring also was to a certain degree only a puppet, because he had always known Göring to be a man who condemned extreme radicalism in this particular question of the Jews. Funk's views on this point were shared by wide circles of the German people, and the fateful Göring meeting of 12 November 1938 (Document 1816-PS) proved this to be correct. This document has been mentioned here repeatedly. At a meeting which preceded that of 12 November 1938, Göring sharply condemned the acts of terrorism which had occurred and declared to the Gauleiter present that he would make every Gauleiter personally responsible for acts of violence committed in his district. But what was the good of that?

In the course of the second meeting, the minutes of which were submitted to the Tribunal under Number 1816-PS, Goebbels ultimately succeeded in imposing his radical demands; and the course taken by this meeting forced Funk to admit that the complete elimination of the Jews from German economic life could no longer be delayed for the simple reason that the circles in power had become far too fanatical. It became evident to Funk that legislative measures were necessary if the Jews were to be protected from further acts of terrorism, looting, and violence and if they were to get any reasonable compensation. During the Göring meeting of 12 November 1938, Funk repeatedly expressed his views again, as is shown by the records. It was due to the efforts made by the Defendant Funk, with the support of Göring, that Jewish businesses were reopened for the time being, that the whole procedure was taken out of the hands of the arbitrary local agencies and put on a legal basis throughout Germany, and finally that in order to gain time in which to carry out this action a definite date was set for its completion. Anyone who reads carefully the minutes of the Göring meeting of 12 November 1938 will, in spite of their incorrect and incomplete formulation, be able to find definite and repeated indications of Funk's moderating influence; namely, his insistence—repeatedly mentioned

in the minutes—on the reopening of Jewish stores, his proposal that the Jews be allowed to retain at least their securities, and finally his attitude to Heydrich's demand that the Jews be placed in ghettos. The minutes of 12 November 1938 prove beyond doubt that it was Funk who opposed Heydrich's proposal by saying: "We don't need ghettos. Surely the Jews could move closer together among themselves. The existence of 3 million Jewish people among no less than 70 million Germans can be regulated without ghettos." This is a literal quotation.

Funk therefore wanted to save the Jews at least from being interned in ghettos. It must be admitted that at that time Funk did not entirely succeed in securing recognition for his point of view, so that the proposal that the Jews should be allowed to retain their securities, for instance, was turned down, although Funk pointed out, as the minutes show, that to realize the Jewish securities would suddenly flood the German stock market with securities to the value of 500 million Reichsmark and would, therefore, have serious consequences for the German stock market. The decisive question in judging the Defendant Funk is not so much his success as the fact that he made an obvious effort to save for the Jews all that could be saved in the circumstances; and we must not lose sight of the fact that in all those measures Funk acted only in his capacity as Minister of Economics, that is, as an official who merely gave the order to execute a command which Göring as Delegate of the Four Year Plan had issued on the orders of Hitler. Funk found himself in exactly the same position of constraint, as, for example, the Reich Minister of Finance, Graf Schwerin von Krosigk, who at that time had to order the punitive levy of 1,000 million Reichsmark to be paid by the Jews, or the Reich Minister of Justice and the Reich Minister of the Interior, both of whom issued similar executive instructions in their respective spheres. The Tribunal must decide the difficult legal question of whether a state official whose government has been legally recognized by all the governments of the world is liable to legal punishment for putting into effect a law—and I emphasize the word "law"—passed in accordance with the legislative system of this state. This legal problem is entirely different from the other question, dealt with in the Charter and by the Prosecution, as to whether or not the fact that an official order was given by a superior can serve as an excuse. I might add here that I shall not discuss this legal question because I shall leave it to the other members of the Defense. I shall discuss only whether an official who puts into effect a law passed by the internationally recognized government of his country thereby becomes liable to punishment. That is an entirely different problem from the one dealt with by the Charter.

Gentlemen, since this has not been dealt with before, I have to state the following; I read at the bottom of Page 50: Our natural sense of justice fully approves that a citizen, an official, or even a soldier, cannot defend himself by reference to the official order given him by his superior if this order obviously implies an illegal act, and especially a crime; and if in the existing circumstances and in due consideration of all the accompanying facts, the subordinate realizes, or should realize, that the official order is contrary to the law.

If the latter condition exists, in other words, if the official order obviously constitutes a breach of the law, it may in general be fully approved that the subordinate is not accorded the right to refer to his superior's official order as an excuse and to maintain that he was only carrying out that order. In that respect this stipulation of the Charter contains nothing essentially new, but only the confirmation and further development of legal principles which are recognized to a varying extent in the penal codes of most civilized nations today. A certain amount of precaution, however, seems to be indicated in this matter, for it should not be forgotten, on the other hand, that obedience to the orders of a superior—not obedience to the law, but to a superior—is, and must in future remain the foundation of every government in all nations if the orderly functioning of the state administrative apparatus is to be secured; and that it would be dangerous for the civil servant to decide for himself whether to keep his oath of allegiance.

But, Gentlemen, in our case something different is involved: We are dealing here with the obedience of the citizen and especially of the civil servant, such as Funk was at that time, to a national law, which was legally promulgated in accordance with the constitutional rules of this State. If we wish to find a just and correct answer to this complicated juridical question, which so far has not been treated in literature, it will be pertinent to disregard entirely conditions in Germany and the present Trial, and to ask ourselves what decision would be given in a case where a civil servant of a different country—not Germany—carried out a law. Let us assume for instance, that some foreign country embracing a minority promulgated, in accordance with its constitution, a law exiling from its territory all members of this minority, or confiscating for the benefit of the state the property of such inhabitants, or turning over to the state or partitioning among other citizens the large agricultural estates of such inhabitants. Let us assume that such a case exists and let us ask ourselves: Does the civil servant in this nation really commit a crime if he carries out this lawful order? Is it really the duty of the official charged with the execution of this law to refuse to obey the law and to declare that in his personal opinion the law concerned is

a crime against humanity, or has he even the right to do so? In such a case, Gentlemen, would any state today grant its civil servants permission to examine whether the law proclaimed is contrary to the principles of humanity or to the fluctuating norms of international law? What state would tolerate the refusal of its civil servants for such a reason to execute a law already proclaimed?

Or another example: Let us assume that the laws of a nation decree that certain new weapons are to be introduced into the armed forces, or that more warships are to be built, or that some preparations have to be made for war. Should an individual civil servant really have the right to refuse the execution of the law, even perhaps to sabotage its execution, and then to say, by way of explanation, that in his personal opinion concerning international law it involved the preparation of an aggressive war, consequently an international crime?

The Tribunal will have to decide these legal problems. But Funk may point out in his own defense the fact that by reason of his entire ideology and background it was especially painful to him to issue these executive instructions, although he believed he was only doing his duty as a civil servant.

In this connection I wish to remind you of Funk's circular of 6 February 1939 (Document 3498-PS, Trial Brief Funk, Page, 19), where he emphasizes to his officials that it was their duty to "insure that it was carried out in a correct manner in every respect" and where he already feels impelled to disclaim personal responsibility for these measures by expressly emphasizing: "How far and how rapidly the powers conferred by the Four Year Plan are to be exercised will depend on the instructions to be given by me in accordance with the directives of the Delegate for the Four Year Plan." This special reference made by the Defendant Funk to the legal decrees of the Four Year Plan, which was authorized to promulgate laws, originated in the defendant's desire to express formally and solemnly, and to establish for the future, the fact that in issuing the executive instructions in 1938 he was a victim of his obedience to the State, a victim of his loyalty to the laws of the State to which he had sworn allegiance.

Funk's circular of 6 February 1939, already mentioned on Page 19 of the trial brief, clearly expresses the qualms of conscience which had gripped Funk in those days, although he had not incriminated himself—qualms which, during his interrogation by an American officer on 22 October 1945, led to his complete nervous collapse, so that Funk was unable to restrain his tears and told the interrogating officer: "Yes, I am guilty; I should have resigned at that time."

These same qualms of conscience gripped the defendant throughout the entire Trial and are still haunting him; and we remember that in the session

of 6 May 1946, when this point was discussed, Funk was so deeply shaken that he could hardly continue talking and finally declared here before you, Gentlemen, that at that moment he fully realized that this, meaning the atrocities of November 1938, was the starting point of the chain of events leading to those horrible and frightful things of which we have learned here, some of which he too had already heard of during his imprisonment, and which culminated in Auschwitz. He felt, as he said during his interrogation on 22 October 1945, "deep shame and heavy guilt," and he still feels it today; but he had put the will of the State and the laws of the State above his own feelings and above the voice of conscience since he, as a civil servant, was tied by duty to the State. He felt these ties all the more strongly as these legal measures were particularly necessary for the protection of the Jews in order to save them from losing their rights completely, and from suffering further despotism and violence. These are the very words of the Defendant Funk; and they represent his actual feelings. Today Funk still feels that it was a terrible tragedy that he of all people was charged with these things—he who never during his entire life said a spiteful word against a Jew, but had wherever he could always worked for tolerance and equality for the Jews.

If during his interrogation on 22 October 1945 Funk said: "I am guilty," it need not be investigated here whether the defendant intended these words to apply to his criminal guilt, or only to a moral guilt which he saw in the fact that he had remained in an office which compelled him to carry out laws incompatible with his own philosophy of life. Funk was not in a position to decide for himself the complicated legal question of whether an official of an internationally acknowledged state can be punished at all if he only carries out laws passed in accordance with the legal constitution of this state. For the Defendant Funk his "guilt" did not lie in the fact that he had signed the executive instructions in November 1938, since this had been his duty as an official, rather did he consider himself guilty because he had remained a member of the Government although he found the acts of terror which had occurred intolerable, and abhorred them; he was not involved in the "conflict of conscience," of which he spoke when he was interrogated, because he acted according to the laws which he considered necessary under the conditions prevailing at the time. This conflict was a result of the fact that he had not, in this difficult situation, listened to the voice of his conscience and had not resigned his ministerial office. But the decisive reasons for his attitude and his final decision to remain in office in spite of his feelings about the matter were certainly not material considerations. His reputation as a journalist and his abilities as such would easily have enabled him to find

another suitable position. Much is to be said for the opinion that the Defendant was held in office above all by the thought that his resignation would in no way improve matters, but that on the contrary the administration would become still more radical under an unsuitable and fanatical successor, while by staying in office he might hope to alleviate much distress.

These considerations, which may have guided the Defendant Funk in the first place, were certainly correct up to a point. His State Secretary, Dr. Landfried, at least has testified that later on too Funk often expressed serious misgivings concerning the action taken against the Jews in November 1938 and showed very strong disapproval of all excesses and infringements of the law committed by various Government agencies in carrying out the action. Funk could talk openly to his confidant Landfried, and he often complained to him that he had no power to prevent such excesses. But, as he said to Landfried: "We of the Ministry of Economics should take particular care to see that no one makes illicit profits out of the Aryanization—that is, the transfer to non-Jewish ownership—of business firms." And Ministerialrat Kallus described in his deposition of 19 April 1946 the various measures taken at that time by Funk to protect the interests of Jewish owners. Kallus also told us that Funk even made personal efforts to insure that his orders were carried out by his subordinates in a proper manner.

Gentlemen, thus a sense of duty on the one hand, and humane feeling on the other, were the motives which kept the defendant in office and thus brought him into a situation where he is today charged with criminal action.

Mr. President, I am now coming to a new subject and I have altogether about 15 more pages. Does the Court wish to adjourn now? It is 6 minutes to 4.

THE PRESIDENT: Can you finish it by that time, Dr. Sauter?

DR. SAUTER: There are 15 more pages; I should say about 8 or 9 minutes. On further thought, Mr. President, it will take about half an hour.

THE PRESIDENT: We will adjourn at this time.

[*The Tribunal adjourned until 15 July 1946 at 1000 hours.*]

ONE HUNDRED AND SEVENTY-EIGHTH DAY

Monday, 15 July 1946

Morning Session

MARSHAL: May it please the Tribunal, the Defendant Ribbentrop is absent today.

THE PRESIDENT: Would it be convenient to Counsel for the Prosecution and the Defense if at 2 o'clock today we were to deal with those interrogatories and affidavits which have come in since the last applications were made?

SIR DAVID MAXWELL-FYFE (Deputy Chief Prosecutor for the United Kingdom): My Lord, it would be perfectly convenient for the Prosecution.

THE PRESIDENT: Dr. Sauter, do you think it would be convenient for the Defense Counsel to deal with those matters at 2 o'clock?

DR. SAUTER: Certainly, Mr. President; I will inform the other defense counsel that these applications will be discussed at 2 o'clock.

DR. RUDOLF DIX (Counsel for Defendant Schacht): I agree with my colleague, Dr. Sauter, that this should be done. But if this is done at 2 o'clock it will interrupt my final speech. I should be very grateful if it could be done immediately after Dr. Sauter finishes his speech, so that I could present my plea coherently. It would be very awkward if I were interrupted.

THE PRESIDENT: Certainly, Dr. Dix. Very well; we will do it immediately after Dr. Sauter's plea.

DR. SAUTER: May I speak now, Mr. President?

THE PRESIDENT: Yes, Dr. Sauter.

DR. SAUTER: May it please the Tribunal; before the adjournment on Friday, I explained in conclusion the position and the attitude of the Defendant Funk with respect to the Jewish question. On this occasion I pointed out that in connection with the executive instructions issued late in 1938 on the legal exclusion of the Jews from economic life, the Defendant

Funk acted only in his capacity as a Reich official and in the performance of the duties of that office.

On Friday, I finished my statements in that respect with the words:

It was a sense of duty on the one hand, and humane feeling on the other, which kept the Defendant Funk in office and thus brought him into a situation where he is today charged with criminal action.

Now, Gentlemen of the Tribunal, I turn to the last chapter of my appraisal of the Defendant Funk, of his motives and actions, and will now deal with the gold deliveries by the SS to the Reichsbank, and with the relation of the Defendant Funk to the concentration camp question. That is to say, I am going to refer to Page 58 of the written speech which has been submitted to you.

It is a peculiar tragedy in the life of the Defendant Funk that he was not only forced by fate in the year 1938 to issue executive instructions for laws which he always inwardly condemned and repudiated more than anybody else, but that once again, in the year 1942, he became involved in a particularly horrible manner with Jewish persecutions. I am thinking now of the deposits made by the SS in the Reichsbank, that is to say, the matter on which a film was shown here of the steel vault of the Frankfurt Branch of the Reichsbank and about which two witnesses have testified, namely, Vice President Emil Puhl and Reichsbank Councillor Albert Thoms.

The Defendant Funk was already examined about this matter of the gold deposits at the preliminary proceedings on 4 June 1945, (see 2828-PS); at that time, however, no details were disclosed to him, and Funk made the same statement then as he did before this Tribunal, namely, that he was only briefly told about the matter in question on a few occasions, and that he had not attached any importance to it at all. That is also the reason why the Defendant Funk could not at first recall those happenings very well during the proceedings here. He did not know anything more about them than he had already said.

Nevertheless, Gentlemen of the Tribunal, Funk had to expect that this matter would be brought up in the Trial, at any rate in the cross-examination. And this was actually done by the American Prosecution on 7 May 1946, who submitted an affidavit by the witness Emil Puhl, Vice President of the Reichsbank, in which at first sight Puhl appeared to make serious accusations against the Defendant Funk. Now it is remarkable that since the beginning of this Trial the Defendant Funk has repeatedly referred to this very witness Puhl for various points, and that since December 1945 he has repeatedly requested that the latter be interrogated. Measured by ordinary human standards, Funk would certainly not have done this if he had had a

bad conscience and had reason to expect to be compromised in the most damaging way by his own witness regarding the concentration camp matter. But the oral examination of the witness Emil Puhl here before this Tribunal showed beyond a doubt that Puhl could no longer in any way maintain the incriminating statements in his affidavit, as far as the character of the Defendant Funk and his knowledge of the particulars of the SS deposits were concerned.

It is true that Funk, as he recalled after Puhl's testimony (and concerning this I submitted on 17 June 1946 a corrected copy of his sworn testimony), was once asked by Reichsführer SS Himmler whether articles of value which had been seized by the SS in the Eastern Territories could be deposited in the vaults of the Reichsbank. Funk answered this question in the affirmative and told Himmler that he should delegate somebody to discuss the matter with Vice President Puhl, and settle the details. Himmler at that time told Funk that his Gruppenführer Pohl could do this and that the latter would get in touch with Vice President Puhl. That was all that Funk at that time, I believe in 1942, had discussed with Reichsführer SS Himmler and which he on that occasion also repeated to his Vice President Puhl who was actually directing the business of the Reichsbank and therefore responsible for this affair.

There was nothing extraordinary in this question of Reichsführer SS Himmler, at least nothing which Funk could recognize. For, as far as Funk knew, the SS was at that time in charge of the entire police service in the Occupied Eastern Territories. For that reason it often had to confiscate valuables just as the ordinary police did in the interior, that is, within Germany. Moreover, all gold coins, foreign currency, *et cetera*, in the Occupied Eastern Territories had to be turned in according to law, and these deliveries in the Eastern Territories were naturally made to the SS, because there were no other state offices equipped for that purpose. Funk also knew that the concentration camps were under the direction of the SS and thought that the valuables which were to be given to the Reichsbank by the SS for safekeeping belonged very probably to that category of valuables which the entire population was obliged to deliver.

Finally, as has been ascertained in the course of this Trial, the SS was constantly just as much engaged in the fighting in the East as the Armed Forces, and like the latter the SS had also collected so-called booty in the abandoned and destroyed towns of the East and delivered it to the Reich. Therefore, there was nothing at all extraordinary for Funk in the fact that the SS possessed gold and foreign currency and brought it in for delivery in the regular way.

Now, the essential point in this whole business is the question whether the Defendant Funk knew or saw that among the objects delivered by the SS there were unusual quantities of gold spectacle frames, gold teeth, and similar objects which had come into the hands of the SS not through legal but criminal confiscations. If—and I emphasize, Gentlemen, if—it could be proven that the Defendant Funk had seen such objects in the deposits of the SS, this would naturally have caused him some surprise. But we heard the witness Puhl say in the most positive way that the Defendant Funk had no knowledge of this and, indeed, that Vice President Puhl himself knew no further details about it. In any case Funk never saw what particular gold objects and what quantities the SS delivered.

Now, it has been said against Funk that he himself entered the vaults of the Berlin Reichsbank several times, and from this one felt entitled to draw the conclusion that he must have seen what objects had been delivered to the Reichsbank by the SS. This conclusion is obviously wrong because the evidence shows that during the entire period of the war Funk went to the vaults of the Reichsbank only a very few times for the purpose of showing these vaults and the bullion of the Reichsbank stored there to special visitors, especially foreign guests. But on those few visits to the vaults he never saw the deposits of the SS. He never observed what in particular the SS had deposited in his bank. This is established beyond doubt, not only by the sworn statement of the Defendant Funk himself, but also by the oral testimony of Vice President Puhl and Reichsbank Councillor Thoms here in this courtroom. This Prosecution witness, who is certainly free from suspicion and who by his own admission volunteered to testify, has declared here under oath that the valuables were delivered by the SS in locked trunks, boxes, and bags and were also stored away in these containers, and that Funk was never present in the vaults when the bank employees made an inventory of the contents of an individual box or trunk. The witness Thoms, who was in charge of these vaults, never saw the Defendant Funk there at all. Therefore, Funk neither knew of the proportions which the deliveries of the SS gradually assumed in the course of time, nor did he know that the deposits contained jewelry, pearls, and precious stones, and also spectacle frames and gold teeth. He never saw any of those things and none of his officials ever reported to him about them either.

Now it is the opinion of the Prosecution that Funk, as President of the Reichsbank, surely must have known what was kept in the vaults of his bank; but this conclusion is also evidently mistaken and does not take into consideration actual conditions in a large central issuing bank. Funk, who was also Reich Minister of Economics, had in his capacity as President of

the Reichsbank no occasion whatever to bother about the deposit of an individual customer, even if this happened to belong to the SS. As President of the Reichsbank he did not bother about any deposits of other clients of his bank either, since this was not his job. On only one occasion, following a suggestion of his Vice President Puhl, he asked Reichsführer SS Himmler—this was during his second conversation with him—whether the valuables deposited by the SS in the Reichsbank could be converted into cash in the legal course of business at the Reichsbank. Himmler gave his permission and Funk passed this information on to his Vice President Puhl. But in this matter he was only thinking of gold coins and foreign currency, that is to say, of those particular valuables which had to be turned in to the Reichsbank as a matter of course in the German Reich and which could be and had to be converted into cash by the Reichsbank. The idea never occurred to Funk that the deposits might contain gold teeth or other such remarkable objects which had their origin in criminal acts in concentration camps. He heard about these things to his horror for the first time here in the courtroom during the Trial.

The only remaining point in the statement of the witness Puhl which might excite a certain amount of suspicion, Your Honors, was the question of preserving secrecy, which in fact played a very important part indeed in the examination of the witness. Vice President Puhl stated here at the beginning of his testimony that the Defendant Funk had told him that the matter of the SS deposits must be kept especially secret. Funk, on the other hand, has always denied this in the most insistent manner and declared under oath that he never talked to Puhl at all about any such secrecy. Thus at the very beginning, here in the courtroom, we had one statement pitted against another, oath against oath. Vice President Puhl's statements regarding this point, however, seemed somewhat contradictory from the beginning. For on one occasion Vice President Puhl said that this secrecy had not struck him as anything extraordinary, since after all secrecy is preserved about everything that occurs in a bank. In answer to a special question, Puhl then stated repeatedly that he did not notice at all that the Defendant Funk had supposedly spoken about preserving secrecy.

When, however, the affidavit of the witness Thoms of 8 May 1945 was read and pointed out to the witness Puhl, the latter finally stated here under oath on 15 May 1946 that it was plainly visible from this affidavit that the desire for secrecy emanated from the SS. The SS considered it important that this business should be transacted secretly. The SS, as Puhl said, had been the ones originally responsible for the imposition of secrecy. This was the literal conclusion of the witness Puhl's sworn statement and at the end of

it he again confirmed that the obligation for secrecy was desired and imposed by the SS.

The initial contradiction regarding this point between the statements of the Defendant Funk and those of the witness Puhl was hereby completely eliminated, Your Honors, in favor of the defendant. Puhl himself could no longer maintain his original assertion that it was Funk who had ordered the SS deposits to be kept secret. Therefore, in arriving at your verdict, you must proceed from the premise that the statement of the Defendant Funk is correct in this point also and deserves preference, for he has declared under oath from the very beginning and with the utmost certainty that he himself knew nothing about keeping anything secret and that he had never spoken of any such secrecy to Puhl, either. Moreover, there was absolutely no reason for Funk to say anything to Puhl about any special secrecy, since Funk was obviously of the opinion that the valuables involved were only of the kind which had to be turned in and confiscated, and which came within the regular lawful business of the Reichsbank and need not be kept secret, regardless of whether these things which had to be turned in were the property of a prisoner in a concentration camp or the property of a free individual.

It was never made clear by the evidence submitted why the SS on their part stressed the importance of preserving secrecy to Vice President Puhl and why, furthermore, the SS opened the deposit in the name of Melmer instead of in the name of the SS, and the Prosecution for their part did not attach any importance to clearing up this point. However, in any case, the demand of the SS for secrecy evidently did not strike Vice President Puhl as unusual any more than it did the witness Thoms who had nothing at all to do with the matter but who confirmed the fact that this secrecy was nothing unusual. But nevertheless, Your Honors, one thing is still a fact, namely, that nothing was kept secret from the numerous employees of the Reichsbank about exactly what kinds of objects were involved. On the contrary, the Reichsbank personnel was even entrusted by Vice President Puhl with the task of sorting the valuables delivered and converting them into cash at the pawn shop. Dozens of Reichsbank officials who regularly entered the vaults could see the various articles every day, and the Reichshauptkasse, an institution entirely separate from the Reichsbank, from time to time settled accounts for the conversion of valuables into cash with the Reich Ministry of Finance in a quite open and thoroughly routine way. Naturally, the Defendant Funk did not know, and still does not know today, whether and to what extent agreements had been reached between the Finance Minister and

Reichsführer SS Himmler for accounting for the gold articles to the Reich. He was never interested in it, and indeed it did not concern him.

From all these facts, as shown by the evidence, one can readily conclude that Funk himself knew nothing about the things which were turned over to the Reichsbank at the time, and that even Vice President Puhl and Reichsbank Councillor Thoms did not think there was anything bad connected with the things, although Thoms, at least, had seen of what the deposits actually consisted.

For this reason there is no longer any need to examine the obvious question as to whether the initial statements of Puhl with regard to the deposits of the SS should not have been received with a certain skepticism from the very beginning. Puhl apparently had the understandable desire at least by his written affidavit to shift responsibility from himself to the shoulders of his President Funk in order to free himself of his own responsibility for the unpleasant facts of the case when he was told during his imprisonment that the gold articles of the SS consisted mostly of spectacle frames and gold teeth and had been taken from victims of concentration camps. At the beginning, even Puhl apparently did not see anything wrong in the whole business. For him the matter was an ordinary business transaction of the Reichsbank for the account of the Reich, which he dealt with in the same manner as he dealt with gold articles and foreign currency that had been confiscated by the Customs Investigation Office or the Office of Control for Foreign Currency or any other State authority. Gentlemen, whatever one may judge the responsibility of Vice President Puhl to be, at all events these things lie outside the responsibility of the Defendant Funk who is the only one with whom you are concerned in connection with this point here. In the period after this time Funk had only two or three very brief and unimportant conversations with Puhl regarding these gold deposits with a view to converting into cash gold coins and foreign currency delivered in the regular way. Outside of this, Funk did not concern himself at all with this whole matter any more. He knew even less about the matter than Puhl, and it is not without significance that Puhl declared here under oath that he would never have permitted these gold objects to be deposited in the Reichsbank at all if he had had the slightest notion that the things had been taken from concentration camp victims under criminal circumstances by the SS. If Vice President Puhl did not know that and could not have guessed it, then Funk could have known even less about it, and Puhl's initial statement which was to the effect that—as he said at the time—"the gold articles had been accepted by the Reichsbank with Funk's knowledge and agreement and had been converted into cash with the

assistance of the Reichsbank personnel," was a grossly misleading statement to the Prosecution. Subsequently during his imprisonment when Puhl first learned of the true circumstances, he surely must have felt the same compunctions as Funk, however innocent the latter was in the case. In conclusion, Puhl declared here under oath that he would not have tolerated such transactions either, and that he would have brought the matter to the attention of the Directorate of the Reichsbank as well as to that of President Funk if he had known that the valuables were taken from victims of concentration camps and had been informed about the nature of these valuables.

In connection with this topic, therefore, I come to the following conclusion: The Reichsbank certainly transacted business for the account of the Reich, the subject matter of which was derived from criminal acts of the SS; but the Defendant Funk knew nothing of this. He would not have tolerated such transactions had he known the true circumstances. Therefore, he cannot be made criminally responsible for this.

The same is true, Your Honors, with regard to Reichsbank credits for the business agencies of the SS, concerning which I shall limit myself to a few sentences. In his written affidavit of 3 May 1946 the witness Puhl has given a completely misleading account of this matter also. For he stated originally that credits of 10 to 12 million Reichsmark furnished by the Gold Discount Bank upon the instruction of the Defendant Funk were used—and I am now quoting literally: "for financing production in SS factories by workers from concentration camps."

In his oral examination as a witness, Puhl then was asked whether Funk had any knowledge that persons from concentration camps were employed in these factories at all. In reply to this, Puhl declared literally: "I am inclined to assume this, but I am not in a position to know it." Therefore, he was not able to give any definite evidence concerning Funk's knowledge, but only to express a conjecture. In contrast to this, Funk's own statement in regard to this matter is quite clear and convincing. It was to the effect that he knew, indeed, about the request for credit by the SS, and that he even granted it, but that he knew nothing about the nature of the SS enterprises concerned and about the people who were employed in them. Funk stated this under oath. Accordingly, this credit transaction, which moreover occurred about 2 years before the affair of the SS gold deposits, that is, prior to 1940, incriminates neither the Defendant Funk nor the witness Vice President Puhl. At that time, in 1940, neither of them was acquainted with the conditions in the concentration camps. They only learned about them much later, that is, in the course of this Trial. Nor did the Defendant Funk

know that persons from the concentration camps were working in the aforementioned SS factories for which the credit was intended.

Gentlemen, in this connection it appears necessary to devote a few more sentences to a discussion of the question whether Funk ever visited a concentration camp. The witness Dr. Blaha, who was examined here, stated that Dr. Funk was once in Dachau in the first half of 1944. This visit was supposed to have occurred as a sequel to a conference of the Finance Ministers at Berchtesgaden, or in some other place in this region, in which Funk is said to have participated. Yet, Gentlemen, when he was examined here, the witness Dr. Blaha was unable to say that he had personally seen the Defendant Funk in Dachau, but had only heard from camp inmates at Dachau—that is, from other persons—that the Reich Minister of Economics, Funk, was with many other visitors allegedly present. He did not see him; nor would he have known him if he had. From the very beginning Funk himself has flatly denied this visit to Dachau. He also stated this under oath, and the affidavit made by his constant companion Dr. Schwedler (contained in the Funk document book under Number 13 submitted to you) proves beyond a doubt that Funk never was in a concentration camp. Dr. Schwedler is in a position to know this, as at that time he was the constant companion of the defendant and knew where Funk was from day to day. Moreover, Funk was never a Finance Minister, as the witness Dr. Blaha assumed, and never took part in a conference of Finance Ministers. Therefore, it appears beyond any doubt that what the witness Dr. Blaha stated here purely from hearsay is based on false information, or he has confused Funk with another visitor, which was very easily possible since the Defendant Funk was comparatively unknown to the public. The conclusion, therefore, is that Funk never visited a concentration camp and never personally became aware of the conditions prevailing in such camps.

Now, by this assertion Funk by no means wishes to allege that he knew nothing at all about the existence of concentration camps. Funk was naturally cognizant of the fact, just as almost any other German, that there were concentration camps in Germany after 1933; just as he knew that there were and still are penitentiaries, prisons, and other penal institutions in Germany.

But what he did not know, and what I want to stress here, was the very large number of such concentration camps and the hundreds of thousands, even millions, of their inmates. Equally unknown to him were the countless atrocities committed in these camps, which first became known only in this Trial. In particular it was only during this Trial that Funk learned that there were extermination camps which murdered millions of Jews. Funk had no

knowledge of this; he has stated this under oath and it also appears absolutely credible, for one of the most important results of this Trial, in the opinion of the Defense, consists in providing proof of the fact that the German people in general knew nothing about the large number of concentration camps or the conditions within them, but that on the contrary those conditions were kept secret in such a cunning and cruel way that even the highest officials of the Reich including the very ministers knew nothing about them.

Your Honors, the Defense have now presented their views on that part of the Indictment which, had it been true, would have tragically incriminated the man Funk. One may think as one pleases about acts of violence during a political and economic struggle, especially in stormy revolutionary periods, but in the opinion of the Defendant Funk himself there can be no disagreement on one point, namely, with regard to the concentration camp atrocities committed for years, especially against the Jewish population. Anyone who participated in such unheard-of atrocities should be made to atone for them in the severest way, according to the opinion of the entire German people.

That is also the point of view of the Defendant Funk, which he expressed here on 6 May 1946 when he replied to the American prosecutor from the witness stand that as a man and as a German he felt deeply guilty and shamed for the crimes which Germans committed against millions of poor people.

Gentlemen, I have now reached the end of my consideration of the Funk case as far as criminal law is concerned, and that is the duty of the Defense in this Trial.

The examination of the evidence with regard to the Funk case has, in the opinion of the defendant, produced proof that a legal guilt, a criminal guilt, on his part does not exist, and that he can ask you for his acquittal with a clear conscience because he has never committed any criminal acts in his life.

Your task as judges will now be to find a just verdict for the Defendant Funk, a verdict which will not make him atone for the crimes of others, crimes he could not prevent and which he may not even have known about, but a verdict which only establishes the degree of his own guilt and not the degree of his political guilt, but of his criminal guilt which is the sole object of these proceedings. This verdict should be valid not only for today but also recognized as just in the future when we shall view these terrible events in the proper perspective and dispassionately as we would ancient history; a verdict, Your Honors, which will not only satisfy the nations which you

represent, but which will also be recognized as just and wise by the German people as a whole; a verdict, finally, which is not only destructive, retaliatory, and which will sow hatred for the future, but one which will make it possible for the German people to move forward toward a happier future of human dignity and charity, of equality and peace.

THE PRESIDENT: Mr. Dodd, will you or Sir David deal with this. Sir David, I have got a document drawn up by the General Secretary which shows in the first place, in the case of the Defendant Göring, that there are four interrogatories which have been submitted, and to which the Prosecution has not objected. Is that right?

SIR DAVID MAXWELL-FYFE: That is so, My Lord, so there is no further comment with regard to that first application.

THE PRESIDENT: Yes. Then, with reference to the Defendant Ribbentrop, there are two affidavits to which there is no objection, and there are three further affidavits which have not been received, I understand.

SIR DAVID MAXWELL-FYFE: That is so, My Lord.

THE PRESIDENT: And one document to which the defendants' counsel wants to refer in its entirety, namely, TC-75, is that right?

SIR DAVID MAXWELL-FYFE: Yes, My Lord, that is so. There is no objection to that.

THE PRESIDENT: Perhaps I had better go on to the end of the documents and then call upon Dr. Horn for what he has got to say about those three, because as far as I can see, there are only these three documents and an affidavit for Seyss-Inquart from a man called Erwin Schotter, and another from a man called Adalbert Joppich, which have not yet been received.

SIR DAVID MAXWELL-FYFE: That is so, My Lord.

THE PRESIDENT: And three letters from Seyss-Inquart to Himmler which have not yet been produced.

SIR DAVID MAXWELL-FYFE: That is so, My Lord.

THE PRESIDENT: Also, in the case of Fritzsche there are two interrogatories of Delmar and Feldscher which have not yet been received.

SIR DAVID MAXWELL-FYFE: My Lord, with regard to the three letters of the Defendant Seyss-Inquart, they have been received, but they have not yet been translated into French, and I think, My Lord, the simplest way would be if the Tribunal took it that provisionally there is no objection but that the French Delegation reserve their right to make any objection if, upon receiving the translation, they find there is any objection to make.

THE PRESIDENT: Yes.

SIR DAVID MAXWELL-FYFE: My Lord, the French Delegation will let the Tribunal know if they find there is any objection.

THE PRESIDENT: Yes. Now, with reference to the rest, so far as the Prosecution are concerned, what are the objections, if any?

SIR DAVID MAXWELL-FYFE: My Lord, I think the only objection there is concerns the application of Dr. Servatius for the Defendant Sauckel. Your Lordship sees that after the interrogatories granted by the Tribunal there are certain documents which were introduced on 3 July by the Defendant Sauckel to be considered by the Tribunal, and then there is a number which is lettered "A" to "I." The Prosecution suggests that these documents are cumulative of the large number of documents already introduced on behalf of this defendant, and, My Lord ...

THE PRESIDENT [*Interposing*]: Just one minute, Sir David. These documents "A" to "I," were they applied for after the case had been closed?

SIR DAVID MAXWELL-FYFE: They were submitted on 3 July, Sir. That would be after the case had been closed.

THE PRESIDENT: But that was at the time, was it not, when we were asking for supplementaries?

SIR DAVID MAXWELL-FYFE: Yes, at the very end.

THE PRESIDENT: That very day?

SIR DAVID MAXWELL-FYFE: Yes. My Lord, I am sorry, but the case was not technically closed, for that day was open for any defendant to put in.

THE PRESIDENT: Are these documents which you have just been referring to—"A" to "I"—are they already all in the document book?

SIR DAVID MAXWELL-FYFE: Dr. Servatius tells me they are.

My Lord, I have just been having a word with Dr. Servatius and he says that the one to which he attaches the greatest importance is "A," the decree by the Defendant Sauckel as to return transportation of sick foreign workers. My Lord, I am quite prepared on that assurance by Dr. Servatius not to make any objection to number "A," and Dr. Servatius, on the other hand, says that he does not press for the others.

My Lord, there is another application which has just come in on behalf of the Defendant Sauckel for a document. It is an affidavit by the defendant himself, dated 29 June 1946. The Prosecution have no objection to the application.

My Lord, I think the only other matter with regard to the Defendant Sauckel is with regard to an affidavit from a witness called Falkenhorst. My Lord, that again, the Prosecution submits, is cumulative.

THE PRESIDENT: You say Falkenhorst?

SIR DAVID MAXWELL-FYFE: Falkenhorst, Sir. My Lord, it is the very last application on my list.

DR. ROBERT SERVATIUS (Counsel for Defendant Sauckel): Mr. President, may I make a statement concerning the witness Falkenhorst? This witness was called for Bormann; I waived his examination and submitted this affidavit with the approval of the Tribunal, and since, in my opinion, it was approved, I waived the witness. I assume that this is quite clear and is confirmed by the Prosecution also.

THE PRESIDENT: Do you mean, Dr. Servatius, that the affidavit from Falkenhorst had already been granted before?

DR. SERVATIUS: I assume it was granted at that time. The witness was waiting outside and I was asked whether I would like to question him, and I said in reply that I had an affidavit which was limited to one particular incident and it would be sufficient if I could submit the affidavit. He was the last witness who was supposed to be examined here, after the end of the actual hearing of evidence.

SIR DAVID MAXWELL-FYFE: My Lord, I do not insist in the opposition in these circumstances. My Lord, that is all the comment the Prosecution have to make.

THE PRESIDENT: What about these two affidavits asked for by Dr. Steinbauer from Erwin Schotter and Adalbert Joppich?

SIR DAVID MAXWELL-FYFE: My Lord, we have not got these yet. As I understand it, they have been admitted by the Tribunal subject to any objection, and I am afraid we cannot tell until we have seen them.

THE PRESIDENT: I see; well, then for the rest you have no other objections?

SIR DAVID MAXWELL-FYFE: No other objections.

THE PRESIDENT: Sir David, we have just had another document placed before us which contains an application on behalf of the Defendant Sauckel to call as a witness his son Friedrich Sauckel. The Prosecution has objected to that on the ground of irrelevance and cumulativeness.

SIR DAVID MAXWELL-FYFE: Yes, My Lord, that is the position.

It did not seem, on consideration of the outline of the evidence, that the evidence of the defendant's son would contribute anything fresh.

THE PRESIDENT: And that application was made after the 3 July? No, I see that is wrong. It was submitted before, but it was not mentioned on 3 July.

DR. SERVATIUS: Mr. President, it was an application to bring the witness here from England, since presumably he can give information regarding a number of things. I have not yet made a formal application. It was just a request to have him brought from England to Nuremberg for the purpose of finding out whether he knows anything of importance, as he claims.

SIR DAVID MAXWELL-FYFE: My Lord, I would not make objection to the defendant's son being brought here for the purpose of Dr. Servatius' having a talk with him and seeing whether he can contribute anything.

THE PRESIDENT: The difficulty that these sorts of applications put the Tribunal in is that the case never closes.

SIR DAVID MAXWELL-FYFE: Yes, My Lord, I quite agree.

DR. SERVATIUS: I did not know that the witness was in England. He was a prisoner and there had been no news about him previously.

THE PRESIDENT: Then, Sir David, do we have an affidavit from the Defendant Sauckel himself which you have already dealt with?

SIR DAVID MAXWELL-FYFE: Yes, My Lord.

THE PRESIDENT: Then there is an affidavit by the Defendant Jodl on behalf of Kaltenbrunner; the application has been received at the General Secretary's office on 5 July.

SIR DAVID MAXWELL-FYFE: Yes, My Lord.

THE PRESIDENT: That was after the last date when the defendants' counsel were asked for their applications.

SIR DAVID MAXWELL-FYFE: Well, My Lord, I am afraid I have not been able to collect the views of the Prosecution on that point.

My Lord, the substance of that affidavit was contained in Dr. Kauffmann's speech. I do not think it really has any materiality, I mean that there is any real—that there can be any objection to the affidavit, because I am almost positive I remember this passage occurring, or an equivalent passage, giving the Defendant Jodl's views on Kaltenbrunner in Dr. Kauffmann's speech. My Lord, therefore, I do not think we should occupy time discussing it and therefore I think we should let the affidavit go in.

THE PRESIDENT: Very well. Then there is an application from the Defendant Rosenberg for a document entitled "Tradition in Present Times." That has been objected to as cumulative.

SIR DAVID MAXWELL-FYFE: Yes, My Lord.

THE PRESIDENT: Dr. Thoma, are you wanting to say anything in support of that application or is it sufficiently covered by your speech?

DR. THOMA: I am of the opinion that it has been sufficiently dealt with in my speech.

THE PRESIDENT: Then, Dr. Horn, there are two affidavits, one from Ribbentrop and one from Schulze, not yet put in. Do you want them?

DR. MARTIN HORN (Counsel for Defendant Von Ribbentrop): Mr. President, there must be some mistake about the Schulze affidavit. I have not submitted any Schulze affidavit or made any application for it.

THE PRESIDENT: It was a mistake. Then, as to Ribbentrop's affidavit, are you asking as to that or have we already dealt with that?

DR. HORN: No, I am asking that official cognizance be taken of the affidavit of Ribbentrop, and of Document TC-75. The other two affidavits of Thadden and Best have already been approved.

THE PRESIDENT: Yes. Why do you desire the Defendant Ribbentrop to make an affidavit? He has given his evidence in full. Is it something that has arisen since?

DR. HORN: The Defendant Ribbentrop only commented on a few documents which were submitted to him during his cross-examination when he had an opportunity to speak only very briefly about them. I did not want to make my final speech any longer with a detailed discussion of the other documents and, therefore, I have submitted this affidavit and beg the Tribunal to approve it.

THE PRESIDENT: Then, with regard to TC-75 ...

SIR DAVID MAXWELL-FYFE: My Lord, that is one of our original British documents. I have no objection to Dr. Horn using it.

THE PRESIDENT: How about the translation, though? I suppose it is a German document, is it not?

DR. HORN: Yes, it is a German document which was only translated in part and I have referred to the entire contents in my final plea.

THE PRESIDENT: Is it a very long document or not?

DR. HORN: No, it has only nine pages, Mr. President. The Prosecution submitted one page of the document to the Court in evidence. Then later I ascertained that there were two copies of the document. I then took the second copy, which represents the complete document, and submitted it to the Tribunal, and have had it translated.

THE PRESIDENT: It has been translated?

DR. HORN: Yes.

THE PRESIDENT: Very well then, that is all right then.

Now, Dr. Steinbauer, what about these two affidavits that you are asking for, one from Erwin Schotter and another from Adalbert Joppich?

DR. GUSTAV STEINBAUER (Counsel for Defendant Seyss-Inquart): I have submitted the two documents for translation and since the Translation Division is very busy I have not received the translation yet. But I should like to submit the two originals to the Tribunal under the numbers already given, Seyss-Inquart-112 and 113.

THE PRESIDENT: Has the Prosecution seen the substance of the affidavits or not?

SIR DAVID MAXWELL-FYFE: No, My Lord, we have not. My Lord, they are very short affidavits. I will ask someone to read them in German through the day and let the Tribunal know before the Tribunal rises tonight.

THE PRESIDENT: Was the application made before 3 July, or when was it made?

DR. STEINBAUER: Yes, on 3 July exactly. I received both of these two documents on 3 July through the General Secretary and presented them on the same day.

THE PRESIDENT: The Tribunal will consider the matter then and they will be glad to hear from the Prosecution if they have any objection.

DR. STEINBAUER: Mr. President, may I present one more document on this occasion? The Tribunal had approved the interrogation of Dr. Reuter and the day before yesterday I received the answer with the questions of the Prosecution ...

THE PRESIDENT: What was it you were saying, Dr. Steinbauer?

DR. STEINBAUER: That I received the approved document containing the interrogation of the witness, Dr. Reuter, on Saturday in a German and English translation. I should like to submit the original to the Tribunal under Number 114.

THE PRESIDENT: What is the name of the person who was interrogated?

DR. STEINBAUER: The physician, Dr. Gero Reuter. He was questioned about health conditions in the Netherlands. The Tribunal expressly granted me that interrogatory.

THE PRESIDENT: Well, that will be considered, then.

DR. STEINBAUER: Then I shall submit it to the Court under Number 114.

THE PRESIDENT: Sir David, perhaps you can look at that later.

SIR DAVID MAXWELL-FYFE: Certainly, My Lord. I understood that the Tribunal had already approved and that this was just putting in the answer.

THE PRESIDENT: Yes, that is all.

SIR DAVID MAXWELL-FYFE: Then, My Lord, there can be no objection.

THE PRESIDENT: I ought to say that in order to save time, all these documents which we are now dealing with must be taken to be offered in evidence now because some of these defendants' cases have been finally dealt with.

SIR DAVID MAXWELL-FYFE: Yes, My Lord.

THE PRESIDENT: And they must, therefore, be given the appropriate numbers as exhibits, and defendants' counsel must see to that. They must give numbers to them and give them in with those numbers to the General Secretary so that the documents will be identified as exhibits on the record.

SIR DAVID MAXWELL-FYFE: My Lord, I appreciate that. I gather that Dr. Steinbauer has just given that the Number 114.

THE PRESIDENT: Yes, and the same applies to all the other defendants' counsel, the counsel for Göring and Ribbentrop and the counsel for Raeder and the other defendants, because these are dealing with a considerable number of interrogatories and affidavits, all of which ought to have exhibit numbers.

SIR DAVID MAXWELL-FYFE: If Your Lordship pleases.

My Lord, Dr. Siemers just wanted to know that his applications were covered. I think he is quite safe.

THE PRESIDENT: Yes. Well, then, the only thing that remains is Dr. Fritz's on behalf of the Defendant Fritzsche. There are two interrogatories which have not been received, as I understand, from Delmar and Feldscher. Those have been granted, and the interrogatories and the answers will be put in when you get them.

SIR DAVID MAXWELL-FYFE: That is the way I understand it, My Lord.

THE PRESIDENT: Well, then, the Tribunal will consider all these matters and make the appropriate order upon it.

SIR DAVID MAXWELL-FYFE: If Your Lordship pleases.

THE PRESIDENT: We will adjourn now. Wait a minute, wait a minute!

DR. EGON KUBUSCHOK (Counsel for Defendant Von Papen): In the case of the Defendant Von Papen there are still a number of interrogatories which have not been received. In the meantime, I have received four interrogatories with answers, but they are still with the Translation Division. Three interrogatories have not yet come back. I request an opportunity to present them later on.

THE PRESIDENT: They have been granted before, I suppose? Have they been granted?

DR. KUBUSCHOK: Yes, they had already been granted, with the exception of one affidavit which I have also dealt with here but which has not yet been translated and has been in the Translation Division for some time.

THE PRESIDENT: Yes, but the application for that interrogatory had been allowed, I suppose?

DR. KUBUSCHOK: I presented this application recently. I was told to have this affidavit translated, but I have not yet received the translation. I shall submit this document together with the others as soon as I receive them from the Translation Division.

THE PRESIDENT: Very well. We will adjourn now.

[*A recess was taken*.]

THE PRESIDENT: Go on, Dr. Dix.

DR. DIX: Mr. President, Gentlemen of the Tribunal. A mere glance at the dock reveals the singularity of Schacht's case and the story of his imprisonment and defense. There in the dock sit Kaltenbrunner and Schacht. Whatever the powers of the Defendant Kaltenbrunner may have been, he was in any case Chief of the Reich Security Main Office. Until those May days of 1945, Schacht was a prisoner of the Reich Security Main Office in various concentration camps. It is surely a rare and grotesque picture to see jailor and prisoner sharing a bench in the dock. At the very start of the Trial this remarkable picture alone must have given cause for reflection to all those participating in the Trial: judges, prosecutors, and defense counsel alike.

Schacht was banished to a concentration camp on the order of Hitler, as has been established here. The charge against him was high treason against the Hitler regime. The judicial authority, the Peoples' Court, headed by that bloodthirsty judge, Freisler, would have convicted him, had not his imprisonment turned into detention by the victorious Allied Powers. Since the summer of 1944 I was assigned to defend Schacht before Adolf Hitler's

Peoples' Court; in the summer of 1945 I was asked to conduct his defense before the International Military Tribunal. This, too, is in itself a self-contradictory state of affairs. This, too, compels all those participating in the Trial to reflect on the personality of Schacht. One involuntarily recalls the fate of Seneca; Nero, as a counterpart to Hitler, put Seneca on trial for revolutionary activities. After the death of Nero, Seneca was charged with complicity in Nero's misgovernment and cruelties, in short, with conspiring with Nero. A certain wry humor is not lacking in the fact that Seneca was then declared a pagan saint by early Christianity as early as the fourth century. Although Schacht does not indulge in such expectations, this historical precedent nevertheless forces us to remain always conscious of the fact that the sentence to be pronounced by this High Court will also have to be justified before the judgment seat of history.

The picture of the Third Reich has been revealed to the Tribunal in a thorough and careful presentation of evidence. It is a picture with a great deal of background. An opportunity was given to depict this background also, as far as it was possible within the limits of such a thorough-going investigation entailing a judicial presentation of evidence which, to be sure, though thorough enough, was nevertheless concluded as soon as possible according to the requirements of the Charter.

In order to learn what it was like under Hitler in German countries, there is still enough which has been left to the intuition of the Court. It is not possible, and never will be possible, to understand Hitler Germany from a constitutional point of view, according to the scholarly conceptions and views of people with a legal mind. As a scholarly topic, "The Constitution under Adolf Hitler" is a *lucus a non lucendo*. Mark my words, "The Constitution"—that is, the reduction of the Hitler State to a legal system, and not the attempt as made in the final plea by Jahrreiss, to explain the tyranny of a despot under the aspect of legal research. A scientific sociology of the Third Reich would, although feasible, be very difficult and therefore has not yet appeared.

Only very few Germans living in Germany knew the conditions and the distribution of power within those circles of people who were seemingly or actually called upon to contribute their share toward the formation of a political will. Most Germans will be surprised when this picture is unveiled. How much less possible was it for a foreigner to form a correct judgment of the constitutional, sociological, and inner political conditions of Hitler Germany at the time when the Indictment was presented. But a correct judgment of these things was the prerequisite for an Indictment correctly founded in both fact and law.

I am of the opinion that the members of the Prosecution were thereby confronted with a task which defied solution. I am furthermore of the opinion that the Prosecution would never have presented their criminal charges against the defendants under the count of a conspiracy if they had been able to see the distribution of political power in Hitler Germany in the same way as this may perhaps be today possible, although with great difficulty, for an intelligent, politically gifted observer and listener at this Trial.

A conspiracy within the meaning of the Indictment was, as a practical matter, not possible in Adolf Hitler's Third Reich, as my colleagues have already pointed out. The only thing possible in the Third Reich was a conspiracy by the opposition against Adolf Hitler and the regime. Several such conspiracies were formed, as was here proven. The relationship between conspirators is somewhat different than that between an accomplice and the chief perpetrator. The part to be played by the individual conspirator in the execution of the common plan may vary. Some, or a single one, of the conspirators may hold a leading position within the conspiracy. At all times, however, co-operation is necessary. Common usage of the term in itself precludes speaking of a conspiracy when only one commands and all the others are merely executive agents.

I am, therefore, of the opinion that that which was defined as a crime here in this hall can never constitute the elements of a conspiracy according to criminal law. Other legal factors which might enter into the question are of no interest to me as defense counsel for the Defendant Schacht, because no criminal charge whatsoever can be brought against Schacht personally, as an individual, and without connecting him with deeds of others—in other words merely on the basis of his own actions. Schacht himself desired only the permissible and the beneficial, and his actions served these intentions. To the extent that he erred politically, he is in all candor prepared for the verdict of history. Yet even the greatest dynamics of international law cannot penalize political error. If it did this the profession of the statesman and politician would become impossible. World history is more affected by mistakes and errors than by correct perceptions. According to Lessing's wise words, the perception of absolute truth is God's privilege. There remains for man as his greatest blessing only the quest for truth. *Nescis, mi fili, quanta stultitia mundus regitur*, as old Axel Oxenstierna once said, and he was probably right.

Schacht declared here that he felt that he had been most grossly deceived by Adolf Hitler. He thereby admitted that certain of his decisions and actions had been wrong. The Prosecution disputes Schacht's good faith

and imputes to him the *dolus* of having deliberately worked for a war of aggression as Adolf Hitler's financial agent, thereby becoming by implication criminally responsible, from the point of view of the conspiracy, for all the cruelties and atrocities which were committed by others during this war. The Prosecution itself was not able to produce any direct proof of these allegations. They attempted to do so first by means of alleged documentary evidence in the form of misinterpreted statements by Schacht, torn from their context. For this the Prosecution referred to witnesses who could not be made available for examination before this Court because some of them were absent and some had died. I recall, for example, the affidavits of Messersmith and Fuller, and Dodd's diary notes. Their lack of value as evidence was clearly set forth to the Tribunal by Schacht during his examination. In the interest of saving time I do not wish to repeat things which have already been said, and which surely must still be within the recollection of the Court.

The Prosecution further attempted to base its charges on actions of Schacht which had been established beyond reasonable doubt. All these arguments of the Prosecution are mistaken conclusions from allegedly incriminating circumstances. I shall confine myself to an enumeration of the most essential wrong conclusions. The others either result from these directly or by analogy.

Schacht was opposed to the Treaty of Versailles, says the Prosecution. That he was indeed. The Prosecution does not hold this opposition in itself against him. However, it concludes from this that Schacht wanted to do away with the treaty by force. Schacht favored colonial activity, says the Prosecution. He did so indeed. They do not reproach him for this, either, but conclude from this fact that he wanted to conquer the colonies by force, and so it goes on.

Schacht as President of the Reichsbank and Minister of Economics co-operated with Hitler, consequently he endorsed Nazi ideology. Schacht was a member of the Reich Defense Council, consequently he was in favor of a war of aggression. Schacht helped to finance rearmament during its first phase until early in 1938, consequently he wanted war. Schacht welcomed the union with Austria, consequently he approved of a policy of violence against that country. Schacht devised the "New Plan" in commercial policy, consequently he wanted to procure raw materials for armament. Schacht was concerned about the possibilities of livelihood for the excess population in central Europe, consequently he wanted to attack and conquer foreign countries and to annihilate foreign peoples. Over and over again Schacht warned the world against an anti-German policy of oppression and the moral

defamation of Germany, consequently Schacht threatened war. Because no written evidence has been found that Schacht resigned from his official positions as a result of his antagonism to war, the conclusion is that he resigned from these official positions merely because of his rivalry with Göring.

The list of these false conclusions could be continued *ad infinitum*. It finds its culmination in the fallacy that Hitler would never have come to power if it had not been for Schacht, that Hitler would never have been able to rearm if Schacht had not helped. But, Gentlemen, this kind of evaluation of evidence would convict an automobile manufacturer because a taxi driver, while drunk, ran over a pedestrian. In his speeches or writings Schacht never advocated violence or even war. It is true that after Versailles he pointed out again and again the dangers which would result from the moral outlawing and economic exclusion of Germany. In this opinion he is in the best international company. It is not necessary for me to cite before this Tribunal the numerous voices, not of Germans, but of members of the victor states, heard soon after the Versailles Treaty and all in the same tone as the warnings of Schacht. Moreover, the correctness of these objections to that treaty will be absolutely valid for all time. At no time did Schacht however recommend, or even declare possible, other ways than those of a peaceful understanding and collaboration. As an avowed economic politician, it was clearer to him than to anybody else that war can never solve anything, not even if it is won. In all of Schacht's utterances his pacifist attitude was expressed again and again; perhaps the shortest and most striking of them was that statement at the Berlin Congress of the International Chamber of Commerce, when Schacht in the presence of Hitler, Göring, and other exponents of the Government called out to the assembly: "Believe me, my friends, all nations desire to live, not to die!" This pronounced pacifist attitude of Schacht is indeed confirmed by all witnesses and affidavits.

For the few in the world—and I purposely say in the world, not only in Germany—who from the very beginning recognized Hitler and his Government for what they were, it certainly was a cause for anxiety and sorrow, or at the very least puzzling, to see a man like Schacht placing his services and his great professional ability at the disposal of Adolf Hitler after he had come to power. The witness Gisevius also shared this anxiety, as he has testified here. Later on he convinced himself of Schacht's honorable intentions through the latter's upright and courageous behavior in 1938 and 1939. In his interrogation Schacht outlined for us the reasons which caused him to act in this manner. I need not and do not wish to repeat them in the

interest of saving time. The evidence has not shown anything which would refute the veracity of this presentation by Schacht. On the contrary, I only refer for example to the affidavit of State Secretary Schmid, Exhibit Number 41 of my document book, containing detailed statements on this subject on Page 2, which are in complete agreement with Schacht's description. A consideration of the remaining testimony and affidavits as a whole leads to the same result. In order to understand the manner in which Schacht acted at that time both directly after the seizure of power as well as after he had recognized Hitler and his disastrous activity, it is absolutely necessary to form a clear picture of Adolf Hitler's pernicious spell and his system of government. For both are the soil in which Schacht's actions grew, and by which alone they can be explained. I realize that one could speak about this for days and write volumes about it if one wished to treat the subject exhaustively. However, I also realize that before this Tribunal short references and spotlights will be sufficient in order to gain the Tribunal's understanding.

The disintegrating collapse of imperial Germany in 1918 presented the German people, who were heterogeneously composed and had never become an organic unit, with a parliamentary democratic form of constitution. I venture to assert that all political thinking which is not directed by selfish motives must strive for democracy, if this is also understood to include the protection of justice, tolerance toward those of different convictions, freedom of thought, and the political development of humanity. These are the highest timeless ideals which, however, in their very constitutional forms actually harbor dangers in themselves. When democracy appeared for the first time on the European continent, reactionary political thinkers like Prince Metternich and the like opposed every democratic impulse, because they saw only the dangers of democracy and not its educative qualities and historical necessity. In pointing to these dangers they were unfortunately right. Perhaps the cleverest nation which ever lived, the Greeks of antiquity, had already pointed out the danger of democracy developing through demagogy to tyranny; and probably all philosophizing political thinkers from Aristotle to Thomas Aquinas, and down to the present time, have pointed out the danger of this development. This danger becomes all the greater if democratic freedom in the theoretical constitutional sense does not arise and grow organically, but becomes more or less a chance gift to a nation.

En fait d'histoire il vaut mieux continuer que recommencer, a great French thinker once said. Unfortunately, this has made Germany the latest and, it is to be hoped, the last example of a tyranny of a single despot

established by means of a diabolical demagogy. For there is no doubt that the Hitler regime was the despotism of an individual, whose parallel is to be found only in ancient Asia. In order to understand the attitude of any individual toward this Government—not only that of Schacht and of the Germans, but that of any person and any government in the world which has collaborated with Hitler, and on the part of the foreign countries such collaboration based on confidence was much greater toward Hitler than toward any government of the intermediate Reich or of the State of the Weimar Constitution—it is necessary to analyze the personality of this despot, this political Pied Piper, this brilliant demagogue who, as Schacht testified here in his interrogation with understandable agitation, not only deceived him, but also the German people and the whole world. In order to accomplish this deceit, Hitler was forced to bring under the spell of his personality innumerable clever and politically trained individuals besides Schacht, even those outside the German frontiers. He succeeded in doing this even with prominent foreigners, including those in leading political positions. I shall refrain from citing names and quotations to prove this point. The fact is generally known to the Tribunal.

I shall now skip the next lines and continue on Line 10 of the same page. How was this influence of Hitler possible, both in Germany and abroad? Of course, Faust also succumbed to Mephistopheles. In Germany, all the circumstances of the conditions prevailing at that time, which have been described here in the evidence given by Schacht and others, favored this influence. The complete collapse of the parliamentary party system and the resulting necessity, felt already at the time by the existing Government, of having to rule by emergency decrees enacted without parliamentary participation, thus establishing a dictatorship of ministerial bureaucracy as a forerunner of the Hitler dictatorship, produced in nearly every quarter a cry for stronger leadership. The economic crisis and unemployment opened the ears of the masses, as misery always does, to demagogic insinuations. The complete lethargy and inactivity of the center and leftist parties of the time also created among critical and intelligent observers, of whom Schacht assuredly was one, the inward readiness and longing to welcome spirited political "dynamics" and activity. If someone, like the sharp-witted and perspicacious Schacht, already at that time discovered faults and dark sides, he could hope, as Schacht did, by his very active penetration into the Movement or by co-operation with leading State departments quickly and easily to combat these shady aspects, which in any case beset every revolutionary movement. "When the eagle soars, vermin settle on his wings," replied the late Minister of Justice Gürtner, quoting from Conrad

Ferdinand Meyer's novel Pescara, when I pointed out these shady sides to him after the seizure of power. These considerations are in themselves reasonable and plausible. The fact that they contained a political error even in Schacht's case does not deprive them of their good faith and honest convictions. However, we ought not to forget that here, during the proceedings, we heard of a message from the American Consul General Messersmith, dating from 1933, in which he joyfully hails the report that decent and sensible people are now joining the Party too, as this gave reason to hope that radicalism would thereby cease. I refer to the relevant document submitted here by the Prosecution, Document Number L-198, report Number 1184 by the American Consul General Messersmith to the Secretary of State in Washington.

> "Since the election on March 5th, some of the more important thinking people in various parts of Germany have allied themselves with the National Socialist movement, in the hope of tempering its radicalism by their action within rather than from without the Party."

But what Messersmith very reasonably says of ordinary Party members of that time, naturally applies also, *mutatis mutandis*, to the man who offered his co-operation in a leading Government post. The reasons Schacht gave for his decision at the time to accept the post of President of the Reichsbank and later of Reich Minister of Economics are, therefore, thoroughly credible in themselves and have no immoral or criminal implication. Schacht, indeed, has acknowledged his activity. He only lacked the intuition to recognize at the outset the personalities of Hitler and some of his henchmen for what they were. But that is no punishable act; neither does it indicate any criminal intention. This intuition was lacking in most people both within and without the German frontiers. The possession of intuition is a matter of good fortune and a divine gift unfathomable by reason. Every man has his limitations, even the most intelligent. Schacht is certainly very intelligent, but in this case reason prevailed at the cost of intuition. In the last analysis this process can only be fully appreciated when those mysterious forces are taken into account which affect world events, and of which Wallenstein says: "The earth belongs to the evil spirit, not to the good" where he speaks of "the sinister powers of evil which lurk in the bowels of the earth." Adolf Hitler was a prominent example of these powers of darkness and his influence was all the more nefarious since he lacked the grandeur which accompanies Satan. He remained a half-educated, completely earth-bound bourgeois who also lacked any sense of the law. The Defendant Frank said truly of him that he hated jurists, because the jurist appeared to him as a man of law, as a

disturbing factor in the face of his power. Thus he could promise everything to everybody and not keep his promise, for a promise to him meant only a technical instrument of power, and signified no legal or moral obligation.

Neither was the pernicious influence of Himmler and Bormann detected by Schacht at this time, or probably by anybody else. Yet all those crimes that are now covered by the Indictment matured within this very trio, for to Himmler politics were identical with murder, and in his purely biological view he regarded human society as a breeding farm and never as a social and ethical community. A personality like Adolf Hitler, and his effect upon men, even including such intelligent men as Schacht, can only be correctly judged by following the prophetic vision of the poet, as I have already just tried to do, thereby achieving insight otherwise inaccessible to the mind of man. The demon undoubtedly became incarnate in Adolf Hitler to the detriment of Germany and the world, and perhaps I can summarize by quoting—and this is absolutely necessary for an understanding of Schacht's conduct, as well as that of all those others who deliberately and in all purity of heart offered their services to Hitler—a passage from Goethe, which in a few words sums up and discloses the mystery. Here lies the key to the understanding of all those who flocked to follow Hitler. May I quote from "Poetry and Truth," Part 4, Book 20, as follows:

> "Although the demoniac can manifest itself in everything material and immaterial, and indeed be singularly apparent in beasts, it assumes its most extraordinary form when associated with man, and constitutes a power which if not contrary to is yet a disturbing element in the moral world order. There are innumerable names for the phenomena which are brought to light in this way. For all philosophies and religions have tried both in prose and in poetry to solve this riddle and to dispose of the matter once and for all, which they may well continue to do in the future. But the demoniac assumes its most dreadful form when it manifests itself preponderantly in any one human being. During my lifetime I have had occasion to observe several such persons, either closely or from afar. They are not always the most distinguished persons, either in intellect or in talent, and they rarely excel by their goodness of heart; yet a tremendous force emanates from them, and they exercise an incredible power over every creature and even over the elements, and none can tell how far such influence will extend. No coalition of moral forces can prevail against them; it is in vain that the better part of humanity attempts to put them in disrepute as victims of deception, or as impostors. The masses are

attracted to them. They seldom or never find contemporary equals, and nothing short of the universe itself, against which they begin the fight, can overcome them; and these observations may perhaps have inspired that curious but monstrous saying: *Nemo contra Deum, nisi Deus ipse*."

I think I have demonstrated that the fact that he served Hitler does not incriminate Schacht and that it can by no means be concluded from this act that at that time he embodied the criminal deeds of Hitler and his regime into his own intentions. He did not even think them possible. Therefore he followed no dolus eventualis either; on the contrary: Insofar as the violent character of the regime disturbed him he believed he would be able, through his appointment to an important post, to contribute to the abolition and prevention of those attendant phenomena of which he also disapproved, and to aid Germany's recovery within his sphere of activity in a decent and peaceful manner.

That being the case, not the slightest reproach could be made against him for not only serving Hitler after the seizure of power, but also for helping him to gain control. This latter charge is, therefore, completely immaterial as evidence of criminal behavior or of criminal intent. However, there is no need for this argument at all, since as a matter of fact Schacht did not help Hitler to gain power. Hitler was in power when Schacht began to work for him. Hitler's victory was already assured when the July elections of the Reichstag in 1932 brought him no less than 230 seats. These represented about 40 percent of the total votes. There had been no such election result for any party for decades. But the immediate political future was thereby established under a Government headed by Hitler, thanks to the very rules of the German democratic Constitution and every other democratic constitution. Any other path was beset with the danger of civil war.

It was only natural that Schacht, who at that time honestly believed in Hitler's political mission, did not wish to take this path. It was likewise natural that he should take an active part whenever he believed that thereby he might be able to prevent harmful radicalism in the economic political domain. A wise French statesman says:

"Every epoch confronts us in some way with the task of creating benefits or preventing abuses. For this reason, in my opinion, a patriotic man can and must serve any government which his country appoints for itself."

By serving Hitler, Schacht, in his opinion, was serving his country and not Hitler. This opinion may have been the greatest of mistakes, and it has subsequently revealed itself as completely erroneous as far as Hitler was concerned, yet Schacht can never be criminally charged for acting as he did at that time, neither directly nor circumstantially. And indeed we must not forget that the Hitler of 1933 not only seemed to be a different man from the Hitler of 1938 or even of 1941, but actually was different. Schacht has already referred during his interrogation to this transformation, which was caused by the poison of mass worship. Moreover, the transformation of such personalities is a psychological law. History proves this in Nero, Constantine the Great, and many others. In the case of Hitler there exist many irreproachable witnesses for the truth of this fact, irreproachable in the sense that a purpose or an intention to violate the law, to raise terrorism to a principle, and to attack mankind with a war of aggression, can never be imputed to them. I merely wish to quote a few of them. I could multiply the quotations a hundredfold. In 1934 Lord Rothermere wrote an article in the *Daily Mail*, entitled: "Adolf Hitler from Close By." I quote only a few sentences:

> "The most prominent figure in the world today is Adolf Hitler ... Hitler stands in direct line with those great leaders of mankind who seldom appear more than once in two or three centuries ... it is delightful to see that Hitler's speech has considerably brightened his popularity in England."

THE PRESIDENT: Dr. Dix, I thought the Tribunal had refused to allow the writings of Lord Rothermere to be put in evidence or used.

DR. DIX: I interpreted the decision of the High Tribunal barring quotations from Lord Rothermere from the document book to mean—and this is also the reason given in the Indictment—that this was a matter for argument which should not be submitted in evidence as a fact, and that it would be irrelevant in the hearing of the evidence that Rothermere and others were of this opinion; and from this I drew the conclusion—and I am still of the opinion today that this conclusion is correct—that in the course of my argument, that is, in the course of my appraisal of the evidence, I could cite passages from the literature of the entire world, insofar as it is known, in order to support a line of thought. That Rothermere said that is not a fact which I want to submit to the Tribunal as evidence, but only in support of the assertion forming part of my argument that not only Schacht but also other intelligent and prominent people, even outside of Germany, at first had the same opinion of Hitler's personality ...

THE PRESIDENT: Dr. Dix, the Tribunal has already indicated its refusal to allow this to be used as evidence, because it does not pay any attention to the opinions expressed by this author. Therefore, we think it would be better if you went on to some other part of your argument.

DR. DIX: Then I ask—the Tribunal surely has a translation of my final speech before it—that I be allowed to quote a short passage from Sumner Welles, and then a passage, which seems very important to me, from the book written by the last British Ambassador. I should be very grateful if I could quote both of these two passages for, if one wants to prove that even an intelligent man can hold a certain opinion and is entitled to hold it, then I do not know but what the most obvious and convincing proof for that lies in the fact that other intelligent and completely objective people also held the same view. I shall lose an important point of my argument if I am not permitted to quote the two short passages, and I should like to ask that they be heard briefly; it is only the quotation from Sumner Welles and Henderson.

THE PRESIDENT: I have not said anything about Sumner Welles. It was only because we had expressly excluded the writings on this subject of Lord Rothermere that we thought it was inappropriate that you should quote him. I do not think we excluded these other books to which you here refer in your speech and therefore we thought you might go on to that.

DR. DIX: I quote from Sumner Welles' book *Time for Decision*, published in New York in 1944:

> "Economic circles in each of the western European democracies and the New World welcomed Hitlerism."

And it is only right, when Great Britain's last Ambassador in Berlin, even during the war, states on Page 25 of his book:

> "It would be highly unjust not to recognize that a great number of those who joined Hitler and worked for him and his Nazi regime were honest idealists."

Further on he makes this interesting remark:

> "It is possible that Hitler was an idealist himself in the beginning."

And the Government of the United Kingdom would surely never have concluded a naval treaty with Hitler Germany in April 1935, and therewith have contributed in the interests of justice to a modification of the Versailles Treaty, if they had not had entire confidence in Hitler and his Government. Finally, the same holds true for all the international treaties concluded by

Hitler, including the treaty concluded with Russia in August 1939. And it is a striking fact, even today, that so intelligent a man of such high ethical standing as the late British Prime Minister Chamberlain declared in a speech as late as January 1939—at a time when Schacht had already long been treading the dark paths of conspiracy against Hitler, in the face of the events of 1938—that he had gained the definite impression from Hitler's recent speech that these were not the words of a man who was making preparations to plunge Europe into another war. I do not doubt that these words were not spoken as a matter of tactics, but reflected the speaker's true opinion. Such examples could be quoted in great number. Is it desired to deny to a German, in 1933 and the following years, the right to come to the same opinion about Hitler in good faith?

The fact that Schacht did not enter office as Minister of Economies until after 30 June 1934 is not inconsistent with this either. Only in retrospect does the full enormity of these events become clear. In June 1934 we were still in the midst of revolutionary turmoil, and history will be able to show similar occurrences in any revolution of this kind. I do not have to give detailed proof of this, nor do I wish to do so. The events of 30 June provided just as little, if not less, motive for Schacht to turn away from Hitler with disgust, as they did for the governments in the world who not only continued diplomatic relations with Hitler in full confidence, but also rendered him great honors and allowed him to score important successes in foreign policy, especially after 1934.

If Schacht, however, cannot be criminally charged with the fact that he placed himself at the disposal of Hitler's Government, it is surely completely superfluous, indeed it would be beside the point, to attempt to make long statements in excuse of individual acts, such as his petition addressed to the Reich President in 1932, or his letter to Hitler in the same year. Anybody who knows life can find a thoroughly natural explanation for them in the fundamental attitude of Schacht. If this attitude is proved to be unobjectionable from the point of view of criminal law and the rules of evidence, then no such documents can be used in argument against Schacht. It is the principle that matters. The same holds true for Schacht's participation in the so-called meeting of industrialists. On this subject I should only like to remark by way of correction that Schacht neither presided at this meeting nor administered these funds exclusively for the National Socialist Party.

Now one witness here has passed judgment on Schacht's attitude toward the seizure and consolidation of power during this period:

"Schacht was an untrustworthy person," he said. "Schacht betrayed the cause of democracy at that time. I therefore refused in 1943 to join a Government proposing to overthrow Hitler with Schacht's participation."

This was the former Minister Severing who, according to his own statement, relinquished his ministerial chair and premises on 20 July 1932, when the Berlin Chief of Police and two police officers called on him, demanding his withdrawal with the assertion that they had been authorized to do so by the Reich President. Severing withdrew, as he said himself, to avoid bloodshed. In spite of the great respect which I feel toward Severing's clean political character, I am forced to my regret to deny him any right to pass competent judgment on statesmen who, unlike him and his Government coalition, did not remain lethargically passive. Severing and his political friends indeed bear a disproportionately greater responsibility than Hjalmar Schacht for Adolf Hitler's seizure of power because of their indecision and, finally, their lack of political ideas; but they do not have to answer for this to any judge except history. And this responsibility will be all the greater since the witness indeed makes the claim that at that time he had already recognized that Hitler's accession to power meant war. If one may really believe that he possessed this correct political intuition, then his responsibility, and that of his political friends, will be all the greater in view of their passivity on that and later occasions, and again this responsibility will be disproportionately greater than that of Hjalmar Schacht. Our German workers are certainly no greater cowards than the Dutch. Our hearts rejoiced to hear a witness here describe the manly courage of Dutch workers who dared to strike under the very bayonets of the invading army. The following which Severing and his political friends deservedly had in the German working class might perhaps have induced them not to watch the dissolution of the trade unions with such dull passivity as was the case in 1933, had only their natural leaders such as Severing and his colleagues been a little more daring and willing to expose themselves. In the last resort, the Kapp revolt in 1923 was also overcome by the general strike of the workmen. The Hitler regime was not so strong in 1933 that it did not have to fear the truth of the poet's words addressed to the workers: "All wheels stand still at your strong arm's will." The National Socialist Government at that time was quite well informed about this and was consequently apprehensive. This is also apparent from Göring's interrogation on 13 October 1945, the transcript of which was quoted and submitted by Professor Kempner on 16 January 1946. Göring said: "You must consider that at that time the activity of the Communists was extraordinarily strong and that our new Government as

such was not very secure." But even this strong arm which I have just mentioned required a guidance which was denied to the working class and for which men like Severing would have been indicated. In all justice they will have to account for their passivity, not before the judge in a criminal court, but before history. I do not presume to pass a final judgment. I confine myself to revealing this problem and to attributing a full and embarrassing measure of self-righteousness to the witness Severing, although I respect him as a man, if he feels himself called upon to accuse others, when studying the question as to who from the view point of history is guilty of the seizure and consolidation of power by Nazism—especially if, in contrast to Schacht, he intuitively foresaw the later evolution of Hitler—instead of submitting himself with humility to the judgment of history, relying on his undoubtedly unimpeachable views and his undoubtedly pure intentions.

Let us always bear in mind, in the interest of historical truth, that especially at the beginning of the Nazi rule there were only two power groups, with the exception of foreign intervention, which could perhaps have liberated Germany, namely, the Army and the working class, provided, of course, that both were under the proper leadership.

I had to go into more detail on this point because such a detrimental remark by such a blameless and distinguished man as Severing brings with it the danger of unjust deductions regarding my client. It would have been agreeable to me if I could have been spared this discussion of Severing's incriminating testimony. Severing has further brought the charge of political opportunism against Schacht. In politics, to be sure, the boundary between opportunism and statesmanlike conduct dictated by expediency is very fluid. Before appraising Schacht's conduct in 1932 and 1933 as opportunistic, his past should also have been considered. After 1923 this past lived in the public eye. It has partly been a subject of these proceedings, partly it is already known to the Court. This past speaks rather for the fact that Schacht does what he judges to be right, not only with a great disregard of consequences, but also with great courage. Indeed, he has also proved this courage as a conspirator against Hitler, as is bound to appear from an examination of this activity as conspirator, and as Gisevius expressly described here.

But let us go back with Schacht to the year 1923. At that time he stabilized the mark against all parties interested in inflation; in 1924 he blocked credits against all hoarders of foreign currency; in 1927 he deprived the exchange speculators of the credit basis for their exchange manipulations. From 1925 to 1929 he fought against the debt and expenditure policy of the municipalities and thereby incurred the enmity of

all the mayors. In 1929 he signed the Young Plan and thus defied the opposition of the heavy industry circles and continuing this policy, he fought openly since 1934 against the perversions and abuses of the Nazi ideology and never personally carried out a plan or an order which was contrary to his conscience or his sense of justice.

Every statesman must make certain concessions during a time of fanaticism. Certain sticklers for morality—of whom there are many today—who demand a steely hardness for the protection of principles, should not forget that steel has two qualities, not only solidity but also flexibility.

My Lord, I have now finished one particular section; the next one would take longer. I certainly will not finish it until after 1 o'clock. I should be grateful if Your Lordship would call the noon recess now. I am now coming to Appendix Number 1 ...

THE PRESIDENT: Dr. Dix, I think you had better go on until 1 o'clock.

DR. DIX: Your Honors, in the translated copy which you have before you, there are two appendices at the end. I had to employ this device because the matters dealt with in this annex occurred after I had given my speech to be translated. Therefore, I had to work in my comments on this subject somehow, and could only do it by way of an appendix.

And so I now come to the reading of Appendix 1, which is at the back, and to the opinion of the testimony of Gisevius as expressed by my colleague, Dr. Nelte, since I am here concerned with evaluating the testimony of witnesses.

Insofar as my colleague Dr. Nelte criticized the objective reliability of the testimony of Gisevius regarding his statements incriminating the Defendants Keitel, Göring, and so on, I refrain from any statements. The Prosecution may take any standpoint it desires. This is not my task.

But now Dr. Nelte has also attacked the subjective credibility of Gisevius in the personal character of this witness and thus also indirectly the reliability of his testimony concerning Dr. Schacht. This demands a statement of my opinion, and a statement of a very fundamental nature.

Your Honors, it is here that minds part company. A gap that cannot be bridged opens up between Schacht's standpoint and the standpoint of all those who adopt the train of thought with which Dr. Nelte attempts to discredit the character of Gisevius, the deceased Canaris, Oster, Nebe, and others. I most certainly owe it to my client, Dr. Schacht, to state the following fundamental point very clearly and unequivocally:

Patriotism means loyalty to one's fatherland and people and fight without quarter against anyone who criminally leads one's fatherland and people into misery and destruction. Such a leader is an enemy of the fatherland; his actions are infinitely more dangerous than those of any enemy in war. Every method is justified against such a criminal State leadership, and the motto must be: *à corsaire, corsaire et demi*.

High treason against such a State leadership is true and genuine patriotism and as such highly moral, even during war. Who could still entertain the slightest doubt after the findings of this Trial, and finally after the testimony of Speer about Hitler's cynical remarks regarding the destruction of the German people, that Adolf Hitler was the greatest enemy of his people, in short, a criminal toward this people, and that to remove him any means were justified and any, literally any, deed was patriotic. All those on the defendant's bench who do not recognize this are worlds apart from Schacht.

I had to make this point in order to clear the atmosphere. After this fundamental clarification I can refrain from refuting details in Dr. Nelte's attacks against Dr. Gisevius. Insofar as Dr. Nelte fails to see any willingness for active service among these resistance groups to which Dr. Schacht belonged, I need only point to the many hundreds who were hanged on 20 July alone; Schacht numbers among the very few survivors, and he too was to be liquidated in Flossenbürg. I point to the dead victims of the political judiciary of the Hitlerian State whose numbers run into thousands. Truly, the waging of a war of conspiracy against Hitler and the necessity for cunning and dissimulation in connection therewith were no less dangerous to life and limb than exposing one's self at the front.

During the very fair cross-examination conducted by my colleague, Dr. Kubuschok, Gisevius immediately admitted his mistake resulting from the ban on publication, in the affair of Papen's resignation. I have nothing more to say about this.

THE PRESIDENT: The Tribunal will adjourn.

[*The Tribunal recessed until 1400 hours.*]

Afternoon Session

DR. DIX: May it please the Tribunal, I had concluded with the consideration of the probative value of the statements made here by the witnesses Severing and Gisevius.

Now, on concluding the evaluation of Schacht's conduct up to about 1935 and entering the period from 1935 to 1937, I would emphasize once more that in order to save time I will not repeat the arguments which were presented to the Tribunal in detail during the cross-examination, as for instance the nonparticipation of Schacht in the legislation which led to the total disregard for international law, because this took place before his entry into the Cabinet. The decisive event for the stabilization of Hitler's power, the merging of the offices of the Reich President and of the Chancellor of the Reich in the person of Hitler, also lay outside his co-operation and responsibility. By this decree the Army took its oath to Hitler. The Chancellor of the Reich not only had police authority as heretofore but also authority over the Army. It is not my task to investigate who bears the political responsibility and thus the historic guilt for this law; in any case, it is not Schacht.

All the basic anti-Jewish laws were also enacted before he entered into office as a minister. He was completely surprised by the subsequent Nuremberg Laws. The decree dealing with the exclusion of the Jews from German economic life dated 12 November 1938 and the ordinance concerning the use of Jewish property and possessions of 3 December 1938 were issued after he had left his post as Minister of Economics and thus without his active collaboration. The same applies to the decree excluding Jews from the Reich Labor Service, which moreover probably hardly inconvenienced them. The law providing for the death penalty for secret reserves of foreign exchange, the so-called Law of Betrayal of the People, was not directed specifically against the Jews but solely against big industry and high finance; also it was not evolved by Schacht but by the Minister of Finance. Schacht did not want to effect a breach of relations on account of such laws because he believed it was his duty to perform a more important task. In any case, this can hardly be regarded as important, for in the Jewish question Schacht, by his public speeches and his reports to Hitler, showed such a favorable attitude toward the Jews that it would be unjust to disqualify him politically and morally for such a reason, much less from the angle of criminal law. As examples I would remind you of the Reichsbank speech after the anti-Jewish pogrom in November 1938, the speech at

Königsberg, the memoranda of the year 1935, and so forth. In the Third Reich Schacht was considered the most courageous and active protector of the Jews. I only remind you of the letter of the Frankfurt businessman, Merton, which was submitted to the Court, and of the illuminating statement of the witness Hayler. According to the latter, when Hayler reproached Himmler for the events of November 1938, he replied that after all it had been the fault of the economic administration that matters had reached such a point. Of a man like Herr Schacht one could not expect anything better than that he should exercise a constant restraining influence in the Jewish question and be opposed to the will of the Party.

In response to my further inquiry Justice Jackson defined this specific charge of the Prosecution as follows: Schacht is not being charged with anti-Semitism, but for activities which have a causal connection with the atrocities committed against the Jews within the framework of the planned war of aggression. Thus it follows that a denial of guilt as to a war of aggression leads with compelling logic to the denial of any guilt as to the atrocities which were committed against the Jews during the war. Justice Jackson made some phases of the legislation in respect to the Jews during Schacht's term as Minister the subject of his cross-examination. I shall refrain from this part of the cross-examination; going into the questions put to Schacht and answered by him is irrelevant according to the Charter and the previously mentioned authentic interpretation of this part of the Indictment by Justice Jackson. The anti-Semitic legislation of the Third Reich and the personal attitude of an individual defendant toward it are, according to the Charter, relevant in these proceedings only insofar as they are connected with other crimes which are subject to punishment according to the Charter, as for example the conspiracy to wage war, mass extermination, and so forth. According to the Charter they cannot constitute an offense in themselves, not even one against humanity. Only those defendants are punishable for their deeds who can be proved to have participated in the planning of a war of aggression with its resulting inhuman consequences for the Jews. A prerequisite for their conviction on this account, however, is that they recognized and desired this goal and its result. There exists no purely objective liability for the outcome in criminal law. According to the Charter, he who desired the war and thus also the inhuman actions connected with it is punishable; but the incriminating activity must always have occurred in the course of the execution of such a plan. This purely legal consideration in itself excludes the conviction of Schacht on the grounds of atrocities against the Jews.

Another discrepancy between the Prosecution, especially with regard to the statements of Justice Jackson, and myself must likewise be clarified at this point, otherwise we will be talking at cross purposes. During the cross-examination Justice Jackson repeatedly pointed out that the defendant is not being charged with anti-Semitism as such, that he is not being charged with his opposition to the Treaty of Versailles, that he is not being charged with his ideas and statements on the so-called Lebensraum problem as representing the food problem of the central European nations, that he is not being charged with his colonial aspirations; but that he is being charged with all this only to the extent that it served, with his knowledge and desire, for the preparation of a war of aggression. By this objection Justice Jackson meant to preclude certain questions and discussions. This would have been justified and I too could now forego such arguments, were not the Prosecution taking away with one hand what it is giving with the other, because in the course of argumentation all this, namely, Schacht's alleged anti-Semitism, *et cetera*, is used as indirect proof, that is, as circumstantial evidence that Schacht had prepared and desired this war of aggression. The Prosecution of course does not count all that as a criminal fact in itself, but as indirect proof, as circumstantial evidence. Therefore in evaluating the evidence, I must also treat these problems. I think I have finished dealing with the Jewish question. With regard to the problem of Lebensraum, in order to save time, I can probably refer to what Schacht has stated here during his interrogation in justification of his statements and activities in this respect. The colonial problem was the subject of cross-examination by Justice Jackson insofar as he tried to prove that colonial activity by Germany was impossible without world domination, or at least the military domination of the seas. Further development of this train of thought would result in the Defendant Schacht being charged with the fact that his striving for colonies logically depended on the planning of a war of aggression. That is a false conclusion. I think that Justice Jackson's conception of colonial policy is too imperialistic. Anyone desiring colonies for his country without attendant domination of the world or the sea bases his colonial activity on a lasting state of peace with the stronger maritime powers. He must necessarily believe in peace with these powers. Germany also possessed colonies from 1884 until the first World War; her merchant marine carried on the necessary traffic with these colonies. Her merchant marine before this war would also have been sufficient. Aviation, in reply to Justice Jackson's question, would not have been essential. Nothing supports the presumption that in his desire for colonies Schacht would have striven to eliminate foreign naval supremacy by means of war. In view of his general conduct one can hardly credit him with being as foolish as all that. France and

Holland likewise possess colonies, the sea routes of which they certainly do not control.

This charge of the Prosecution is therefore inconclusive. Moreover, the Tribunal knows that during the years before the war nearly all the statesmen of the victorious powers were sympathetic to these colonial aspirations of Germany, as is shown in many of their public speeches.

I now come to the subject of rearmament, that is, to the activity of Schacht in his capacity as President of the Reichsbank and Reich Minister of Economics until 1937, in other words, up to the time when he changed from a loyal servant of Adolf Hitler to a traitor against him and took to the dark ways of artifice and dissimulation while making preparations for an attempt on his life.

The Prosecution considers the violation of the Versailles Treaty, the Locarno Pact, and other treaties as indirect proof, that is, as circumstantial evidence, of his criminal intention to wage a war of aggression. This involves first the question of whether any treaty violations took place and, if so, whether these treaty violations must be judged as indications of an intent to wage a war of aggression on the part of members of the Reich Government, Schacht included. It is impossible, and also unnecessary, to discuss exhaustively in this plea the problem of whether actual treaty violations were committed and to what extent. My colleague Dr. Horn has already touched upon this question. A short remark can serve to show at least the problematical nature of this question. This again is important for a proper evaluation. There are no lasting treaties, neither in the domain of civil jurisdiction nor, still less, in the domain of international law. The *clausula rebus sic stantibus* often plays a much more important role in the domain of international law affecting the political intercourse between nations than in private dealings between individuals. One must be very careful not to apply, offhand, the relatively narrow principles of civil law to the breadth and depth of international law. International law has its own dynamics. The highly political intercourse between nations is subject to other juridical aspects than the commercial and personal relations between individuals. The most striking proof of the correctness of this thesis is the juridical basis of the Indictment, particularly insofar as it deals with the sentence *nulla poena sine lege poenale* and demands, instead of sanctions, the individual punishment of the leading statesmen of an aggressor nation. Whoever upholds the conception of the Prosecution in this respect, acknowledges the dynamics of international law and the fact that international law develops according to a process of its own.

History has taught us that treaties based on international law do not usually come to an end by a formal repeal but succumb to the development of events. They inevitably sink into oblivion. In specific instances opinions may differ as to whether this is the case or not; but that does not affect the basic truth of this statement. The militarization of the Rhineland and the introduction of general conscription, the extent of rearmament which Schacht approved of and strived for, the voluntary "Anschluss" of Austria to Germany, which was also basically desired by Schacht, all of these certainly are offenses against the meaning and text of the above-mentioned pacts, particularly the Versailles Treaty. If, however, such violations are only answered by formal protestations, and otherwise very friendly relations continue to exist and honors are even conferred upon the offending nation, and if agreements are concluded which alter the basic stipulations of such a treaty, as for instance the Naval Pact with Great Britain, the view is fully justified that because of all this such a treaty is gradually reaching a state of obsolescence and extinction, or at least there is cause for such a subjective point of view.

I beg you to consider that the prerequisite for the conclusion of an armament pact, as for instance the Naval Pact with Great Britain, is the military sovereignty of both nations. The denial of such sovereignty to Germany was, however, one of the main aspects of the Versailles Treaty. I do not wish to speak here about the justice or injustice of this treaty. I know the Court's wish, or rather prohibition, in regard to this matter, and of course I shall observe it. But I must speak about the legal possibility and therefore the innocence, criminally speaking, of Schacht's personal opinions on the question of treaty violation. Even if, therefore, one still wished to defend the point of view that the said treaties have not become obsolete, one cannot, at least as far as its inherent honesty is concerned, doubt the justification of an opinion to the contrary. But if this is recognized, these treaty violations no longer provide any proof of the criminal intention of a war of aggression. And that is all that matters. For the violation of treaties in itself is not considered a punishable act by the Charter. Here, too, Schacht can justify his good faith by referring to the same or similar views on the part of leading foreign statesmen, in whom it is therefore logically impossible to assume the existence of a suspicion as to a desire for aggression on the part of Germany. Here again I must limit myself to a few instances, since a complete enumeration would exceed the time limit of this plea.

The first of the violations of the Versailles Treaty is supposedly the reintroduction of general conscription. With regard to this measure, the British Foreign Secretary, Sir John Simon, with a statesman's far-sighted

objectivity, gave the following reply, which was universally made known in reports by the press and radio and which therefore is valid as legal evidence:

> "There is no doubt that an agreed reduction of the armaments of other big nations was to follow upon the forced disarmament of Germany."

This remark contains a confirmation of the juridical point of view I developed a while ago, in spite of the criticism of Hitler's action that follows. The same applies to the fact that the visit of Sir John Simon and Mr. Anthony Eden to Berlin took place 8 days after this so-called treaty violation, namely, on 24 March 1935. It would not have taken place if this measure of Hitler's had been considered abroad as militarily aggressive. I will just mention in passing the history of the treatment of this question by the Council of the League of Nations, which is well known. Should Schacht, as a German and a German Minister, judge it in a manner different from that of the foreign Governments?

A second treaty violation by Hitler was the occupation of the Rhineland, also in March 1935. This action did not only violate the Versailles Treaty ...

THE PRESIDENT: [*Interposing*] The date of the occupation of the Rhineland was not March 1935, but March 1936.

DR. DIX: I cannot ascertain that at the moment.

The point in question is that this action took place, namely, the occupation of the Rhineland. This action was not only a breach of the Treaty of Versailles but also of the Locarno Pact, that is, of an undoubtedly voluntarily contracted treaty. Two days later Mr. Baldwin stated in the House of Commons, in a speech made public and therefore valid as legal evidence, that, while Germany's conduct could not be excused, there was no reason to assume that this action contained a threat of hostilities. Was Schacht, a German and a German Minister, to take a different and more skeptical attitude in regard to the aggressive significance of the act than foreign statesmen? And particularly when he was forced to note the fact, which is now history and is universally known, that 10 days after this breach of treaty the Locarno Powers, except Germany, submitted to the Council of the League of Nations a memorandum which proposed the reduction of the number of German troops in the Rhineland to 36,500 men and only endeavored to avoid the strengthening of the SA and SS in the Rhineland and the erection of fortifications and airfields. Should not this memorandum be interpreted as a ratification of an alleged breach of the treaty?

A third breach of the treaty was the fortification of Helgoland, which was hardly observed by the contracting parties, and merely called forth from Mr. Eden, in the now famous public speech before the House of Commons on 29 July 1936, the remark that it was not considered favorable to increase the difficulties of the proceedings by individual questions like the one under discussion. Was the German Minister Schacht to take another and more rigorous attitude?

And what about the terroristic annexation of Austria in March 1938 when, moreover, Schacht was no longer Reich Minister for Economics? If foreign countries had gathered from this action the conviction that Hitler was preparing a war of aggression, they would not have abstained from threatening to use force. Was the German Minister Schacht to hold a different and stricter opinion? He did, in fact, have a different opinion at the time and was already eagerly at work with Witzleben and others to eliminate Adolf Hitler and his regime by means of a Putsch; an effort on the part of these patriotic conspirators which was frustrated, as the unequivocal testimony of the witness Gisevius has shown, because Hitler was able to record one success after another in foreign politics.

I merely remind you of the unequivocal evidence of Gisevius regarding the effects of the Munich Agreement on the influence of the opposition group of which Schacht was a leader; I remind you of the evidence of Gisevius regarding the warnings and hints in this connection sent across the German frontiers to responsible personalities of foreign countries. Is it fair to require from the German Minister Schacht a more critical attitude to those political developments than that adopted by foreign countries whose interests had been injured? As we know from Gisevius, from Vocke, and from all the affidavits submitted, he did have this critical attitude from 1937 on, in which year he took to the dark ways of a conspirator. I remind you of his first contact with the then General Von Kluge. I could give many examples such as those just mentioned. I do not criticize this attitude of foreign countries; that is not for me to do, quite apart from the fact that I have complete understanding for the pacifist attitude it reveals, which is fully aware of its responsibilities. It is, however, my duty to point out that no warlike intention can be imputed to Schacht on account of his opinions and attitude, when the same opinions and the same attitude can be identified as belonging to the foreign countries whose interests had been injured. If foreign countries could entertain the hope of maintaining further friendly relations with Hitler, the same right must be conceded to Schacht as far as he claims it. He does not, however, claim it for himself, at least not after the Fritsch crisis of 1938.

After that time he, in contrast to the foreign countries, had a very clear idea of the danger, which fact, according to the evidence of Gisevius, is undeniable, and he personally risked his life and liberty to maintain peace by attempting to overthrow Hitler. The fact that all these Putsch actions before the war and after the outbreak of war were unsuccessful cannot, according to the evidence submitted, be considered his fault. The responsibility for the failure of this German resistance movement does not lie with the latter but elsewhere, within and without the German frontiers. I shall return to this later.

There remains, therefore, the fact of rearmament as such. Here, too, I can refer essentially to the statements Schacht made in justifying himself during his cross-examination. This was exhaustive, and a repetition would be superfluous. It is therefore also completely superfluous to enter into an academic discussion as to whether Schacht's views were right; that is to say, whether it is correct that a certain amount of military force sufficient for defensive purposes is necessary for any country and was particularly necessary for Germany, and whether he was correct in his opinion that the nonfulfillment by the parties to the Versailles Treaty of the obligation to disarm justified the rearmament of Germany. The sole point in question is whether these opinions and motives of Schacht's were honest, or whether he pursued secret aggressive intentions under cover of this defensive armament. But these proceedings have established absolutely nothing to disprove the honesty of these opinions and motives. Of course, one can question the fact whether the quotation "*si vis pacem, para bellum*" has absolute validity; or whether objectively any pronounced rearmament does not carry an inherent danger of war, since good armies with competent officers naturally strive for a chance for real action. Of course, one can defend the thesis that moral strength is stronger than any armed strength. The cohesion of the British Empire and the world-wide influence of the Vatican's foreign policy could perhaps be cited as proof of this. All these questions carry a certain relativity in themselves; at any rate, one thing is certain: Even today in all large countries of the world the warning is constantly repeated that one must be militarily strong in order to preserve peace. Nations whose individualism and love of liberty rejected general conscription and a strong standing army now act to the contrary and honestly believe that they thereby serve peace. Let us take as an example a nation whose love of peace absolutely no one in the world, even the most mistrustful, can question, namely, Switzerland. Yet this peace-loving nation has always taken pride in maintaining the defense capacity of its people with the very intention of protecting its freedom and independence in a peaceful manner. One may academically call this idea of

discouraging foreign aggression by the maintenance of a sufficiently strong defensive army imperialistic. It is, at any rate, honestly entertained by peaceful and liberty-loving nations and perhaps serves the cause of peace more effectively than many so-called antimilitaristic and pacifist doctrines. This sound point of view has really nothing to do with militarism. Whoever today recognizes this viewpoint as justified for great and small nations cannot contest the honesty of this view on the part of Schacht in the years 1935 to 1938. I have no more to say about this.

I also need not give a wearisome enumeration of figures and make specialized technical statements to the effect that this part of rearmament which Schacht first financed with 9,000 million, and then reluctantly with a further 3,000 million Reichsmark, was by no means sufficient for a war of aggression, in fact, not even for an effective defense of the German frontiers. The answers that the witnesses Keitel, Bodenschatz, Milch, General Thomas, Kesselring, et cetera, have given to this in their depositions and affidavits are available and have been submitted to, or officially brought to the attention of, the Tribunal. In this respect they are unanimously agreed that even at the outbreak of war—that is, 18 months later—Germany was not sufficiently armed for an aggressive war; that therefore, when Hitler led this nation into a war of aggression in August 1939, it was not only a crime against humanity but also against his own people, the people with whose leadership he was entrusted.

Therefore I also consider it superfluous to go into long discussions as to whether Blomberg's statement that Schacht was aware of the progress of rearmament is correct, or the statement of Schacht and Vocke that this was not so. I accept without further discussion the sincerity of Blomberg's statement. But since he had more to do with the technical side of rearmament than the Reichsbank had, general experience would seem to indicate that the memory of Schacht and Vocke is more reliable on this point than Blomberg's, to whom this report to the Reichsbank was a matter of secondary importance for his department. For the Reichsbank the desire to be informed about the technical progress of the armament as well as about the financial expenditure was a very important matter. One remembers such facts better than unimportant secondary matters. In any case it is established that until the budget year 1937-38 only 21,000 millions were spent on armament, of which 12,000 millions were financed by credits of the Reichsbank, and that, according to Generaloberst Jodl's statement of 5 June, on 1 April 1938 only 27 or 28 divisions were ready, whereas in 1939 there were already 73 or 75 divisions.

It needs no expert to show that this volume of expenditure and armament on 1 April 1938 was entirely insufficient for a war of aggression. Indeed Hitler was of the same opinion when in his memorandum of August 1936, which has been submitted to the Court, and which was handed to Speer in 1944, he pointed out, along with many derogatory remarks about Schacht's conduct of economic affairs, that 4 precious years had gone by, that we had had time enough in these 4 years to determine what we could not do, and that he hereby gave orders that the German Army must be ready for action in 4 years, that is, in the course of the year 1940.

I should like to remind the Court that after Schacht's withdrawal as President of the Reichsbank, 31,500 millions were spent on armament during the two budget years 1938-39 and 1939-40. The issuing and expenditure of money on armament therefore continued without Schacht, and indeed to a considerably greater extent. Schacht had once written to Blomberg that he was not a money-making machine.

He exercised constant pressure on Blomberg along this line. I refer only to his letter to Blomberg on 21 December 1935, which has been submitted to the Tribunal. He exercised a restraining influence by means of explanatory lectures to officers of the War Ministry and of the Armed Forces Academy. He refused the railway loan of 1936 requested by the Minister of Communications, which was indirectly in the interest of armament; and he stopped the credits of the Reichsbank as early as the beginning of 1937, concluding them by compromising on a final grant of 3,000 millions. He refused the credit which the Reich Minister of Finance requested from him in December 1938.

He created an automatic brake for armament expenditure through the mefo bills, which from the technical and financial point of view was a somewhat bold measure, although legally tenable. These served at first to finance the armament expenditure but restricted further armament expenditure after their expiration on 1 April 1939 because the Reich was obligated to redeem them. Schacht's foresight proved true. The increase in employment brought such a rise in the state revenues that it would not have been difficult to liquidate the mefo bills at their expiration 5 years later. Keitel's statement has proved that during the budget year beginning 1 April 1938, 5,000 million marks more were spent for armament than during the preceding year, although as from 1 April 1938 the Reichsbank credits had completely ceased. Half of the 5,000 millions would have sufficed to redeem the mefo bills which matured during the budget year beginning 1 April 1939. The use of this money for further rearmament would have been avoided; but this was exactly what Schacht intended. From the beginning he

had limited the validity of the mefo bills to 5 years; he stopped the credit assistance of the Reichsbank on 1 April 1939 in order to limit armament. It was impossible for Schacht to foresee that Hitler would simply break a strict credit obligation and not redeem the bills. These facts in themselves show that his attempts to resign could have had no other reason than opposition to any further armament, and the refusal to accept responsibility for it. In this sense the assertion of the Prosecution that he wanted to evade responsibility is completely correct.

Nothing indicates that any other motives than those which are obvious from the facts just mentioned caused him to make this attempt to relinquish his duties. If the Prosecution maintains that the reason was his antagonism to Göring, this is also correct insofar as Schacht was an opponent of the Four Year Plan, of which Göring was the chief. That the reason was rivalry of power is a pure supposition, an interpretation of actual events which justifies the quotation: "Interpret to your heart's content; should you fail to explain, you will at least insinuate."

The Reichsbank memorandum of November 1938, which led to the dismissal of Schacht and most of his collaborators including Vocke, is also unequivocally and forcibly opposed to armament. It naturally had to contain reasons for this which were derived from the departmental jurisdiction of the Reichsbank. Its aim was obvious. Hence Hitler's remark, "This is mutiny." The memorandum ends with the demand for control of the capital and loan market as well as the management of taxation by the Reichsbank. Compliance with this demand would have deprived Hitler of every possibility of raising money for further armament, and therefore this demand was unacceptable to him. Schacht and his colleagues knew this. Accordingly, they deliberately sought a break by this step. Schacht now bore no further responsibility. From now on he could devote himself exclusively to the plans for a *coup d'état* by the conspiracy group to which he belonged. He became a traitor to Hitler. By remaining Minister without Portfolio, he hoped to learn more about what went on than if he resigned altogether; this was vital for the aims of his conspiracy group. I shall return to this point later.

The fact of armament, as such, therefore, proves absolutely nothing for the assertion of the Prosecution that Schacht deliberately contributed to the preparation of a war of aggression. Simultaneous economic armament, however, belongs of necessity to armament in the modern sense. On the German side this was already recognized for the first time at the beginning of the first World War by two very important German Jews, the founder of the Hamburg-America Line, Albert Ballin, and the great German

industrialist, Rathenau. This is the same Rathenau who made the wonderful speech on peace during the Genoa Conference, which was received with wild applause by the delegates of those very powers which had opposed his country but 4 years previously as enemies, and who, as German Foreign Minister, was the victim of an anti-Semitic outrage in the early twenties. I probably can assume that the personality of Albert Ballin is known to the Court. Both men recognized, at the very outbreak of the first World War, the error of omitting economic mobilization. Rathenau then organized the so-called War Raw Materials Department of the War Ministry. The first Plenipotentiary General for War Economy, for this is what he really was, was thus ideologically a pacifist; and certainly since that time there is probably no mobilization plan by any nation which does not provide for the purely military armament to be accompanied by a corresponding economic preparation for war. Therefore, the designation of a Plenipotentiary General for War Economy, even if he had taken up his duties, which as the evidence demonstrates most convincingly he never did but remained a dummy, does not show anything in the way of proof that the intention to wage a war of aggression existed. This post is equally necessary when arming for defense. The same applies to the institution of the Reich Defense Council, the Reich Defense Committee, *et cetera*. As such they are the same harmless, matter-of-course factors. They have no incriminating value. Only their misuse for the purpose of a war of aggression would be incriminating. However, Schacht's criminal intention in this respect has not been established, nor has anything else been found. I therefore refrain from going into details on this subject.

In conclusion, the Prosecution sees something incriminating in the so-called maintenance of secrecy regarding certain mobilization measures and mobilization arrangements, as for example the second Reich Defense Law. Here, too, a natural and worldly-wise way of thinking deprives these findings of any incriminating character. All nations are accustomed to treat mobilization and armament measures as secret. Upon further consideration and after closer observation this practice can, of course, be recognized as a very superfluous routine matter. Only plans and technical details can be really kept secret. The fact of rearmament as such can never be kept secret. The same applies to the existence of a large body which is to serve the purpose of this rearmament. Either it becomes known because it starts to function, or, like the ominous Defense Council, it remains hidden and secret only because it does not function.

In the memoirs of a Czarist officer regarding his experiences in the Russo-Japanese war I found the following humorous observation:

> "If I, as a member of the General Staff, wished an incident to become known, I had it classified as 'secret' and my wish was fulfilled. If I wished to keep something secret, which was almost an impossibility, I unobtrusively gave it free circulation and occasionally my wish was fulfilled."

One should not quibble in a vacuum; but if one wishes to find the truth, one must take into account the teachings of experience based on hard facts.

Thus, the fact of the military activation of Germany after the seizure of power by Hitler and the subsequent rearmament was never a secret to the world. The main proceedings have produced a great deal of evidence to this effect. We know the report of Consul General Messersmith; we know his sworn testimony of 30 August 1945, submitted by the Prosecution under Number 2385-PS, according to which the armament program—he speaks of a giant armament program immediately following the seizure of power—and the rapid development of the air program had been apparent to everybody; it had been impossible to move in the streets of Berlin or in any other city of importance in Germany without seeing pilots or aviators in training. He expressly states, on Page 8 of his testimony, that this giant German rearmament program was never a secret and was quite publicly announced in the spring of 1935.

I would like to remind you, amongst a great deal of other evidence, of the remark of Ambassador Dodd, who contends that he pointed out to Schacht that the German Government had bought high-grade airplanes from American airplane manufacturers for 1 million dollars and had paid for them in gold. Even if Ambassador Dodd perhaps made a mistake in this detail, yet all this still proves that German rearmament—the extent of which was surely even overestimated abroad at that time—must have been, at the very best, an open secret.

Therefore it is not even necessary to refer to the mutual visits of the Chiefs of General Staffs, to which Milch and Bodenschatz testified, the visits of the Chief of the British Intelligence Service, Courtney, the permanent presence in Berlin of military attachés of nearly all countries, in order to recognize that the so-called secret rearmament was quite public and only safeguarded a few technical secrets, as did rearmament in every state. The outside world knew of the existence of this rearmament and, in any case, considered it to be compatible with world peace longer than Schacht himself did.

It is not for me to criticize the attitude of the outside world, nor is it my intention to do so. Each part on the stage of life has its own rules of tact,

including the part played by the defendant and his defense counsel. Their task is to establish a defense, and not to bring charges and make an attack. In connection therewith I expressly wish to guard against a possible misunderstanding to the effect that I want to appear as an accuser, a critic, or a know-it-all in any way. I present all this only from the aspect of my submission that the indirect circumstantial evidence submitted by the Prosecution is not conclusive.

Furthermore, the Prosecution argues that Schacht was a member of the Reich Cabinet, at least as Minister without Portfolio from the time of his dismissal in January 1938, as Minister of Economics, until January 1943. The Prosecution makes the Reich Cabinet responsible—criminally responsible—for the belligerent invasions of Hitler. This argumentation has an attractively convincing power for somebody who starts with the normal concept of a Reich Cabinet. The effect disappears once it has been ascertained that the so-called Reich Cabinet was not a cabinet in the usual sense applying to a constitutional state.

Judgments should not, however, be based on outward appearances and form—not on fiction, but only on actually established conditions. This makes it necessary to penetrate sociologically the nature of the Hitler regime and to examine whether a member of the Reich Cabinet, hence of the Reich Government as such, must in this capacity bear the same criminal responsibility as if he were in any other normal state set-up, be it a democratic republic or a democratic monarchy or a constitutional monarchy or a monarchy which, although absolute, was nevertheless founded on law, or some other constitutionally based set-up which bears the character of a somehow lawful state based on a constitution. We are thus obliged to investigate the actual sociological structure of the Hitler regime. We have heard an account on the Führer Order (Führerbefehl) in this connection by Professor Jahrreiss. Here, too, I want to avoid repetition and would only state the following in abbreviated form:

I want to say first of all, in order to avoid once more the danger of a misunderstanding, that when I speak of the Hitler regime here I do so without referring in any way to the persons sitting in the dock; naturally with the exception of Schacht. For the latter, I do so in the negative sense, for he did not belong to the regime as such, in spite of the fact that he was a member of the Reich Government and President of the Reichsbank. I leave the question completely open as to whether any of the other defendants should be considered a member or supporter of the regime. That question is subject only to the judgment of the Tribunal and the evaluation of the defense counsel for each case.

At the very beginning of my argument I indicated that, even for a person who lived in Germany during the Hitler regime, it is difficult to differentiate between the ostensible distribution of power and the actual underlying influence, since this requires a great deal of political intuition; it is bound to be impossible to judge for people who lived outside Germany and can only be arrived at through the findings resulting from the presentation of evidence before this Tribunal. We have established here that the Reich Cabinet, whom Hitler termed a club of defeatists, was convened for the last time in 1938 and that it met then only to receive a communication from Hitler. For actual deliberation and the passing of a resolution it had last been convened in 1937. We have also established that Hitler deliberately kept all news of political importance from the Reich Cabinet, as is proved quite unequivocally by the so-called Hossbach minutes of 10 November. During this meeting the Führer called the attention of the chiefs of the branches of the Wehrmacht and the Reich Foreign Minister, who were present—Schacht, of course, was not present and did not learn about the Hossbach minutes until he came here—to the fact that the subject for deliberation was of such great importance that it would result in full Cabinet meetings in other countries but that, just because of its great significance, he had decided not to discuss the matter with the Reich Cabinet.

Thus, at least after 1937, the members of the Reich Cabinet can no longer be considered the architects and supporters of the political aspirations of the Reich. The same holds true for the members of the Reich Defense Council, which as such was nothing but a bureaucratic and routine affair. Accordingly Hitler, in the spring of 1939, explicitly excluded the Reich Defense Council also from further war preparations, saying: "Preparations will be made on the basis of peacetime legislation."

Despotism and tyranny showed themselves in unadulterated form as from 1938. It is a characteristic quality of the Fascist as well as the National Socialist regime, to have the political will concentrated in the head of the Party, who with the help of this Party subjugates and becomes master of the State and the nation. Justice Jackson also recognized this when he stated, on 28 February 1946, that the apex of power rested with a power group outside the State and the Constitution.

To speak, in the case of such a regime, of a responsible Reich Government and of free citizens who, through some organizations or others, could exert influence on the formation of the political will, would be to proceed from entirely wrong hypotheses. Intangible elements devoid of all sense of responsibility usually gain influence on the head of the State and

Party in such regimes. The formation of the political will can be recognized in its crystallized form only in the head of the State himself; all around him is shrouded in a haze. It is another characteristic of such a regime—and this again belongs to its inner untruthfulness—that beneath the surface of seemingly absolute harmony and union several power groups fight against each other. Hitler not only tolerated such opposing groups, he even encouraged them and made use of them as a basis for his power.

One of the defendants spoke here of the unity of the German people during this war in contrast with the first World War, but I must stress in reply that hardly at any time during its history was the German nation so torn internally as it was during the Third Reich. The apparent unity was merely the quiet of a churchyard, enforced through terror. The conflicts between the individual high functionaries of the German people, which we have ascertained here, reflect the inner strife-torn condition of the German nation, carefully concealed through the terror wielded by the Gestapo.

To give only a few examples: We were confronted here with the conflicts between Himmler and Frank, between Himmler and Keitel, between Sauckel and Seldte, between Schellenberg and Canaris, between Bormann and Lammers, between SA and SS, between Wehrmacht and SS, between SD and Justice, between Ribbentrop and Neurath, and so on and so forth. The list could be continued ad libitum.

Even ideologically the Party in itself was divided into pronounced oppositional groups, which was shown already at the very beginning of the presentation of evidence by Göring's testimony. These oppositions were fundamental, and they were not bridged by Hitler but rather deepened. They were the instrument from which he elicited his power. The ministers were not responsible governing persons, as in any other state where law is the foundation; they were nothing but employees with specialized training who had to obey orders. And if a departmental minister, as in the case of Schacht, did not wish to submit to this, it resulted in conflict and resignation from his post.

For this very reason no minister could in the long run take full responsibility for his department, because he was not exclusively competent for it. A minister, in accordance with constitutional law, must first of all have access to the head of State; and he must have the right to report to him in person. He must be in a position to reject interference and influences coming from irresponsible sources. None of the characteristics applicable to a minister apply to the so-called ministers of Adolf Hitler. The Four Year Plan came as a surprise to Schacht. Similarly, the Minister of Justice was surprised by so extremely important a law as the Nuremberg Decrees.

Ministers were not in a position to appoint their staffs independently. The appointment of every civil service employee required the consent of the Party Chancellery. The intervention and influence of all possible agencies and persons of the various Chancelleries—Chancellery of the Führer, Party Chancellery, *et cetera*—asserted themselves. They, however, were agencies placed above the ministries and they could not be controlled. Special delegates governed over the heads of the departmental chiefs. Ministers, even the Chief of the Reich Chancellery, as we have heard from Lammers, might wait for months for an audience, while Herr Bormann and Herr Himmler had free access to Hitler.

The anticamera and camarilla, indispensable accessories of all absolutism, have at all times been difficult to fathom as to the personal responsibility of the individual circles of which they are composed. The irresponsible influences exerted over and affecting Hitler were absolutely intangible.

Generaloberst Jodl described to us here how Hitler's sudden actions, caused by some urge and attended by the most serious consequences, could be traced back to influences of an entirely obscure and unknown sort, such as pure chance, conversations at a tea party, or the like. For the objective facts this bears out what I already mentioned in the beginning. And so this state of affairs precludes even the possibility of the planning of a crime such as a war of aggression within a clearly defined circle of persons, much less within the so-called Reich Government. But where no planning is possible, there can be no plot, no conspiracy either, the most striking characteristic of which is this very common planning, even though the participants have different and varied roles. Let us assume the broadest conceivable interpretation of the ostensible exterior characteristics of the conspiracy. I am following Justice Jackson's line of reasoning. He who takes part in a counterfeiters' plot is guilty of conspiracy, even through he may have written only a letter or acted as bearer of the letter. He who participates in a plot for robbing a bank is guilty of murder if, in the course of the execution, not he but a third party in the group of planners commits murder. At all times, however, the prerequisite is a body of persons capable of evolving a common plan. Such a thing was not possible for Adolf Hitler's ministers; it was not possible at all under Hitler. From this it follows that no conspirator could participate in Hitler's crime of having forced upon his own people and the world a war of aggression, except those who served Hitler as assistants.

The forces at work in the Third Reich as depicted thus permit in thesis only the assumption that there existed a punishable complicity or punishable assistance, not, however, a punishable group offense such as a conspiracy.

Whether such complicity or such punishable aid in the crime of a war of aggression committed by Hitler exists for individual defendants personally can only be investigated and decided in each individual case. It is my task to investigate this only in the case of Schacht.

A collective crime such as conspiracy is, however, excluded as inconceivable and impossible in the light of the actual conditions as already established. But even if this were not the case, the subjective aspect of the deed is completely lacking in the case of Schacht. Even if the objective facts of a conspiracy were to exist for a certain circle of the accused and even with the most liberal interpretation of the concept of conspiracy, it is still essential that the conspirator should include the plan of conspiracy and the aims of the conspiracy within his will, at least in the form of *dolus eventualis*.

The strict facts constituting a conspiracy can best be illustrated by comparison with a pirate ship. In reality every crew member of the pirate ship, even a subordinate, is guilty and an outlaw. But a person who did not even know that he was on a pirate ship but believed himself to be on a peaceful merchant vessel, is not guilty of piracy. He is equally innocent if, after realizing the pirate character of the ship, he has done everything he could to prevent any piracy, as well as to leave the pirate ship. Schacht did both.

As far as that is concerned, research on conspiracy also recognizes that a person is not guilty who has withdrawn from the conspiracy by a positive act before attainment of the goal of the conspiracy, even if he did co-operate previously in the preparation of the plan for conspiracy, which was not the case with Schacht. In this connection, I also consider as being in my favor Mr. Justice Jackson's answer when I put up for discussion, during Schacht's interrogation, the question whether the persecution of the Jews is also charged to Schacht. Mr. Justice Jackson said, yes, if Schacht had helped prepare the war of aggression before he withdrew from this plan for aggression and its group of conspirators and went over unreservedly to the opposition group, that is, to the conspiracy against Hitler. This desertion would then be the positive act which I have mentioned whereby a person at first participating in a conspiracy would separate himself from it.

This legal problem does not even enter into consideration as far as Schacht is concerned, because the evidence has shown that he never desired to participate in the preparation for a war of aggression.

As already stated, this accusation of the subjective fact of the conspiracy has not been proved either by direct or by indirect evidence. For the events up to the year 1938 I can point to the statements made previously.

It has been proved that from 1938 on, at the latest, Schacht fought the bitterest struggle imaginable against any possibility of war in such a form that he attempted to overthrow the person responsible for this risk of war and this will for aggression and, thereby, the regime.

Your Lordship, I have now arrived at the end of a section, if Your Lordship would care to announce a recess now.

THE PRESIDENT: We will adjourn.

[*A recess was taken.*]

DR. DIX: I beg your pardon for being late, but I was detained at the entrance.

Gentlemen of the Tribunal, I have arrived at the discussion of the beginning of the opposition by means of the various Putsch actions.

It is quite irrelevant and of incidental importance to investigate whether the attempts at a Putsch, which occurred at shorter or longer intervals during the war, would have been instrumental in securing better peace terms for Germany. This is absolutely meaningless for the criminal evaluation of Schacht's course of action. Doubtlessly, according to human reckoning, a successful prewar Putsch would have prevented the outbreak of war; and a successful Putsch after the outbreak of war would at least have shortened the duration of the war. Therefore such skeptical considerations about the political value of these Putsch attempts do not disprove the seriousness of the plans and intentions for a Putsch, and that is all that counts in a criminal legal evaluation. For it proves first of all that a person who has been pursuing them since 1938, and even since 1937, if one includes the attempt with Kluge, could not possibly previously have had warlike intentions. One does not try to overthrow a regime because it involves the danger of war, if previously one has oneself worked toward a war. One does so only if by all one's actions, even that of financing armament, one wished to serve peace. For this reason these repeated Putsch attempts on the part of Schacht do not have any legal significance of a so-called active repentance for previous criminal behavior but constitute *ex post* proof that he cannot be accused even before 1938 of deliberately working for war, because it would be logically and psychologically incompatible with Schacht's activity of conspiracy against Hitler.

These Putsche thus prove the credibility of Schacht in respect to his explanation of the reasons and intentions which caused him actively to enter the Hitler Government and to finance armament to the extent to which he did, namely, to the amount of 12,000 millions. They prove *ex post* the purely

defensive character of this financing of armament; they prove the credibility of Schacht's contention of having tactically achieved, in addition, a general limitation of armament. If one does believe this explanation of Schacht's, and I think one must believe it, then one cannot speak of Schacht's co-operation in instigating a war of aggression.

This credibility is also proved by another circumstance. Schacht originally contradicted the testimony of Gisevius and my questions following the same line, that he had admired Hitler at the beginning and had unreservedly considered him a brilliant statesman. He described this in his interrogation as an erroneous assumption. He said that he had recognized from the beginning many of Hitler's weaknesses, especially the fact of his poor education, and had only hoped to be in a position to control the disadvantages and dangers resulting from them. By this contradiction Schacht made his defense more difficult; but he is wise enough to have recognized this. Thus what he deliberately forfeited from the point of view of evidence which would serve his defense, he gains with regard to his credibility upon objective evaluation of evidence based on psychological experience. For a person who serves the truth by contradiction deserves increased credibility, when the suggested untruth or the half-truth is more advantageous to him technically and tactically by way of evidence.

There should be no doubt about Schacht's leading role in the activities of the various conspiracies about which Gisevius testified on the very basis of this credible testimony. During the cross-examination Mr. Justice Jackson confronted Schacht with photographs and films which superficially show a close connection with Hitler and his paladins. This can only have been done in order to throw doubt on the earnestness of his active opposition to Hitler. I must, therefore, deal briefly with this point of the photographs and films. Mr. Justice Jackson has coupled this accusation with another one by quoting speeches ostensibly expressing great devotion on the part of Schacht toward Adolf Hitler even during the Putsch period. This accusation is on the same level. I believe that this argument cannot stand up either before the experiences of life nor before what we can observe of history. History teaches us that conspirators, especially if they belong to the closer circle of dignitaries of the threatened head of state, show special devotion for purposes of camouflage. Nor has it ever been observed that such people impart their intentions to the prospective victim in a spirit of contradictory loyalty. One could cite many examples of this from history.

There exists an effective German drama by a certain Neumann which concerns itself with the murder of Czar Paul by his first Minister, Count Pahlen. The Czar believes to the very end in the ostentatious devotion of

Count Pahlen, even while the latter is already sharpening his knife. And the historical documents in existence include a note by Count Pahlen to the Russian Ambassador in Berlin, immediately before the assassination, in which Count Pahlen persists in speaking about "*Notre auguste Empereur*," and so forth. Significantly, this drama bears the title *The Patriot*.

Thus, there is a higher patriotism than the merely formal loyalty of a servant of the nation. It would be closer to the psychological truth if this presumptive devotion, assumed for the sake of appearances, and the assurances of loyalty during this period were judged more in favor of the objective credibility of Schacht's explanations than *vice versa*. As a conspirator, he had to camouflage himself especially well. To a certain degree this had to be done by practically everyone who lived under this regime in Germany. As far as the photographs are concerned, it is probably an inevitable consequence of every social and representative participation in a body that one becomes a victim of the camera along with the members of the body whether one likes it or not. A member of a Government cannot always avoid being photographed with these people on the occasion of their meetings. As a result we have pictures that show Schacht between Ley and Streicher and the scene in the film showing the reception of Hitler at the railroad station. Viewed ex post, these pictures give no pleasure to the observer, and certainly not to Schacht either. But they do not prove anything. In a natural evaluation belonging to a normal average experience of life, I consider these pictures without any value as evidence, either *pro* or *contra*.

Foreign countries, too, through their prominent representatives, had social intercourse with Adolf Hitler's Government, and this not only through their diplomatic corps. I wish to assure you that the Defense is in a position to produce pictures of a much more grotesque sort which do not seem nearly as natural as Schacht being photographed together with men who, after all, were his fellow dignitaries in the Third Reich. To produce such pictures, however, might not be very tactful on the part of the Defense; yet should it be necessary to investigate the truth in all seriousness, a defense counsel might have to take upon himself the odium of indiscretion. I do not believe that there is any need for me to do so in this case, because the irrelevance and insignificance of such a presentation of evidence through pictures taken on state occasions of the Third Reich seems to me to be obvious.

The only incriminating point pressed by the Prosecution which is left for me to argue now appears to be that Schacht, after his retirement as Minister of Economics and even after his retirement as President of the Reichsbank in January 1939, remained Minister without Portfolio until 1943. Schacht declared that this had been stipulated by Hitler as a condition

for his release from the Ministry of Economics. Hitler's signature, as that of the head of the State, was necessary for his dismissal. Had Schacht refused to remain as Minister without Portfolio, he would surely have been arrested sooner or later as a political suspect and thus been deprived of all possibility of action against Hitler. The witness Gisevius has testified as to the discussions at that time between him and Schacht concerning the continuation of Schacht's function as Minister without Portfolio. In these deliberations the idea was quite justly considered important that Schacht could be of more use to the group of conspirators as a scout or an outpost if he remained in this position, to outward appearances at least, within the Reich Government. Even as Minister without Portfolio, Schacht remained exposed to great danger, as is shown by his and Gisevius' declarations and as becomes obvious from Ohlendorf's statement that Schacht already in 1937 was on the black list of the State Police.

How much Hitler feared Schacht is proved by his subsequent remarks to Speer, which have been discussed here, particularly his remarks about Schacht after the attempted assassination on 20 July. I would also remind you once more of Hitler's memorandum of 1936, which he gave to Speer in 1944 and which shows that he saw in Schacht a saboteur of his rearmament plans. It has been declared and proved by Lammers that Schacht tried later on to get rid even of this nominal position. Lammers and Schacht have proved furthermore that this position of Minister without Portfolio was without any special importance. Hence my reference to him as an officer with assimilated rank, that is, an officer without command authority, a sham officer. Schacht could not give up the position unless there was a row, and the same held true of his position as Reichsbank President. Schacht, therefore, had to maneuver in such a way that he would be thrown out. He succeeded in this, as I explained, as Reichsbank President through the well-known memorandum of the Directorate of the Reichsbank and the refusal of credits by the Reichsbank in November 1938 contained therein. As far as his position of Minister without Portfolio was concerned, he succeeded through his defeatist letter of November 1942. In the meantime he made use of the time for the attempted *coup d'état* in autumn 1938 and for the various other attempted *coups d'état* leading up to that of 20 July 1944, which finally caused him to be put in a concentration camp.

A criminal reproach can on no account be made against him in his position as Minister without Portfolio. For his proved conspiratorial activity against Hitler during all this time eliminates by force of logic the supposition that he had furthered Hitler's war plans and war strategy during this time. In any event, we can only raise—and even that only in the vacuum

of abstraction—a political reproach against the Schacht of the years 1933-37. But this, too, is fully compensated by the extraordinarily courageous attitude of Schacht after this period. To obtain its just evaluation, may I remind you of the interesting statement of Gisevius to the effect that he, who had at first looked with a certain skepticism upon Schacht's original attitude, not in a criminal but in a political sense, had later become completely reconciled with Schacht by the extraordinary courage which Schacht displayed as opponent and conspirator against Hitler since 1938. I am of the opinion, therefore, that the fact that Schacht remained as Minister without Portfolio does not incriminate him either directly or indirectly, neither according to penal law, which is out of the question, nor morally, if one takes into consideration his behavior as a whole, his motives, and the accompanying circumstances and conditions.

If the Prosecution now finally argues, on the basis of the text of the afore-mentioned memorandum by the Directorate of the Reichsbank, that an opposition to war is not evident from the memorandum, but only technical reflections on finance and currency, then I have only to refer in this respect to my earlier statements and the testimony of Vocke. The presentation of facts by Schacht himself would not even be necessary to refute this argumentation. Vocke in his capacity as closest collaborator declared quite unequivocally that Schacht wished to limit and sabotage rearmament from the moment when he recognized that it was becoming a potential war danger. The sworn affidavit of Hülse and the sworn affidavits of all the collaborators of Schacht in the Reich Ministry of Economics tally with the testimony of Vocke in this respect. I need not quote them individually. They are known to the Tribunal. The Tribunal does not need the commentary of a defense counsel on them; they speak for themselves. If the Prosecution now finally bases its argument on the text of the memorandum which, it is true, actually only deals with financial problems, then again I cannot suppress the remark that such an argumentation moves in a vacuum insofar as one does not take the experiences of history and the general experiences of life into consideration. Naturally, as I have already said, the Directorate of the Reichsbank could only bring up arguments from their department, particularly so in dealing with a Hitler. One says one thing while meaning another.

If the Directorate of the Reichsbank, along with their President, Schacht, had revealed their true purpose in this memorandum, namely, to avert the danger of war and to combat Hitler's will of aggression, then they would have deprived themselves of the effect of technical departmental influence. Hitler very well understood the purpose of this memorandum

when he shouted, after reading it: "That is mutiny!" With this, Hitler recognized the only thing that can be said of Schacht as conspirator: He was never a mutineer and conspirator against world peace; but, insofar as he was a conspirator and mutineer, he was so only against Adolf Hitler and his regime.

Again in this case I must ask the High Tribunal to turn their attention to Appendix Number II, which I must insert at this moment, because the matter that is dealt with here did not reach me for translation until after I had submitted my final speech.

I said that Schacht, insofar as he was a conspirator, was so only against Hitler. As such, he was the subject of ironical belittling by Generaloberst Jodl and my colleague Nelte through the epithet, "frock-coat and drawing-room revolutionary." Now history teaches that the quality of the tailor does not play any role in the case of the revolutionary. And as far as the drawing room is concerned, shacks have no revolutionary precedence over palaces. I would just recall the political drawing rooms of the great French Revolution or, for example, the elegant officers' club of the select Preobrashensk regiment under many a Czar. Should the Gentlemen of the Tribunal be of the opinion that Schacht and his accomplices themselves should have done the shooting, then all I can say is that things were not as easy as all that. Schacht would have loved to do the shooting himself; he proclaimed that here emphatically. But it was not possible for him to do so without possessing the power to master the attendant confusion, thereby making the attempt a revolutionary success. Thus generals with troops were necessary. I do not wish to repay Generaloberst Jodl with the same coin and shall therefore refrain from saying "a necessary evil."

The further reproach of the basic lack of working-class elements to strengthen the Putsche is contradicted by the social composition of the revolutionaries of 20 July. As I stated before, all this is irrelevant for the decision of the Tribunal. But my client is morally entitled to expect his defense counsel not to let this ironical thrust pass, especially since it was delivered in the limelight of public opinion.

In summing up I may say: After the elections in July 1932 it was certain that Hitler was able and bound to seize power. Previous to this Schacht had particularly warned the foreign countries of this development, and thus he had not contributed to it. After the seizure of power only two roads were open to him, as to every German: He either had to estrange himself or to enter the Movement actively. The decision at these crossroads was a purely political one without any criminal aspect. Just as we respect the reasons which caused the foreign countries to collaborate with Hitler much

more intensively and in a more pro-German way than with the previous democratic Governments of Germany, we must recognize the good faith of all those Germans who believed themselves able to serve the country and humanity better by remaining in the Movement, that is, within the Party or the apparatus of officialdom, because of the greater possibilities of exerting their influence, than by grumbling and keeping aloof. To serve Hitler as minister and President of the Reichsbank was a political decision, about the political correctness of which one can argue *ex post facto* but one which certainly lacked any criminal character. Schacht has always remained loyal to the motivating reason for his decision, namely, to combat any radicalism from an influential position. Nowhere in the world, which knew his oppositional attitude, could he see any signs of warning or support. He saw only that the world trusted Hitler much longer than he himself did and permitted Adolf Hitler to gain honors and foreign political successes, which hampered Schacht's work which had already for a long time been directed toward removing Adolf Hitler and his Government. He led this struggle against Adolf Hitler and his Government with a courage and determination which must make it appear a pure miracle that not until after 20 July 1944 did fate overtake him, when he was sent to a concentration camp and was in danger of losing his life either through the Peoples' Court or through a spectacular act of the SS. He is sufficiently wise and self-critical to realize that from a purely political angle the picture of his character will be adjudged diversely in history, or at least in the immediate future, according to favor or hatred of the parties. He humbly resigns himself to the judgment of history, even if one historian or another will label his political line as incorrect. But with the pride of a good conscience he faces the judgment of this High Tribunal. He stands before his judges with clean hands. He also stands before this Tribunal with confidence, as he has already manifested in a letter which he addressed to this Tribunal before the beginning of the proceedings, in which he states that he is grateful to be able to expose before this Tribunal and before the whole world his actions and doings and their underlying reasons. He stands before this Tribunal with confidence because he knows that favor or hatred of the parties will have no effect on this Tribunal. While recognizing the relativity of all political actions in such difficult times, he remains sure of himself and full of confidence with regard to the criminal charges which have been raised against him. Whoever would be found guilty of being criminally responsible for this war and the atrocities and inhuman acts committed in it, Schacht, according to the evidence which has been given here with minute exactness, can confront that culprit with the words which Wilhelm Tell flings in the face of the emperor's assassin, Parricida: "I raise my clean hands to Heaven, and curse you and your deed!"

I therefore request the findings to be established to the effect that Schacht is not guilty of the accusation which has been raised against him and that he be acquitted.

THE PRESIDENT: I call on Dr. Kranzbühler for the Defendant Dönitz.

FLOTTENRICHTER OTTO KRANZBÜHLER (Counsel for the Defendant Dönitz): Mr. President, Gentlemen of the Tribunal: "War is a cruel thing, and it brings in its train a multitude of injustices and misdeeds."[2] With these words of Plutarch's, Hugo Grotius begins his examination of responsibility for war crimes; and they are as true today as they were 2,000 years ago. Acts constituting war crimes, or considered as such by the opponent, have at all times been committed by belligerents. But this fact was always held against the vanquished parties and never against the victors. The law which was applied here was necessarily always the law of the stronger.

While more or less stable rules have been governing land warfare for centuries, in naval warfare the conceptions of the belligerents with regard to international law have always clashed. No one knows better than the British statesmen to what extent these conceptions are dictated by national or economic interests. I refer in this respect to noted witnesses such as Lord Fisher and Lord Edward Grey.[3] Therefore, if ever in history a naval power would have had the idea of prosecuting a defeated enemy admiral, based on its own conception of the rules of naval warfare, the sentence would have been a foregone conclusion from the very indictment.

At this trial two admirals are under indictment for a naval war which has been termed criminal. Thus the Tribunal is confronted with a decision regarding conceptions of law which are necessarily as divergent as the interests of a naval power and a land power. It is not only the fate of the two admirals which depends upon this decision. It is also a question of personal honor to hundreds of thousands of German seamen who believed they were serving a good cause, and who do not deserve to be branded by history as pirates and murderers. It is for these men, the living as well as the dead, that I feel bound by a moral obligation to reject the accusations raised against German naval warfare.

What are these accusations? They are divided into two main groups: Unlawful sinking of ships and deliberate killing of shipwrecked personnel. I shall deal first with the accusation of the illegal sinking of ships.

Two reports by Mr. Roger Allen, of the British Foreign Office, made in the autumn of 1940 and spring of 1941, form the nucleus of that accusation. I do not know to whom and for what purpose these reports were made.

According to their form and content they appear to serve propaganda purposes, and for that reason alone I consider them to have little value as evidence. Even the Prosecution submitted only part of the accusations made therein. The reports trace only one-fifth of the total number of supposedly unlawful attacks back to submarines, whereas four-fifths are ascribed to mines, airplanes, or surface craft. The Prosecution omits these four-fifths, and this reticence may be explained by the fact that the use of these combat means on the British side differed in no way from that on the German side.

With regard to the use of submarines, however, there does seem to exist a difference between the principles followed in Germany's conduct of the naval war and that of our enemies. At any rate, the public in enemy countries and in many neutral countries believed so during the war, and partly still believes it today. Propaganda dominated the field. At the same time the vast majority of all critics neither knew exactly what principles applied to German U-boat warfare, nor on what factual and legal foundations they were based. It shall be my task to attempt to clarify this.

The reports by Mr. Roger Allen culminate in the assertion that the German U-boats, beginning with the summer of 1940, torpedoed everything within range. Undoubtedly, the methods of submarine warfare gradually intensified under the pressure of the measures directed against Germany. This war, however, never degenerated into an orgy of shooting governed only by the law of expediency. Most of what might have been expedient for a U-boat was left undone to the last day of the war because it could only be regarded as legally inadmissible, and all measures of which Germany in her conduct of naval warfare is being accused today by the Prosecution were the result of a development in which both sides took part through measures and countermeasures, as occurs in the course of every war.

The London Protocol of 1936 formed the legal basis for German submarine warfare at the beginning of this war. These regulations were incorporated verbatim into Article 74 of the German Prize Ordinance, which even Mr. Roger Allen calls a reasonable and not inhuman instrument. This Prize Ordinance was sent in 1938 in draft form to the two U-boat flotillas and to the U-boat training school and served as a basis for the training of commanders. Stopping and examining merchant vessels was performed as a tactical task. In order to facilitate for the commander in economic warfare the quick and correct evaluation of his legal position towards ships and cargoes of the enemy and of neutral countries, the prize disc was constructed, which through simple manipulations indicated the articles of the Prize Ordinance to be applied. Thus, insofar as preparations had been

made at all for economic warfare by submarines they were based exclusively on the German Prize Ordinance, and thus on the London Protocol.

The German High Command actually did adhere to this legal foundation in the initial stages of the war. The combat instructions for U-boats of 3 September 1939 contained clear orders to the effect that submarine warfare was to be carried on in accordance with the Prize Ordinance. Accordingly, sinkings were permissible only after stopping and examining the ship, unless it attempted to escape or offered resistance. Some examples were submitted to the Tribunal, from the abundance of available instances, showing the chivalrous spirit in which the German submarine commanders complied with instructions given. In particular, assistance afforded to the crews of ships lawfully sunk, after having been stopped and examined, occasionally reached a point where it could scarcely be justified on military grounds. Lifeboats were towed over long distances, whereby the few available U-boats were diverted from their combat mission. Enemy ships which might have been sunk lawfully were permitted to go free in order to send the crews of ships previously sunk to port aboard them. It is therefore only correct that Mr. Roger Allen stated that the German U-boats, during the first weeks of the war, adhered strictly to the London regulations.

Why was this practice not kept up? Because the conduct of the enemy made such a procedure militarily impossible, and at the same time created the legal prerequisites for its modification.

I shall consider the military side first. From the very first day of the war, U-boat reports reached the Flag Officer of U-boats and the Naval Operations Staff stating that hardly an enemy ship submitted voluntarily to being stopped and examined. The merchant vessels were not content with attempting to escape through flight or by changing their course and bearing directly down upon the U-boat in order to force it to dive. Every U-boat sighted was at once reported by radio; and subsequently, in the shortest space of time, attacked by enemy airplanes or naval forces. However, it was the arming of all enemy merchant vessels that settled the matter. As early as 6 September 1939 a German U-boat was shelled by the British steamship *Manaar*, and that was the starting signal for the great struggle which took place between the U-boats, on the one hand, and the armed merchant vessels equipped with guns and depth charges, on the other hand, as equal military opponents.

In order to show the effect of all the measures taken by the adversary, I have presented to the Tribunal some examples which I do not wish to repeat. They show unequivocally that further action against enemy merchant ships in accordance with the Prize Ordinance was no longer feasible from the

military standpoint and meant suicide for the submarine. Nevertheless, the German command for weeks on end continued to act according to the regulations governing the Prize Ordinance. Only after it was established that action on the part of enemy merchant ships—especially armed action—no longer took the form of individual measures but of general instructions, was the order given on 4 October 1939 to attack all armed enemy merchant ships without warning.

The Prosecution will perhaps take the standpoint that, in lieu of this, submarine warfare against armed merchant vessels should have been discontinued. In the last war the most terrible weapons of warfare were ruthlessly employed by both sides on land and in the air. In view of this experience the thesis can hardly be upheld today that in naval warfare one of the parties waging war should be expected to give up using an effective weapon after the adversary has taken measures making the use of it impossible in its previous form. In any case such a renunciation could only be considered if the novel utilization of the weapon were undeniably illegal. But this is not the case for the utilization of German submarines against enemy merchant shipping, because the measures taken by the enemy changed not only the military but also the legal situation.

According to German legal opinion a ship which is equipped and utilized for battle does not come under the provisions granting protection against sinking without warning as laid down by the London Protocol for merchant ships. I wish to stress the fact that the right of the merchant ship to carry weapons and to fight is not thereby contested. The conclusion drawn from this fact is reflected in the well-known formula: "He who resorts to weapons must expect to be answered by weapons."

During cross-examination the Prosecution referred to this interpretation of the London Protocol as fraudulent. It admits only the closest literal interpretation and considers the sinking of a merchant ship as admissible only if the latter has offered active resistance. It is not the first time that fundamental differences of opinion exist between contracting parties with respect to the interpretation of a treaty, and the extremely divergent interpretations of the meaning of the Potsdam Agreement of 2 August 1945 provide a recent example. Diversity of conception, therefore, does not permit the conclusion that the one or the other party acted fraudulently during the signing or the subsequent interpretation of a treaty. I will endeavor to show how unjustified this charge is particularly in regard to the German interpretation of the London Submarine Protocol.

There are two terms on which the German interpretation hinges, namely, that of "merchant vessel" and "active resistance." If I now consider

some legal questions, this will in no way represent a comprehensive exposition. I can only touch on the problems and due to lack of time must limit myself also when dealing with research on the subject. I shall primarily refer to American sources, because the interests of naval strategy of that nation were not as firmly established as those of the European nations and its research literature can thus claim greater objectivity.

The text of the London Protocol of 1936 is based, of course, on a declaration which was signed at the London Naval Conference of 1930. The committee of jurists appointed at that time expressed its opinion concerning the greatly disputed definition of a merchant vessel in the report of 3 April 1930:

> "The committee wishes to place on record that the expression 'merchant vessel' where it is employed in the declaration is not to be understood as including a merchant vessel which is at the moment participating in hostilities in such a manner as to cause her to lose her right to the immunities of a merchant vessel."

This definition clarifies at least one thing, namely, that by no means every vessel flying a merchant flag may lay claim to being treated as a merchant vessel in the sense of the London Agreement. Beyond this, the explanation has few positive aspects because the question through what kind of participation in hostilities a vessel loses her right to the immunity of a merchant vessel is again subject to the interpretation of the contracting parties. The London Conference, as far as I can see, did not consider this ticklish question any further, and one is probably entitled to assume that this remarkable reserve is based on experiences which the same powers had accumulated in Washington 8 years before.

The Washington Conference of 1922 was held under the impression of the first World War; and therefore it is no wonder that Great Britain, the naval power which during the World War had suffered most from German submarine warfare, now tried to outlaw and abolish altogether by international law submarine warfare against merchant shipping. The resolution, named after the American chief delegate, Root, which in its first part substantially corresponded to the London text of 1930, served that aim. But in the second part the Root Resolution goes further and stipulates that any commander who, no matter whether he acted with or without higher orders, violated the rules established for the sinking of merchant vessels should be punished as a war criminal like a pirate. Finally it was recognized that under the conditions stipulated in the resolution submarine warfare against merchant shipping was impossible, and such warfare was therefore

renounced altogether by the contracting powers. The Root Resolution designates these principles as an established part of international law. While it was accepted as such by the delegates, none of the five participating naval powers, U.S.A., Britain, France, Japan, and Italy ratified it.

In connection with the Root Resolution, however, another question was discussed which is of the greatest importance for the interpretation of the London Protocol, namely, the definition of the term "merchantman." Here the two conflicting views in the entire U-boat question became clearly evident. On the one side there stood Britain, on the other France[4], Italy, and Japan, while the United States took the position of a mediator. According to the minutes of the Washington Conference, the Italian delegate, Senator Schanzer, opened the offensive of the weaker naval powers by expressly emphasizing that a merchantman, when regularly armed, might be attacked by a submarine without preliminaries. In a later session Schanzer repeated his statement that the Italian delegation applied the term of "merchantman" in the resolution only to unarmed merchant vessels. He declared this to be in explicit accordance with the existing rules of international law.[5]

The French delegate, M. Sarraut, at that time received instructions from his Foreign Minister, M. Briand, to second the reservations of the Italian delegate.[6] He thereupon moved to have the Italian reservations included in the minutes of the session.

The Japanese delegate, Hanihara, supported this trend with the statement that he thought it was clear that merchant vessels engaged in giving military assistance to the enemy ceased in fact to be merchant vessels.[7] It can therefore be seen that in 1922, three of the five powers represented expressed the opinion that armed merchant vessels were not to be regarded as merchant vessels in the sense of the Agreement.

Since the whole resolution threatened to collapse because of this difference of opinion, a way out was found which is typical of conferences of this kind. Root closed the debate with the statement that in his opinion the resolution held good for all merchant ships as long as the ship remained a merchant vessel.[8] With this compromise a formula was created which, while representing a momentary political success, would not however carry any weight in the case of war, for it was left to every participating power to decide whether or not it would grant the armed merchant vessels the protection of the resolution in case of war.

I have described these events of the year 1922 a little more in detail because the powers which took part in them were the same as those which participated in the London Naval Conference of 1930. The London

Conference was the continuation of the Washington Conference, and the subjects that had been discussed and included in the minutes of the first conference were of great importance for the second conference. Experts too —and by no means only German but above all American and French experts —based their examinations on the close connection of both conferences, and it was precisely for that reason that they declared the result achieved in the question of submarines to be ambiguous and unsatisfactory. Here I merely wish to point to Wilson's summarizing report on the London Naval Treaty.[9]

This report, besides the ambiguity of the concept "merchant vessel," also stresses the uncertainty connected with the words "active resistance"; and it is with these very words that an exception from the protection of the merchantman is connected, an exception which likewise is not contained in the actual text of the London Agreement but which nevertheless is generally recognized. I am referring to merchantmen in an enemy convoy. If the London Agreement were interpreted literally, it would be understood that even merchantmen in an enemy convoy must not be attacked without warning but that an attacking warship would have to put the escort vessels out of action first and then stop and search the merchantmen. However, this suggestion, which is impossible from a military point of view, evidently is not made even by the Prosecution. In the report of the British Foreign Office, which has been mentioned several times, it says:

> "Ships sailing in enemy convoys are usually deemed to be guilty of forcible resistance and therefore liable to be sunk forthwith."

Here even the Prosecution accepts an interpretation of the words "active resistance," an interpretation which results in no way from the treaty itself but is simply a consequence of military necessity and thus dictated by common sense.

And this very same common sense demands also that the armed merchantman be held just as guilty of forcible resistance as the convoyed ship. Let us take an extreme instance in order to make the matter quite clear. An unarmed merchant ship of 20,000 tons and a speed of 20 knots, which is convoyed by a trawler with, let us say, 2 guns and a speed of 15 knots, may be sunk without warning, because it has placed itself under the protection of the trawler and thereby made itself guilty of active resistance. If, however, this same merchant ship does not have the protection of the trawler and instead the 2 guns, or even 4 or 6 of them, are placed on its decks, thus enabling it to use its full speed, should it in this case not be deemed just as guilty of offering active resistance as before? Such a deduction really seems to me against all common sense. In the opinion of the Prosecution the

submarine would first have to give the merchant ship, which is far superior to it in fighting power, the order to stop and then wait until the merchant ship fires its first broadside at the submarine. Only then would it have the right to use its own weapons. Since, however, a single artillery hit is nearly always fatal to a submarine but as a rule does very little harm to a merchant ship, the result would be the almost certain destruction of the submarine.

> "When you see a rattlesnake rearing its head, you do not wait until it jumps at you but you destroy it before it gets the chance."

These are Roosevelt's words, in which he justified his order to the United States naval forces to attack German submarines. This reason seemed sufficient to him to order the immediate use of arms even without the existence of a state of war. It is a unique instance in the history of warfare, however, to grant one of two armed opponents the right to fire the first shot and to make the other wait to be hit first. Such an interpretation is contradictory to all military reason. It is no wonder, therefore, if in view of such divergent opinions, the experts on international law, even after the London Treaty and the signing of the London Protocol of 1936, consider the treatment of armed merchant vessels in naval warfare to be an unsolved question. Here too I should like to refer to only one source of research, which enjoys especially high authority. It is the draft of an agreement on the rights and duties of neutrals in naval warfare, an agreement which leading American professors of international law, such as Jessup, Borchard, and Charles Warren, published in the *American Journal of International Law* of July 1939 and which includes arguments which furnish an excellent idea of the latest trend of opinion. Article 54 of this draft corresponds word for word to the text of the London Agreement of 1936, with one notable exception: The term "merchant vessel" is replaced by "unarmed vessel." The next article then continues:

> "In their action with regard to enemy armed merchant vessels, belligerent warships, whether surface or submarine, and belligerent military aircraft are governed by the rules applicable to their action with regard to enemy warships."

This opinion is first of all explained by historical development. During the time when it was customary to arm merchant vessels, that is, until the end of the last century, there was no question of any protection for the merchant vessel against immediate attack by an enemy warship. With the introduction of armor plating the warship became so superior to the armed merchant vessel that any resistance on the part of the latter was rendered futile, and the arming of merchant ships therefore gradually ceased. Only

this defenselessness against warships, and this alone, granted merchant vessels the privilege of not being attacked without warning by the enemy: "As merchantmen lost effective fighting power they acquired a legal immunity from attack without warning."

This immunity was never conceded to the merchant vessel as such but only to the defenseless and harmless merchant vessel. In regard to this the American expert on international law, Hyde,[10] stated in 1922, that is, after the Washington Conference and the afore-mentioned Root Resolution on U-boat warfare:

> "Maritime states have never acquiesced in a principle that a merchant vessel so armed as to be capable of destroying a vessel of war of any kind should enjoy immunity from attack at sight, at least when encountering an enemy cruiser of inferior defensive strength."

Legal as well as practical considerations, therefore, led the above-mentioned American authorities, after the signing of the London Agreement and shortly before the outbreak of this war, to form the opinion that armed merchant ships do not enjoy protection from attacks without warning.

Here the old discrimination between defensive and offensive armaments is also rejected as inapplicable. It is a well-known fact that the American Secretary of State, Lansing, in his note to the Allies on 18 January 1916, took the point of view that any kind of armament aboard a merchant vessel will make its fighting power superior to that of a submarine and that such armament is therefore of an offensive nature.[11]

In the later course of the first World War, the United States changed its opinion and declared that mounting guns on the stern could be taken as proof of the defensive character of the armaments. This standpoint was adopted in some international agreements and drafts, as well as by British jurists in particular. It does not do justice to the practice of naval warfare.

First of all, in this war the guns on many vessels were mounted from the very start in the bows, for instance, regularly on fishing trawlers. Furthermore, the antiaircraft weapons of the merchant vessel, which were especially dangerous for the submarine, were frequently placed on the bridge, and could therefore be used in all directions. Besides, there can be no differentiation between defensive and offensive armaments as to the way the weapons are placed.

In this respect orders alone and the way in which these weapons are meant to be employed are the decisive factors. Soon after the war had started

the orders of the British Admiralty had already fallen into German hands. A decision of the Tribunal has made it possible for me to submit them. They are contained partly in the *Confidential Fleet Orders*, chiefly, however, in the *Defense of Merchant Shipping Handbook*. They were issued in 1938. They do not therefore deal with countermeasures against illicit German actions but, on the contrary, were already issued at a time when warfare in accordance with the London Agreement was the only form of submarine warfare taken into consideration in Germany.

The instructions further show that all British merchant vessels acted, from the first day of the war, according to orders received from the British Admiralty. These involved the following points with respect to submarine warfare:

(1) Reporting of submarines by radio telegraphy.

(2) The use of naval artillery.

(3) The use of depth charges.

These instructions were supplemented on 1 October 1939, when a call was transmitted over the radio to ram all German submarines.

It might seem unnecessary after this survey to make any mention at all of the defensive and offensive character of such orders. The orders on the use of artillery by merchant vessels, however, do make such differentiation; that is, guns are to be used for defense only, as long as the enemy on his part adheres to the regulations of international law, and for the offensive only when he no longer does. The orders covering the practical execution of these directives reveal, however, that there is no difference at all between defensive and offensive use. Admiral Dönitz explained this in detail when he was heard in Court, and I do not want to repeat it. Actually, from the very beginning of the war merchant vessels were under orders to fire on every occasion on every submarine which came within range of their guns. And that is what the captains of British merchant vessels did. The reason for this offensive action can certainly not be found in the conduct of German submarines during the first weeks of the war, for even the Foreign Office report admits that this conduct was correct. On the other hand, British propaganda may have had great influence, since in connection with the unintentional sinking of the Athenia on 3 September 1939, it disseminated through Reuters on 9 September the assertion that unrestricted submarine warfare was in progress and upheld this assertion notwithstanding the fact that the conduct of German submarines during the first weeks of the war refuted this accusation. Together with the announcement of the British Admiralty's ramming orders of 1 October 1939, the merchant navy was again officially informed that the German U-boats had ceased to respect the

rules of naval warfare and that merchant vessels were to adjust their conduct accordingly. It seems to me of no importance that a corresponding written supplement to Admiralty orders was not issued until the spring of 1940, because nowadays a naval war is not directed by letters but by wireless. But according to the latter, the British captains, as from 9 September or 1 October 1939 at the latest, were directed to use their guns offensively against the German U-boats in accordance with the Admiralty's instructions as contained in its handbook. The German order to attack armed enemy merchant vessels without warning was issued only on 4 October. Thus it was justified in any case, even if one did acknowledge a difference in treatment for vessels with defensive and offensive armament.

The guns on the merchant vessels and the orders concerning their use were, however, only a part of a comprehensive system of the use of merchant vessels for military purposes. Since the end of September 1939 the fastest vessels, that is, those ships that were the least endangered by submarines but, on the other hand, were especially suited for chasing U-boats, received depth charge chutes, that is, armaments which call for location of a submerged submarine and thus may be judged as typical weapons for the offensive.

However, another factor of greater general importance, and also of greater danger to the submarines, was the order to report every enemy ship on sight, giving its type and location. This report was destined, so said the order, to facilitate taking advantage of an opportunity, which might never recur, to destroy the enemy by naval or air forces. This is an unequivocal utilization of all merchant vessels for military intelligence service with intent directly to injure the enemy. If one considers the fact that according to the hospital ship agreement even the immunity of hospital ships ceases, if they relay military information of this type, then one need have no doubts about the consequences of such behavior on the part of a commercial vessel. Any craft putting out to sea with the order and intention of using every opportunity that occurs to send military reports about the enemy to its own naval and air forces is taking part in hostilities during the entire course of its voyage and, according to the afore-mentioned report of 1930 of the committee of jurists, has no right to be considered a merchant vessel. Any different conception would not do justice to the immediate danger which a wireless report involves for the vessel reported and which subjects it, often within a few minutes, to attack by enemy aircraft.

All of the Admiralty's directives, taken together, show that British merchant vessels, from the very first day of the war, closely co-operated with the British Navy in combating the enemy's naval forces. They were

part of the military communications network of the British naval and air forces and their armament of guns and depth charges, the practical training in manipulation of the weapons, and the orders relative to their use, were actions taken by the British Navy.

We consider it out of the question that a merchant fleet in this manner destined and utilized for combat should count among the vessels entitled to the protection of the London Protocol against sinking without warning. On the basis of this conception and in connection with the arming of all enemy merchant vessels, which was rapidly being completed, an order was issued on 17 October 1939 to attack all enemy merchant ships without warning.

THE PRESIDENT: Dr. Kranzbühler, we may as well break off now.

SIR DAVID MAXWELL-FYFE: My Lord, I am sorry to detain the Tribunal, but I promised to tell the Tribunal about the two affidavits put forward for the Defendant Seyss-Inquart. We have no objection to them. I promised to tell Your Lordship today. I am sorry to have to detain you.

[*The Tribunal adjourned until 16 July 1946 at 1000 hours.*]

NOTES

[2] De jure pacis ac belli, Book II, Chapter XXIV, Paragraph 10.

[3] Lord Edward Grey: "Twenty-five Years of Politics 1892-1916." (Retranslated into English from the German edition published by Bruckmann, Munich 1926). "International Law has always been very flexible.... A belligerent possessing an over-powerful navy has at all times been in search of an interpretation of International Law which would justify a maximum of intervention in respect of merchandise liable to reach the enemy. This attitude was naturally adopted by Great Britain and the Allies owing to their supremacy at sea. The British position on this subject had not always been the same. When we figured among the neutrals, we naturally contested the right to maximum intervention claimed by the belligerents."

[4] Yamato Ichihalie, The Washington Conference and After, Stanford University Press, Cal., 1928, Page 80, "The chief reason for the British plea was the apprehension of the craft in the hands of the French navy."

[5] Conference on the Limitation of Armaments, Washington, November 12, 1921-February 6, 1922, Washington, Government Printing Office, 1922, Pages 606, 688, 692.

[6] French Yellow Book, La Conférence de Washington, Page 93.

[7] Protocol Pages 693, 702.

[8] Protocol Page 704.

[9] American Journal of International Law, 1931, Page 307.

[10] Hyde, International Law, 1922, Vol. II, Page 469.

[11] U.S. Foreign Relations, 1916, Supplement Page 147.

ONE HUNDRED AND SEVENTY-NINTH DAY

Tuesday, 16 July 1946

Morning Session

FLOTTENRICHTER KRANZBÜHLER: Mr. President, Gentlemen of the Tribunal: I would like to sum up my statements of yesterday and make the following remarks regarding the conduct of German U-boats against enemy merchant vessels.

I believe that the German construction of the London Agreement of 1936, in the light of the position taken by some of the powers involved, as generally known to all experts, as well as according to the opinion of numerous and competent jurists of all countries, was in no way fraudulent. If I were to express myself with all caution, I would say that it is, legally, at least, perfectly tenable, and thus not the slightest charge can be raised against the German Naval Command for issuing its orders on a sensible and perfectly fair basis. We have shown that these orders were given only in consequence of the conditions created by publication of the British measures, which, according to the German concept of law, justified the orders issued.

Before I leave this subject I should like to recall to the mind of the Tribunal the special protection which the German orders provided for passenger vessels. These passenger vessels were excluded for a long time from all measures involving sinking of ships, even when they sailed in an enemy convoy and therefore could have been sunk immediately, according to the British conception. These measures indicate very clearly that the accusation of disregard and brutality is unjustified. The passenger vessels were only included in the orders concerning other vessels when in the spring of 1940 there was no longer any harmless passenger traffic at all, and when these ships, because of their great speed and heavy armament, proved to be particularly dangerous enemies of the submarines. If therefore Mr. Roger Allen's report cites as an especially striking example of German submarine cruelty the sinking of the *City of Benares* in the autumn of 1940, then this

example is not very well chosen because the *City of Benares* was armed and went under convoy.

I shall turn now to the treatment of neutrals in the conduct of German submarine warfare, and I can at once point again in this connection to the example which Mr. Roger Allen cites especially for the sinking of a neutral vessel contrary to international law. It concerns the torpedoing of the Danish steamer *Vendia*, which occurred at the end of September 1939. The Tribunal will recall that this ship was stopped in a regular way and was torpedoed and sunk only when it prepared to ram the German submarine. This occurrence led the German Government to protest to the Danish Government on account of the hostile conduct shown by a neutral boat.

This one example is just to show how different things look if not only the result in the form of the sinking of a neutral ship is known, but also the causes which led to this result. Until the last day of the war the fundamental order to the German submarines was not to attack merchantmen recognized as neutral. There were some accurately defined exceptions to this order, about which the neutral powers had been notified. They affected in the first place ships which conducted themselves in a suspicious or hostile manner, and secondly ships in announced operational areas.

To the first group belonged, above all, those vessels which sailed blacked-out in the war area. On 26 September 1939 the Commander of U-boats asked the High Command of the Navy for permission to attack without warning vessels proceeding in the Channel without lights. The reason was clear. At night the enemy's troop and matériel shipments were taking place, by which the second wave of the British expeditionary army was ferried across to France. At that time the order was still in effect that French ships were not to be attacked at all. But since French ships could not be distinguished from English vessels at night, submarine warfare in the Channel would have had to be discontinued completely after dark in compliance with this order. The Tribunal heard from a witness that in this way a 20,000-ton troop transport passed unmolested in front of the torpedo tubes of a German submarine. Such an occurrence in war is grotesque and therefore of course the Naval Operations Staff approved the request of the Commander of U-boats.

The Prosecution has now made much ado about a note written on this occasion by an assistant at the Naval Operations Staff, Kapitänleutnant Fresdorf. The Chief of Section, Admiral Wagner, already disapproved of the opinions expressed in this note; therefore they did not result in corresponding orders. The order to attack blacked-out ships was issued by radio without any further addition on the part of the Naval Operations Staff

and on 4 October it was extended to further regions along the British coast, and again without any addition in the sense of the above-mentioned note.

Examining the question of blacked-out vessels from the legal standpoint, Vanselow, the well-known expert on the law governing naval warfare, makes the following remark:[12]

> "In war a blacked-out vessel must in case of doubt be considered as an enemy warship. A neutral as well as an enemy merchant vessel navigating without light voluntarily renounces during the hours of darkness all claim to immunity from attack without being stopped."

I furthermore refer to Churchill's declaration, made in the House of Commons on 8 May 1940, concerning the action of British submarines in the Jutland area. Since the beginning of April they had had orders to attack all German vessels without warning during the daytime, and all vessels, and thus all neutrals, as well, at night. This amounts to recognition of the legal standpoint as presented. It even goes beyond the German order, insofar as neutral merchant vessels navigating with all lights on were sunk without warning in these waters. In view of the clear legal aspect it would hardly have been necessary to give an express warning to neutral shipping against suspicious or hostile conduct. Nevertheless, the Naval Operations Staff saw to it that this was done.

On 28 September 1939 the first German note was sent to the neutral governments with the request that they warn their merchant ships against any suspicious conduct, such as changes in course and the use of wireless upon sighting German naval forces, blacking out, noncompliance with the request to stop, *et cetera*. These warnings were subsequently repeated several times, and the neutral governments passed them on to their captains. All this has been proved by documents which have been submitted. If therefore, as a result of suspicious or hostile conduct, neutral ships were treated like enemy ships, they have only themselves to blame for it. The German submarines were not allowed to attack any one who as a neutral maintained a correct attitude during the war, and there are hundreds of examples to prove that such attacks never did occur.

Now I wish to deal with the second danger which threatened neutral shipping: The zones of operations. The actual development, briefly summed up, was as follows:

On 24 November 1939 the Reich Government sent a note to all seafaring neutrals in which it pointed out the use of enemy merchant ships for aggressive purposes, as well as the fact that the Government of the

United States had barred to its own shipping a carefully defined naval zone around the central European coast, the so-called U.S.A. combat zone. As the note states, these two facts give the Reich Government cause—I quote:

> "... to warn anew and more strongly that in view of the fact that the actions are carried on with all the technical means of modern warfare, and in view of the fact that these actions are increasing in the waters around the British Isles and near the French coast, these waters can no longer be considered safe for neutral shipping."

The note then recommends as shipping lanes between neutral powers certain sea routes which are not endangered by German naval warfare and, furthermore, recommends legislative measures according to the example set by the United States. In concluding, the Reich Government rejects responsibility for any consequences which might follow if warning and recommendation should not be complied with. This note constituted the announcement of an operational area equivalent in size to the U.S.A. combat zone, with the specified limitation that only in those sea zones which were actually endangered by actions against the enemy consideration could no longer be given to neutral shipping.

The Naval Operations Staff did indeed observe this limitation. The neutral powers had more than 6 weeks in which to take the measures recommended by the German Government for the safety of their own shipping and to direct their shipping along the routes announced. Starting in January the German command then opened up to the German naval forces, within the operational area announced, certain accurately defined zones around the British coast, in which an attack without warning against all ships sailing there was admissible. The naval chart on which these zones had been marked was submitted to the Tribunal. The chart shows that these zones, and only these, were gradually set up where, as a result of mutually increasing attacks and defensive actions at sea and in the air, engagements continually occurred, so that any ship entering this area was operating in the direct presence of the naval forces of both powers. The last of these zones was designated in May 1940. These zones were not, and need not have been, announced because they were all within the area of operations as proclaimed on 24 November 1939. The distance of these zones from the enemy coast was on the average 60 sea miles. Outside their boundaries the declaration concerning the area of operations of 24 November was not observed, that is to say, neutral ships could be stopped and sunk only in accordance with the Prize Ordinance.

This situation changed when, after the collapse of France in the summer of 1940, the British Isles became the center of war operations. On 17 August 1940 the Reich Government sent to the neutral governments a declaration in which the entire area of the U.S.A. combat zone around England without any limitation was designated as an operational area.

> "Every ship"—so the note reads—"which sails in this area exposes itself to destruction not only by mines but also by other combat means. Therefore the German Government once more urgently warns against entering this endangered area."

From this time on the area was fully utilized and the immediate use of arms against craft encountered in it was permitted to all naval and air forces, except where special exceptions had been ordered. The entire development described was openly dealt with in the German press, and Grossadmiral Raeder granted interviews to the foreign press on this subject, which clearly showed the German viewpoint. If therefore in the sea zones mentioned neutral ships and crews sustained losses, at least they cannot complain about not having been warned explicitly and urgently beforehand.

This statement in itself has not much meaning in the question of whether areas of operation as such constitute an admissible measure. Here, too, the Prosecution will take the position that in the London Agreement of 1936 no exceptions of any kind were made for areas of operation and that therefore such exceptions do not exist.

It is a well-known fact that operational areas were originally proclaimed in the first World War. The first declaration of this kind came from the British Government on 2 November 1914, and designated the entire area of the North Sea as a military area. This declaration was intended as a reprisal against alleged German violations of international law. Since this justification naturally was not recognized, the Imperial Government replied on 4 February 1915 by designating the waters around England as a military area. On both sides certain extensions were made subsequently. I do not wish to go into the individual formulations of these declarations and into the judicial legal deductions which were made from their wording for or against the admissibility of these declarations. Whether these areas are designated as military area, barred zone, operational area, or danger zone, the point always remained that the naval forces in the area determined had permission to destroy any ship encountered there. After the World War the general conviction of naval officers and experts on international law alike was that the operational area would be maintained as a means of naval warfare. A development, typical for the rules of naval warfare, was

confirmed here, namely, that the modern technique of war forcibly leads to the use of war methods which at first are introduced in the guise of reprisals, but which gradually come to be employed without such a justification and recognized as legitimate.

The technical reasons for such a development are obvious: The improvement of mines made it possible to render large sea areas dangerous. But if it was admissible to destroy by mines every ship sailing, despite warning, in a designated sea area, one could see no reason why other means of naval warfare should not be used in this area in the same way. Besides, the traditional institution of the blockade directly off enemy ports and coasts by mines, submarines, and aircraft was made practically impossible, so that the sea powers had to look for new ways to bar the approach to enemy coasts. Consequently it was these necessities which were the compelling factors in bringing about the recognition of the operational area.

It is true that there was by no means a uniform interpretation concerning the particular prerequisites under which the declaration of such areas would be considered admissible, just as there was none with regard to the designation which the belligerent power must choose. The conferences of 1922 and 1930 did not change anything either in that respect, as can be seen, for instance, from the efforts made after 1930, especially by American politicians and experts in international law, for a solution of this question.[13]

Unfortunately, there is no time at my disposal to discuss these questions in detail and therefore it must suffice for the purposes of the defense to state that during the conferences in Washington in 1922 and in London in 1930 the operational area was an arrangement or system known to all powers concerned, which operated in a way determined by both sides in the first World War; that is, that all ships encountered in it would be subject to immediate destruction. If the operational area were to have been abolished in the afore-mentioned conferences, especially in the treaty of 1930, an accord should have been reached on this question, if not in the text of the agreement then at least in the negotiations. The minutes show nothing of the kind. The relationship between operational area and the London Agreement remained unsettled.

The French Admiral Castex[14] has the same viewpoint; Admiral Bauer, Commander of Submarines in the first World War, voiced his disapproval in 1931 of the application of the London rules in the operational area, and this opinion was not unknown to the British Navy.[15] In a thorough study published by Professor Ernst Schmitz[16] in 1938 a merchant vessel which enters an operational area despite general prohibition is deemed to be guilty

of "persistent refusal to stop." The powers participating in the conferences in Washington and London carefully refrained, as also in other cases, from tackling controversial questions on which no accord could be reached. Therefore every power remained at liberty to champion in practice such an opinion as corresponded with its own interests. There was no doubt left in the minds of the participants as to this fact, and I have as a witness for this no less a person than the French Minister for Foreign Affairs at that time, M. Briand. In his instruction of 30 December 1921 to Sarraut, the French chief delegate in Washington, he announces his basic readiness to conclude an agreement on submarine warfare. However, he then points out a series of questions described as essential parts of such an agreement, among them the arming of merchant ships and the definition of combat zones. The instruction goes on:

> "It is indispensable to examine these questions and to solve them by a joint agreement, for surface vessels as well as for submarines and aircraft, in order not to establish ineffective and deceptive stipulations."[17]

Particularly with respect to the question concerning the area of operations, Briand characterizes the submarine rules as being "ineffective and deceptive."

After this testimony nobody would designate the German conception as fraudulent, according to which ships in declared areas of operation forfeit the protection under the London Agreement. Even Mr. Roger Allen's report concedes this.[18] Therefore the attacks of the Prosecution seem to be directed, as I understand from the cross-examination, not so much against the existence of such zones as against their extent, and we have repeatedly heard the figure of 750,000 square sea miles. Incidentally, it must be noted that this figure includes the territorial area of Great Britain, Ireland, and western France; the maritime area only amounts to 600,000 square miles. I quite agree, however, that through operational areas of such a size the interests of the neutrals were badly prejudiced.

It is all the more remarkable that the afore-mentioned American draft of the convention of 1939, which concerns the rights and duties of neutrals, provides for a considerable expansion of the operational area. Such an area, which is termed "blockade zone" in the draft, was to include the waters up to a distance of 50 sea miles from the blockaded coast.

THE PRESIDENT: Dr. Kranzbühler, the Tribunal would like to know what that American draft of 1939 is, to which you refer.

FLOTTENRICHTER KRANZBÜHLER: It is the draft set up by the American Professors Jessup Borchard and Charles Warren, dealing with the rights and duties of neutrals in sea warfare. It was published in the *American Journal of International Law* of July 1939.

THE PRESIDENT: Jessup and Warren, you say?

FLOTTENRICHTER KRANZBÜHLER: Jessup Borchard and Charles Warren.

THE PRESIDENT: Thank you.

FLOTTENRICHTER KRANZBÜHLER: This would correspond roughly to the area of waters in which attacks without warning were authorized until 17 August 1940; it covers approximately 200,000 square sea miles.

However, it seems to me almost impossible to approach from a juridical angle such an eminently practical question as that of the extent of an operational area. As long as this question is not settled by an agreement the actual determination will always be a compromise between what is desirable from a military point of view and what is politically possible. It seems to me that the law is only violated when a belligerent misuses his power against neutrals. The question as to whether such misuse takes place should be made dependent both upon the attitude of the enemy toward the neutrals and upon the measures taken by the neutrals themselves.

THE PRESIDENT: One minute. Dr. Kranzbühler, does not the right to declare a certain zone as an operational zone depend upon the power to enforce it?

FLOTTENRICHTER KRANZBÜHLER: I do not quite follow the point of your question.

THE PRESIDENT: Well, your contention is, apparently, that any state at war has a right to declare such an operational zone as it thinks right and in accordance with its interests, and what I was asking you was whether the right to declare an operational zone, if there is such a right, does not depend upon the ability or power of the state declaring the zone to enforce that zone, to prevent any ships coming into it without being either captured or shot.

FLOTTENRICHTER KRANZBÜHLER: I do not believe, Mr. President, that there exists agreement of expert opinion regarding that question. In contrast to the blockade zone in a classical sense where full effect is necessary, the operational zone only provides for practical endangering through continuous combat actions. This practical threat was present in the German operational zone in my opinion, and I refer in that connection to the proclamation of President Roosevelt regarding the U.S.A.

combat zone, where the entering of that zone was prohibited, because as a result of combat actions shipping must of necessity be continuously endangered.

THE PRESIDENT: The proclamation of the President of the United States was directed, was it not, solely to United States vessels?

FLOTTENRICHTER KRANZBÜHLER: I am referring to it only to establish proof of the German interpretation that this area was endangered, and practical danger seems to be the only legal and necessary prerequisite for declaring an operational zone.

THE PRESIDENT: Would you say that it was a valid proclamation if Germany had declared the whole of the Atlantic to be an operational zone?

FLOTTENRICHTER KRANZBÜHLER: Mr. President, I would say that at the beginning of the war that would not have been possible, for the German forces at that time, without doubt, did not constitute an effective danger to the entire Atlantic sea traffic. I am of the opinion, however, that with the increase in the number of U-boats on the one hand, and with the increase of defense by hostile aircraft on the other, the danger zone of course expanded, and therefore the development of this war quite logically led to the point where operational zones were gradually extended and enlarged.

THE PRESIDENT: Do you mean, then, that you are basing the power of the state to declare a certain zone as an operational zone not upon the power of the state to enforce its orders in that zone, but upon the possibility of danger in that zone?

FLOTTENRICHTER KRANZBÜHLER: Yes.

THE PRESIDENT: You say it depends upon the possibility of danger in the zone?

FLOTTENRICHTER KRANZBÜHLER: I would not say the possibility of danger, Mr. President, but the probability of danger, and the impossibility for the belligerent to protect neutral shipping against this danger.

THE PRESIDENT: May I ask you what other legal basis there is for the theory you are putting forward, other than the adoption of the blockade?

FLOTTENRICHTER KRANZBÜHLER: I am referring as a legal basis especially to the practice of the first World War, and the statements made by experts after the first World War, and also to the generally recognized rules about mined areas. The mined areas actually in this war proved to be operational zones where every means of sea warfare was used to sink without warning. I shall later refer to this topic once more.

THE PRESIDENT: Thank you.

FLOTTENRICHTER KRANZBÜHLER: During the presentation of documents, the Tribunal has eliminated all those which I intended to utilize in order to prove that British naval warfare also paid no attention to the interests of neutrals when they were in contradiction with their own interests. If it is the Tribunal's wish, I will not go into the details of the British measures, and in summing up I will mention them only insofar as they are indispensable for the legal argumentation. The following points are essential:

(1) The British regulations of 3 September 1939 concerning contraband goods, which practically precluded neutral mercantile traffic with Germany through the introduction of the so-called "hunger blockade."

(2) The decree concerning control ports for contraband goods, which compelled neutral ships to make great detours right through the war zone, and to which must be imputed without doubt a series of losses of neutral ships and crews.

(3) The introduction of an export blockade against Germany on 27 November 1939, by means of which the importation of German goods was cut off for neutrals.

(4) The introduction of the navicert system and the black lists, which put the whole of neutral trade under British control and which made ships refusing to accept this system liable to be seized and confiscated.

I do not have to examine the question here whether these British measures toward neutrals were admissible or not from the point of view of international law. In any case the neutrals themselves considered many of them inadmissible, and there was hardly a single one which did not bring forth more or less vehement protests, for instance from Spain, the Netherlands, Soviet Russia, and the United States. From the beginning, the British Government for its part had forestalled any legal examination of the measures by renouncing the optional clause of the Permanent International Tribunal in The Hague, through a note of 7 September 1939. This step was expressly vindicated by the necessity for providing the British Navy with full freedom of action.

On the British side the fact was emphasized in the first World War and ever since that although British measures did prejudice the interests and possibly also the rights of the neutrals, they did not imperil either the ships or the crews and were therefore to be considered morally superior to the inhuman German measures. Actually, as mentioned before, the obligation to enter control ports was dangerous for neutral ships and crews and for this very reason the neutral countries protested against it. But apart from this, it seems to me that the actual divergence between the British and German

measures for blockading the adversary is not founded upon moral differences, but rather upon difference in sea power. In the waters where the British Navy did not exercise naval supremacy, namely, off the coasts we occupied, and in the Baltic Sea, it used the same methods of naval warfare as we did.

In any case the official German opinion was that the afore-mentioned British control measures against neutrals were inadmissible, and the Reich Government reproached the neutral powers with the fact that, although protesting, they in point of fact submitted to the British measures. This is clearly stated in the proclamation issued on the occasion of the declaration of the blockade on 17 August 1940. Consequently, the following facts confronted, the German Naval Command:

(1) A legal trade between the neutrals and the British Isles no longer existed. On the grounds of the German answers to the British stipulations concerning contraband goods and the British export blockade, any trade to and from England was contraband trade and therefore illegal from the point of view of international law.

(2) The neutrals in practice submitted to all British measures, even when these measures were contrary to their own interests and their own conception of legality.

(3) Thus, the neutrals directly supported British warfare, for by submitting to the British control system in their own country they permitted the British Navy to economize considerably on fighting forces which, according to the hitherto existing international law, should have exercised trade control at sea and which were now available for other war tasks.

Therefore the German Government, in determining its operational area with a view to preventing illegal traffic from reaching England, saw no reason for giving preference to the neutrals over its own military requirements, all the less so since neutral shipping, which despite all warnings continued to head for England, demanded a great deal of money for this increased risk and therefore despite all risks still considered trade with England a profitable business.[19]

In addition to that, the most important neutrals themselves took measures which can be regarded as a completely novel interpretation of the existing laws of naval warfare. All the American countries jointly proclaimed the Pan-American safety zone, an area along the American coast within a distance of approximately 300 sea miles. In these waters, comprising altogether several million square miles, they required belligerents to forego the exercise of these rights which, according to

hitherto existing international law, the naval forces of the belligerents were entitled to apply to neutrals. On the other hand, as I have already mentioned, the President of the United States prohibited, on 4 November 1939, U.S. citizens and ships from entering the waters extending over approximately one million square miles along the European coast. Thus the development of the laws of naval warfare, under the influence of the neutrals, necessarily led to the recognition of large areas reserved either for the purpose of safety or for that of combat. In this connection the American President explicitly stated in his proclamation that the maritime zone he had closed was "endangered by combat action" as a result of technical developments. The proclamation thus only took into account the development of modern weapons; the long-range coastal artillery which, for example, could easily fire across the English Channel; the invention of locating devices which permitted coastal supervision of maritime traffic over large areas; and particularly the increased speed and range of aircraft.

From this development the German Naval Command drew the same conclusion as the above-mentioned neutrals, namely, that defensive and offensive action would necessarily have to cover large maritime areas in this war. It was therefore not through arbitrary action that the German operational area, which the Prosecution objects to, grew to such a size; it was only because the German Naval Command was adapting itself to a system which was recognized by the other powers also as justified.

In order to examine the legality of the German measures on the basis of enemy methods, may I ask the Tribunal to recall the naval chart on which the British zones of warning and danger are marked. These zones cover about 120,000 square sea miles. Even if these dimensions are smaller than those of the German operational area, it seems to me that the difference between 100,000 and 600,000 square miles is not so much a question of legal judgment as one of coastal length and of strategic position on the sea. This observation is confirmed by the American practice against Japan, as described by Admiral Nimitz. He says:

> "In the interest of the conduct of operations against Japan the area of the Pacific Ocean is declared a zone of operations."

This zone of operations covers more than 30 million square miles. All ships therein, with the exception of U.S. and Allied, and hospital ships, were sunk without warning. The order was issued on the first day of the war, on 7 December 1941, when the Chief of the Admiralty ordered unrestricted submarine warfare against Japan.

It is not for me to examine whether this order, issued on the first day of the war, is to be looked upon and justified as a measure of reprisal. For me the important thing is to show what actual practice looked like, and that is unequivocal.

The Prosecution finds particularly blameworthy the orders to carry out attacks without warning in the operational areas, if possible without being noticed, so that mine hits could be claimed. Orders to this effect existed for the period between January and August 1940, that is to say, during the period when submarines were not permitted to act without warning throughout the operational area of 24 November 1939, but only in the specially defined areas off the British coast. In this camouflage the Prosecution sees proof of a bad conscience amounting to the recognition of wrongdoing. The real reasons for the measures ordered were both military and political. For the admirals concerned the military reasons, of course, took first place, and these alone were known to the Commander of U-boats. The enemy was to be left in uncertainty as to what weapons of naval warfare had caused his losses, and his defense was to be led astray in this manner. It is obvious that such misleading of the enemy is fully justified in time of war. The measures had the desired military success, and in numerous cases the British Navy employed flotillas of mine sweepers on the spot where a ship had been torpedoed, and conversely started a submarine chase where a loss had occurred through mine hits.

For the Supreme Command, however, it was not the military but the political reasons that were the determining factor. These invisible attacks were meant to provide an opportunity of denying to the neutrals that the sinkings were due to submarines, and of tracing, them back to mines. This actually did happen in some cases. Does that mean that the German Government itself considered the use of submarine action without warning within the area of operations to be illegal? I do not think so.

In view of the repeated accusations which the Prosecution have construed here and elsewhere from the camouflaging of measures and the denial of facts, I feel obliged to make a few remarks on the point as to whether there is any obligation at all in international politics to tell the truth. However things may be in peacetime, in times of war at any rate one cannot recognize any obligation to tell the truth in a question which may be of advantage to the enemy. I need only point to Hugo Grotius who says: “It is permissible to conceal the truth wisely. Dissimulation is absolutely necessary and unavoidable.”[20]

What would it have meant for the military situation if U-boat sinkings such as in the instances dealt with here had not been denied but admitted

instead? First of all, since that would have come to the knowledge of the enemy too, we should have lost the military advantage which lay in misleading his defense. Furthermore—and this is no less important—we might quite possibly have furnished our enemy with allies who would have helped him at least with propaganda, if not with their weapons. In view of the fact that some of the neutrals concerned were so dependent on England, they probably would not have recognized the German viewpoint as to the legitimacy of the operational areas, especially since this viewpoint was contrary to their own interests. It would have led to political tensions, and possibly to armed conflicts. Our enemies would have derived the only immediate advantage from it. From the standpoint of the law this endeavor to camouflage the use of submarines with regard to the neutrals does not seem objectionable to me.

But if the Prosecution uses this with the intention of moral defamation, it is applying standards which heretofore have never been applied to the conduct of a war and to the politics of any other country in the world. It was precisely in naval warfare that the same methods of camouflage were employed by the other side, too. The operational areas which Great Britain declared off the European coasts from Norway to Biscay were, with the exception of the Biscay area, declared mine danger zones. But we know from Churchill's statement of May 1940, as well as from testimonies of witnesses, that in these areas there were unlimited attacks with submarines, speedboats and, above all, with airplanes. Consequently very often neither the German command nor the neutral country which had been attacked knew whether a loss sustained in such an area really should be traced back to a mine or to another weapon of naval warfare. To conclude that the camouflaging of a measure constitutes its illegality thus seems to me entirely without basis.

Within the German operational zone all ships were on principle attacked without warning. However, orders had been given to make exceptions in the case of certain neutrals, such as, in the beginning, Japan, the Soviet Union, Spain, and Italy. In this measure the Prosecution saw the endeavor of the Naval Operations Staff to terrorize the smaller neutral countries whereas it dared not pick a quarrel with the big ones. The real reason for this differentiating treatment is given in Document UK-65 in the notation on the report which the Commander-in-Chief of the Navy made to the Führer on 16 October 1939.

According to this the neutral governments mentioned are requested to declare that they will not carry contraband; otherwise they would be treated just like any other neutral country. The reason for the different treatment was

merely that certain countries were willing and able to forbid their vessels from carrying contraband to England, whereas others could not or would not do so because of their political attitude or their economic dependence on England. Therefore it is not a question of terrorizing the smaller neutrals and sparing the bigger ones, but of preventing traffic in contraband and sparing legal commercial trade. Since no general legal maxim exists which compels the belligerent power to treat all neutral powers alike, no objection can be raised on the basis of international law. It would indeed be strange if here in the name of humanity the demand were made that German submarines should have sunk even those ships which they did not want to sink at all.

The Tribunal saw from the standing war orders submitted that during the further course of the war even the small powers, which were the only neutral ones left, could by virtue of shipping agreements cross the operational area along certain routes without being molested by German submarines. In this way for instance Sweden and Switzerland as well as Turkey could carry on their maritime trade during the entire war.

Outside the operational area announced the German submarines were never permitted to attack neutral ships. In this respect the Naval Command refrained from waging any submarine warfare against neutral merchant shipping, since enemy air surveillance made stopping and searching too dangerous for German submarines. Against the disadvantage of submarine warfare within the operational area, the neutrals had, outside the area, the advantage of remaining completely unmolested, even if they were shipping contraband goods, which fact in itself made them liable to be sunk after being stopped. Thus a neutral vessel outside the operational area was only in danger if it behaved in a suspicious or hostile way or if it was not clearly marked as neutral. The German Naval Operations Staff again and again called the attention of the neutral powers to this necessity.

In this connection I must mention the order of 18 July 1941, according to which United States vessels within the operational area were placed on an equal basis with all other neutrals, that is to say, could be attacked without warning. The Prosecution have seen in this special proof that the submarine warfare against neutrals was waged in a "cynical and opportunist" way. If this is meant to convey that it was influenced also by political considerations, then I am ready to admit it. But I do not consider this a reproach; since war itself is a political instrument, it is in keeping with its essence if individual parts of it are placed under the leadership of politics. In particular, no reproach should be seen in the orders of the German Command as regards the utilization of submarines against the United States,

because they precisely furnish proof of the efforts to avoid any conflict with the United States.

As the Tribunal knows from documents and the testimonies of witnesses, the ships of the United States during the first years of the war were exempt from all measures of naval warfare, and this applied even when contrary to the original American legislation they sailed into the U.S.A. combat zone and thus into the German operational area in order to carry war matériel to England.

This policy was not changed until, in addition to the many unneutral acts of the past, the active employment of the American Navy had been ordered for the protection of British supply lines.

Everybody is familiar with the statements of President Roosevelt, which he made at that time, about the "bridge of boats over the Atlantic" and the support which should be given to England "by every means short of war." It may be considered a matter of doubt whether the "realistic attitude"[21] which the U.S. naval and air forces were ordered to take at that time did not already constitute an illegal war, as has been claimed just now on the part of the Americans.[22]

At least the United States had abandoned her neutrality and claimed the status of a "nonbelligerent," which also presented a new aspect of international law in this war. If in this connection one wishes to raise the charge of cynicism, it should hardly be directed against the orders which were issued as a justified reaction to the American attitude.

I have endeavored to present to the Tribunal a survey of the essential orders issued, and to say a few things with respect to their legality. No doubt there were instances of attacks on ships which according to the orders mentioned should not have been attacked. There are just a few such cases, and some of them have been brought up at this Trial. The best known concerns the sinking of the British passenger vessel *Athenia* on 3 September 1939 by *U-30* under the command of Kapitänleutnant Lemp. The sinking of this ship was due to the fact that the commander mistook it for an armed merchant cruiser.

If the Tribunal should still hesitate to believe the concurring statements of all the witnesses heard here on this critical instance, which was used especially for propaganda purposes, these doubts ought to be removed by the behavior of the same commander in the days and weeks following the sinking. Kapitänleutnant Lemp, as the log of *U-30* at that time shows, adhered strictly to the Prize Ordinance, and from this log I was able to submit several examples of the fair and gentlemanly conduct of German

commanders even when by such conduct they greatly endangered their submarines.

Only on the return of *U-30* from the operations at the end of September 1939 were the Commander of U-boats and the Commander-in-Chief of the Navy fully informed of the whole affair of the sinking of the *Athenia*. Upon his return the commander immediately reported to the Commander of U-boats the mistake which he himself meanwhile recognized as such, and was sent to Berlin to report in person.

Dr. Siemers will deal with the political aspect of this matter. I only mention the military occurrences. Admiral Dönitz received the following communication from the Naval Operations Staff:

(1) The affair was further to be dealt with politically in Berlin.

(2) Court-martial proceedings were not necessary since the commander acted in good faith.

(3) The entire matter was to be kept in strict secrecy.

On the grounds of this order the Commander of U-boats gave orders that the report on the sinking of the *Athenia* be deleted from the log of *U-30* and that the log be complemented in such a manner as to make the absence of the entry inconspicuous. As the Tribunal has seen, this order was not adequately carried out, obviously for the reason that the officer in charge had no experience whatever in such dealings.

The Prosecution pointed to this changing of the War Diary as a particularly criminal act of falsification. This, it seems to me, is based on a misunderstanding of the facts. The War Diary is nothing but a military report by the commander to his superiors. What occurrences should or should not be included in reports of this kind is not decided by any legal or moral principle, but is solely a matter of military regulations. The War Diary was meant to be secret; however, it was—like many secret matters—accessible to a very large group of people. This is already apparent from the fact that it had been circulated in eight copies, of which some were intended not only for higher staffs but for schools and for training flotillas as well. Therefore, whenever an occurrence was to be restricted to a small group of individuals, it was not to be reported in the War Diary. Since the sequence of the War Diary continued, the missing period had to be filled in with another, necessarily incorrect, entry. I can see nothing immoral in such a measure, much less anything illegal. As long as there is secrecy in time of war—and that is the case in all countries—it means that not all facts can be told to everybody, and therefore one sometimes may have to make incorrect statements. A certain moral offense could perhaps be seen in such action in

the case of the *Athenia* if thereby a falsification for all times had been intended. This, however, was by no means the case. The commander's report with regard to the sinking of the *Athenia* was of course submitted in the original form to the immediate superiors, the Commander of U-boats and the Commander-in-Chief of the Navy, and kept in both their offices. I should like further to say briefly that a general order not to enter certain happenings into the War Diary has never existed.

The *Athenia* case brings another fact to light and that is the manner in which the compliance of U-boat commanders with any orders issued was enforced. In spite of the justified conception of the Naval Operations Staff that the commander acted in good faith, he was put under arrest by Admiral Dönitz because by exercising greater caution he perhaps might have recognized that this was not an auxiliary cruiser. Punishment was meted out in other cases, too, where orders had been mistakenly violated.

The Tribunal is familiar with the wireless communications of September 1942, by which, on occasion of the sinking of the *Monte Corbea*, the commander had been informed that upon his return he would have to face court-martial proceedings for violation of orders regarding conduct toward neutrals. All commanders received notice of this measure.

The Tribunal will please consider what such strict warnings mean to a commander at sea. If the directives of the American manual for courts-martial were to be considered as a basis, then court-martial proceedings against officers should only be initiated in cases where dismissal from the service seems warranted.[23] That should never be the case when the violation of an order is an accidental one. For a commanding officer who is supposed with his soldiers to wage war and gain successes, it is extremely hard and, in fact, under certain circumstances actually a mistake to have one of his commanders on his return from a successful operation tried before a court-martial because of a single slip which occurred in that action.

Every military command acts in accordance with these principles. In this connection I will refer to the unreserved recognition which the commander of the British destroyer *Cossack* received for setting free the prisoners of the *Altmark* in spite of the incidents which occurred during this action, which were probably regretted by the British too.

I had to go into those matters in order to meet the accusation that all sinkings carried out against orders were afterward sanctioned by the High Command in that no drastic steps were taken against the commanders. Especially in the field of submarine warfare compliance with orders issued was insured by the continuous personal contact of the commanders with their commanding officer. Upon conclusion of every enemy operation an

oral report had to be made, and all measures taken were subjected to sharp criticism, while instructions were given at the same time for future behavior.

The German submarines undertook many thousands of combat operations during this war. In the course of these, orders issued were violated only in very rare instances. If one considers how difficult it is for a submarine to establish its exact position and the boundaries of an operational area, and to distinguish an armed from an unarmed ship, a passenger ship from a troop transport, or a neutral from an enemy ship, the low number of sinkings considered unjustified by the Germans, too, must be taken as proof of an especially effective and conscientious leadership.

After this discussion of the factual development of German submarine warfare, I still have to deal with the accusations built up by the Prosecution from certain preparatory deliberations on the subject of the organization of submarine warfare.

Simultaneously with the combat instructions of 3 September 1939, whereby German submarines were ordered to adhere in their operations strictly to the Prize Ordinance, an order was prepared in the Naval Operations Staff decreeing action without warning in case the enemy merchantmen were armed. In addition to this, during the first days of the war there was an exchange of correspondence with the Foreign Office on the subject of declaring prohibited zones.

The Prosecution looks upon these two documents as proof of the intention to conduct a war contrary to international law from the very start. I, on the other hand, regard these same documents as proof of the fact that the Naval Operations Staff was fully unprepared for a war with England, and that it was only when the British had already declared war that they began to set about thinking in the most elementary manner on how such a war should be conducted. Since neither surprise attacks on armed merchant vessels nor the declaration of prohibited zones violate international law, a belligerent might well be allowed to consider after the outbreak of war if and when he wants to make use of these opportunities. As we know from the aforementioned orders of the British Admiralty, as early as 1938 a thorough study of all the possibilities resulting from the war upon commercial shipping had been made and elaborated for practical purposes.

This same standpoint holds good also for the memorandum of the Naval Operations Staff of 15 October 1939, which has been quoted several times by the Prosecution. Its very heading shows that it is a study: "Possibilities for the Intensification of Naval Warfare."

In accordance with the heading, the memorandum provides an examination of the military demands for effective naval warfare against

England, and of the legal possibilities for fulfilling these demands. The result was the order of 17 October 1939, decreeing the immediate use of arms against all enemy merchant vessels, since, as we have already shown, they had been armed and incorporated into the military system. Further intensifying measures were for the time being recognized as not yet justified, and the suggestion was made to wait and see what the further conduct of the enemy would be.

One sentence in this memorandum arouses special suspicion on the part of the Prosecution. It says that naval warfare must, as a matter of principle, be kept within the framework of existing international law. However, measures which might result in successes decisive for the war would have to be taken even if new laws of naval warfare were created thereby.

Does this really constitute a renunciation of international law? Quite the contrary. A departure from existing international law is made dependent only on two quite limited conditions: (1) A military one, namely, that measures are involved which are of decisive importance for the outcome of the war, that is, also of importance in shortening the war;[24] (2) a moral one, namely, the nature of the new measures makes them suitable for incorporation into the new international law.

The memorandum itself states that this would be possible only within the framework of the laws of military combat ethics and a demand is therefore made for rigid adherence without any exceptions to these ethics of warfare. Under these conditions there can hardly be any doubt as to the possibility of formulating new international laws.

The well-known expert on international law, Baron von Freytagh-Loringhoven says, and I quote:

> "... always been war which has given its strongest impulses to international law. Sometimes they have been of a positive, sometimes of a negative nature. They have led to further development of already existing institutions and norms, to the creation of new forms or the reversion to old ones, and not infrequently also to failures."[25]

Especially in this Trial, which itself is supposed to serve the development of new international law, the possibility of such a development cannot be denied.

THE PRESIDENT: We will adjourn.

[*A recess was taken.*]

THE PRESIDENT: The Tribunal will not sit in open session after 1 o'clock tomorrow, Wednesday; it will sit in closed session during the afternoon. The Tribunal will not sit in open session on Saturday; it will sit in closed session on Saturday morning.

FLOTTENRICHTER KRANZBÜHLER: Before the recess I was speaking about the possibilities of development of naval law.

The American prosecutor, Justice Robert Jackson, in his report to the President of the United States with regard to this problem, expressed his opinions as follows, and I quote:[26]

> "International law is not capable of development by legislation, for there is no continuously sitting international legislature. Innovations and revisions in international law are brought about by the action of governments, designed to meet a change in circumstances. It grows, as did the common law, through decisions reached from time to time in adapting settled principles to new situations."

These words carry a full justification of the clause objected to by the Prosecution in the memorandum of the Naval Operations Staff. And the fact that the Allies also deemed war-deciding measures to be justified even though they were contradictory to hitherto valid concepts of international law is proved by the use of the atomic bomb against Japanese cities.

Since I am interested in justifying the actual measures taken by the Naval Command in Germany; I have not dealt with the point as to which one of the two admirals accused carried greater or lesser responsibility for one or another. As a formal basis in nearly all cases a Führer decree exists. Both admirals, however, stated here that they considered themselves fully responsible for all orders of naval war which they gave or transmitted. I should like to add to that only two remarks.

As far as political considerations were decisive for orders of the U-boat war, the Commander-in-Chief of the Navy had no influence on them. The Commander of U-boats had not been notified of such considerations any more than of the political settlement of incidents which arose through U-boats.

My second remark concerns the question as to what extent a military commander may be held responsible for the accuracy of legal reasonings which he does not indulge in himself, but which are delivered to him by the leading experts of his country, who after all are not just small-town lawyers.

In addition, the Commander of U-boats had only tactical tasks and his staff contained only a few officers, none of whom was qualified to examine questions of international law of the import mentioned here. He therefore had to rely on the fact that the orders issued by the Naval Operations Staff were examined as to their legality and were in order. That is probably handled in a like manner in every navy in the world. A professional seaman is not competent for legal questions; with this reason the Tribunal cut off a remark by Admiral Dönitz about a legal question. This condition must, however, be considered in applying the principle which the German Supreme Court, during the war crimes trials after the first World War, formulated in this regard, and I quote: "The culprit must be conscious of the violation of international law by his actions."

This appears to me to be equally just, as I should deem it to be incompatible with the demands of justice if soldiers were charged with a criminal responsibility in deciding legal questions which could not be settled at international conferences and are hotly disputed among the experts themselves.

In this connection I should like to mention that the London Pact of 1930 did not from the Root Resolution of 1922 adopt the principle of criminal prosecution for violations of the rules of U-boat warfare. The five naval powers participating in this conference apparently came to the conclusion that the problems of naval warfare cannot be solved by means of penal law. And this fact applies fully today, too.

I am now coming to the second basic charge of the Prosecution—intentional killing of shipwrecked crews. It is directed only against Admiral Dönitz, not Admiral Raeder. The legal basis for the treatment of shipwrecked crews for those ships which are entitled to the protection of the London Agreement of 1936 is laid down in the agreement itself. There it says that, before the sinking, crews and passengers must be brought to safety. This was done by the German side, and the difference of opinion with the Prosecution concerns only the question already dealt with, namely, which ships were entitled to protection under the agreement and which were not.

In the case of all ships not entitled to protection under the agreement, sinking should be considered a military combat action. The legal basis, therefore, with regard to the treatment of shipwrecked crews, in these cases is contained in the Hague Convention concerning the Application of the Principles of the Geneva Convention to Naval Warfare of 18 October 1907, although it was not ratified by Great Britain. According to this, both belligerents shall after each combat action make arrangements for the search

for the shipwrecked, as far as military considerations allow this. Accordingly the German U-boats were also bound to assist the shipwrecked of steamers sunk without warning as long as by doing so, first, the boat would not be endangered and, secondly, the accomplishment of the military mission would not be prejudiced.

These principles are generally acknowledged. In this connection I am referring to the order of the British Admiralty, for example, and I quote: "No British ocean-going merchantman shall aid a ship attacked by a U-boat."

I further refer to the affidavit of Admiral Rogge, according to which in two cases, personally witnessed by him, nothing was done by a British cruiser to rescue the shipwrecked, because U-boats were assumed to be nearby, once correctly so and once erroneously. A higher degree of self-endangering would appear to apply to U-boats as compared with other types of vessels because of their exceptional vulnerability.

As to the second exception to rescue duty, namely, prejudice to the military mission, the U-boat is also subject to special conditions. It has no room to take guests aboard. Its supply of food, water, and fuel is limited and any considerable expenditure will prejudice its combat mission. Furthermore, it is typical for the U-boat that the combat mission may call for an unobserved attack and therefore exclude rescue duty. In order also to present an opinion about the tactics of the opposite side, I quote from the statement of Admiral Nimitz:

> "In general U.S. submarines did not rescue enemy survivors if it meant an unusual additional danger for the submarine or if the submarine was prevented from further carrying out its mission."

In the light of these principles I will briefly deal with rescue measures by U-boats until the autumn of 1942. The basic order was issued by the Naval Operations Staff on 4 October 1939, and specified rescue whenever possible from the military standpoint. This was temporarily restricted by Standing War Order 154. This order, issued in December 1939, applied to the small number of submarines at that time operating immediately off the British coast. It may be seen from the order itself that every paragraph deals with combat in the presence of enemy escort and patrol forces. The last paragraph therefore also deals only with this aspect and serves the warranted purpose of protecting submarine commanders against the dangers to which, under the existing circumstances, they would in every case expose their boats by rescue measures. When after the Norwegian campaign the scene of activity of the submarines gradually shifted to the open Atlantic, this order became outdated, and it was finally canceled in the autumn of 1940. In the

period that followed, the German submarine commanders carried out rescue measures whenever they could assume responsibility from the military standpoint. This is known to the Tribunal from numerous specific examples cited here, contained both in the statements of submarine commanders submitted here and in the war diaries. This situation was changed through Admiral Dönitz's order of 17 September 1942, in which he forbade rescue measures on principle. The decisive sentences are:

> "The rescue of members of the crew of a ship sunk is not to be attempted. Rescue is contradictory to the most primitive demands of warfare, which are the annihilation of enemy ships and crews."

It has been disputed by the Prosecution that this actually prohibits rescue. It looks upon this order as a hidden provocation to kill the shipwrecked, and it has gone through the press of the world as a command for murder. If any accusation at all has been refuted in this Trial, then it seems to me to be this ignominious interpretation of the order mentioned above.

How was this order brought on? Beginning with June 1942, the losses of German submarines through the Allied air force rose by leaps and bounds, and jumped from a monthly average of 4 or 5 during the first 6 months of 1942 to 10, 11, 13, finally reaching 38 boats in May 1943. Orders and measures from the command of submarine warfare multiplied in order to counter those losses. They were of no avail and every day brought fresh reports of air attacks and losses of submarines.

This was the situation when on 12 September it was reported that the heavily armed British troop transport *Laconia* with 1,500 Italian prisoners of war and an Allied crew of 1,000 men and some women and children aboard had been torpedoed. Admiral Dönitz withdrew several submarines from current operations for the purpose of rescuing the shipwrecked, no distinction being made between Italians and Allies. From the very start the danger of enemy air attacks filled him with anxiety. While the submarines during the following days devotedly rescued, towed boats, supplied food, and so forth, they received no less than three admonitions from the Commander to be careful, to divide the shipwrecked, and at all times to be ready to submerge. These warnings were of no avail. On 16 September one of the submarines displaying a Red Cross flag and towing life boats was attacked and considerably damaged by an Allied bomber; one lifeboat was hit and losses caused among the shipwrecked. Following this report the Commander sent three more radio messages with orders immediately to submerge in case of danger and under no circumstances to risk the boats'

own safety. Again without avail. In the evening of that day, 17 September 1942, the second submarine reported that during rescue actions it had been taken unawares and bombed by an airplane.

Notwithstanding these experiences, and in spite of the explicit order from Führer headquarters not to endanger any boats under any consideration, Admiral Dönitz did not discontinue rescue work, but had it continued until the shipwrecked were taken aboard French warships sent to their rescue. However, this incident was a lesson. Due to enemy air reconnaissance activity over the entire sea area, it was simply no longer possible to carry out rescue measures without endangering the submarine. It was useless to give orders over and over again to commanders to undertake rescue work only if their own boats were not endangered thereby. Earlier experiences had already shown that their human desire to render aid had led many commanders to underestimate the dangers from the air. Yet it takes a submarine with decks cleared at least one minute to submerge on alarm, while an airplane can cover 6,000 meters in that time. In practice this means that a submarine engaged in rescue action when sighting a plane has not time enough to submerge.

These were the reasons which caused Admiral Dönitz directly after the close of the *Laconia* incident to forbid rescue measures on principle. This was motivated by the endeavor to preclude any calculation on the part of the commander as to the danger of air attack whenever in individual cases he should feel tempted to undertake rescue work.

It is difficult to judge the actual effects of this order. From 1943 on about 80 percent of the submarines were fighting against convoys, where even without this order rescue measures would have been impossible. Whether or not some commander would have, without this order, again risked concerning himself with the lifeboats, nobody can tell with certainty. As is known, an order existed since the middle of 1942 to bring in as prisoners, if possible, captains and chief engineers. Over a period of almost 3 years this order was carried out not even a dozen times, which proves how high the commanders themselves estimated the danger to their boats in surfacing. On the other hand, nothing was more distressing for members of the crews of torpedoed ships than to be taken aboard a U-boat, because of course they knew that their chance of being rescued was much better in a lifeboat than on a U-boat which, with a probability of at least 50 percent, would not return to its base. Therefore, I arrive at the conclusion, as did Admiral Godt, that the *Laconia* order may have cost the lives of some Allied seamen just as it may have saved the lives of others. Be that as it may, in the face of the enormous losses by the enemy air forces the order forbidding

rescue was justified. It was completely in line with the basic idea of the precedence of one's own vessel and of one's own task, as prevailing in all navies; a principle which I believe I have proved as commonly valid in view of existing British and American orders and practices.

How then can the Prosecution consider this order an "order to murder"? Grounds for this are said to be furnished by the discussion between Hitler and the Japanese Ambassador, Oshima, in January 1942, in which Hitler mentioned a prospective order to his U-boats to kill the survivors of ships sunk. This announcement, the Prosecution infers, Hitler doubtless followed up, and Admiral Dönitz carried it out by the *Laconia* order. Actually, on the occasion of a report on U-boat problems which both admirals had to make in May 1942, the Führer suggested that in future action should be taken against the shipwrecked, that is, to shoot them; Admiral Dönitz immediately rejected this sort of action as thoroughly impossible and Grossadmiral Raeder unreservedly agreed with him. Both admirals specified the improvement of torpedoes as the only permissible way to increase losses among the crews. In the face of the opposition of both admirals Adolf Hitler dropped his proposal, and following this report no order whatever was given concerning shipwrecked crews, let alone concerning the killing of the shipwrecked by shooting. The destruction of the crews through improved efficiency of the torpedoes is an idea which for the first time cropped up during this discussion in May 1942, and which recurs in later documents of the Naval Operations Staff. I must therefore express myself on the legality of such a tendency. According to classical international law the destruction of combatants constituted a legal aim of war actions, not however that of noncombatants.[27] In view of the development of the last wars one may be doubtful whether this classical theory still has any validity. I am inclined to regard the hunger blockade as the first important infringement of this theory, which by cutting off all food supply was aimed at the civilian population, therefore the noncombatants of a country. The victims of this during the first World War were estimated at 700,000 people.[28] Although this blockade was frequently acknowledged to be inadmissible according to international law, [29] it was nevertheless practiced, and therefore it amounts to an infringement of the principle of protection for noncombatants against war measures.[30]

The second great infringement was brought on by aerial warfare. I do not wish to discuss the unsolvable question of who started it, but only to state the fact that war from the air, at least during the two final years, was aimed against the civilian population. If in dozens of attacks on residential quarters of German cities thousands or tens of thousands of civilians were among the victims while soldiers numbered only a few dozen or a few

hundred, then nobody can assert that the civilian population was not included in the target of the attack. The mass dropping of explosives and incendiary bombs on entire areas does not permit of doubt, and the use of the atomic bomb has produced final evidence thereof.

In view of the hundreds of thousands of women and children who in this manner miserably perished in their houses by being buried, suffocated, or burnt to death, I am surprised at the indignation of the Prosecution about the loss of about 30,000 men who lost their lives in war areas on ships which were armed and carried war material, and often enough bombs destined for German cities. Moreover, most of these men died in combat, that is, by mines, aircraft action, and especially in attacks on convoys, all actions which according to British conception, too, were lawful.

The German Naval Operations Staff regarded these men as combatants. The British Admiralty takes the opposite standpoint in its orders to the merchant navy. In this connection Oppenheim, the foremost British expert on international law, before the outbreak of the first World War still maintained that the crew should be put on the same level as combatants.[31] He points to the century-old practice, especially followed in Britain, of taking the crew of merchant ships prisoner of war. He find's this principle confirmed in the 11th Hague Convention of 1907, and looks upon the crew of the merchant navy as potential members of the navy. The legal position in their defense against a warship is described by him as "entirely analogous to the position of the population of an unoccupied territory which takes up arms in order to combat invading troops." It is well known that such a force is considered a combat unit. According to Paragraph 2 of the Hague Convention on Land Warfare, they are considered combatants irrespective of whether or not the individual actually makes use of weapons. Accordingly, Oppenheim also refused to make any distinction among the crew, between men who are enrolled in the enemy navy and men who are not.

If this interpretation was already valid before the first World War, it certainly was unassailable in the year 1942, at a time when there were no more unarmed enemy ships and when the neutrals who happened to enter the zone of operations were exclusively moving in enemy convoys, which made them, just like enemy ships, integral parts of the enemy forces. All of them had lost their peaceful character and were considered as being guilty of active resistance. Active resistance against acts of war is not permitted to any noncombatant in land warfare and results in his being punished as a *franc-tireur*. And in naval warfare should a ship's crew be entitled to the combatant's privileges, without suffering any of his disadvantages? Should a crew be permitted to participate in every conceivable act of war, even

including the use of guns and depth charges, and yet remain noncombatant? Such an interpretation renders illusory the entire concept of a noncombatant. Nor does it make any difference whether or not only part of the crew has anything to do with the firing of the guns. The ship as an entity represents a fighting unit, and on board a merchant ship more people actually had something to do with the handling of weapons than on board a submarine. These men were trained under military supervision, they fired the guns along with gunners of the navy, and the use of their weapons was regulated according to the Admiralty's orders.[32] The crews of ships were accordingly combatants and thus it was legitimate for the adversary to try to destroy them by the use of arms.

This explains at the same time the sentence about the destruction of ships and crews, which is considered by the Prosecution as a specific indication that the *Laconia* order bore the character of a murder order. There has been enough discussion concerning the meaning of this sentence as an argument for forbidding rescue work. It may, taken out of its context, give cause for misunderstanding. But whoever goes to the trouble of reading the entire order cannot misunderstand it. To me the decisive crime appears to be that, in accordance With its origin, it was never meant to be a murder order and was not interpreted as such by the commanders. This is proved by the declarations and statements of dozens of submarine commanders. From its context it could not have been interpreted as a murder order. In fact in the next paragraphs it was explicitly ruled that so far as possible certain members of the crew should be brought back as prisoners. Surely one must credit a military command with enough intelligence, when giving such a murder order at all, to refrain from additional orders to conserve a number of witnesses of its crime.

Contrary to the Prosecution, the British Admiralty clearly did not believe in such a murder order. Otherwise it would not have given orders to its captains and chief engineers to escape capture by German submarines by camouflaging themselves as plain sailors while in the lifeboats. According to the interpretation by the Prosecution, such an order would indeed have meant that the captain would have been killed by the submarine along with all the other members of the crew.

Furthermore, the Prosecution have quoted the order to attack so-called "rescue ships" as evidence of the intention to kill shipwrecked people. However, only the individual who is either in the water or in a lifeboat is shipwrecked. A shipwrecked combatant who is again on board a ship is nothing but a combatant, and accordingly the legitimate aim of an attack. I have already pointed out, during the hearing of evidence, the shooting down

of German sea rescue planes with intent to kill the rescued airmen, in order to show that the enemy acted according to the same conception.

I shall discuss as briefly as possible the depositions of witnesses on which the Prosecution tries to base its interpretation of the Laconia order. In my opinion, the deposition of Oberleutnant zur See Heisig, as made here before the Tribunal, is irrelevant. His earlier affidavit is wrong, and we know why from the witness Wagner. Here, before the Tribunal, Heisig has explicitly denied that in Grossadmiral Dönitz's address to the cadets of the submarine school in September 1942 there was any reference to the effect that shipwrecked people should be fired upon. Rather did he personally draw this conclusion from the passage that total war must be waged against ship and crew, with added reference to air bombing. His interpretation may be explained by the fresh impression of the bombing of Lübeck, which he had just experienced. The other listeners did not share this interpretation; in fact, it did not even occur to them. This is evident from the deposition of three persons who heard the address. The further assertion of Heisig, that an officer unknown to him had instructed him on an unknown occasion that the men should be ordered below deck when exterminating shipwrecked people, I consider as an improvisation of his imagination, which appears to be easily excited. If this had really been the case, then so astonishing an occurrence, which would have been in contradiction to all training principles of the Navy, must have made such an impression on a young officer that he would have retained some recollection of the full circumstances of such an instruction.

The testimony of Korvettenkapitän Möhle must be taken much more seriously, because he had—there is no doubt about it—at least hinted to a few submarine commanders that the *Laconia* order demanded, or at least approved of, the killing of shipwrecked. Möhle did not receive this interpretation either from Admiral Dönitz himself, nor from the Chief of Staff nor his chief assistant, Fregattenkapitän Hessler; that is to say, from none of the officers who alone would have been qualified to transmit such an interpretation to the chief of a flotilla.

How Möhle actually arrived at this interpretation has in my opinion not been explained by the Trial. He maintains that it was due to the fact that Korvettenkapitän Kuppisch from the staff of the Commander of U-boats had told him the story of *U-386*, a boat whose commander had been reprimanded for not having shot Allied airmen drifting in a rubber dinghy. This explanation of Möhle's cannot be correct. It is proven beyond any doubt by the War Diary and by witnesses that the commander of *U-386* had been reprimanded because he did not take on board the airmen concerned

and bring them back. The whole affair concerning *U-386*, furthermore, took place a year after the *Laconia* incident in September 1943 and Korvettenkapitän Kuppisch, who was supposed to have told it, had already been killed in action as a U-boat commander in August 1943. It is not my task to try to explain how Möhle actually acquired his knowledge about the *Laconia* order. One thing at any rate has been proven, namely, that Admiral Dönitz and his staff had not caused this briefing to be given, nor did they know anything about it. Considering the frequent personal contacts between the U-boat commanders and the staff of the Commander of U-boats this can only be explained by the fact that the few commanders whom Möhle thus briefed did not take his words seriously.

Is Admiral Dönitz thus responsible for the interpretation of the *Laconia* order as given by Möhle? Criminal responsibility in the first place presupposes guilt, that is to say, possibility of foreseeing the result. Considering the close contact with his flotilla chiefs and commanders, for whom alone the *Laconia* order was intended, Admiral Dönitz could not foresee that a flotilla chief might give such an interpretation to that order without taking any steps to be enlightened by the Commander of U-boats. Such conduct is beyond anything that could reasonably be expected.

Therefore all guilt is excluded. Criminal responsibility requires another criterion, namely, that results shall be proven. This also is entirely lacking. The Prosecution have not even made a serious attempt to prove that any one of the commanders briefed by Möhle in that sense ever actually fired on shipwrecked crews. As far as we are informed, such a thing occurred only once in this war on the German side in the case of Kapitänleutnant Eck. It is significant that this case was presented not by the Prosecution, but by the Defense. For the conduct of Eck has nothing whatsoever to do with the *Laconia* order as the Prosecution desires to construe it. He was not concerned with the destruction of human lives but with the removal of wreckage and floats from which the Allied airplanes could deduce the presence of a German U-boat in the area. For this conduct he and two of his officers were sentenced to death, and thereby punished with a severity which less agitated times will no longer comprehend.

The two cases presented by the Prosecution, where shipwrecked crews allegedly were shot at, are so obviously unsuited to prove this accusation that I need not deal with them any further. The testimony about the sinking of the *Noreen Mary* bears the stamp of phantasy in various points, and in the case of the attack on the *Antonica* the intention to destroy shipwrecked people is out of the question because everything was over in 20 minutes and the night was dark.

I was in the fortunate position to be able to present to the Tribunal a compilation of the Naval Operations Staff concerning a dozen cases in which Allied forces had allegedly shot at German shipwrecked crews. It seems to me that every one of these instances is better than that of the Prosecution, and some appear rather convincing. I therefore attach all the more value to the sober attitude assumed by the Naval Operations Staff when transmitting their opinion on these cases to the Führer's headquarters.

They point out that: (1) Part of the incidents occurred during combat operations; (2) shipwrecked men swimming in the water might easily be led to believe that a miss on other targets was aimed at them; (3) so far no written or verbal order for the use of arms against shipwrecked crews had been traced. I can only request that these principles be equally applied to the incidents presented by the Prosecution.

In the same written opinion to the Führer's headquarters the Naval Operations Staff reject reprisals by destroying enemy shipwrecked; that was on 14 September 1942, 3 days before the *Laconia* order. Since the latter, as a radio order, came to the knowledge of the Naval Operations Staff, it would doubtlessly have been canceled in accordance with the opposite viewpoint just expressed to the Führer's headquarters if it had been understood to be an order for the shooting of shipwrecked crews.

And now I am coming to the positive counterevidence against the opinion of the Prosecution. It consists in the first place of the number of rescued Allied sailors. This amounted, according to a survey by the British Minister of Transport in 1943, to 87 percent of the crews. Such a result is simply not compatible with an order for destruction. Furthermore, it has been established that Grossadmiral Dönitz in 1943, that is, after the *Laconia* order, rejected all consideration of action against shipwrecked crews.

In a written opinion given to the Foreign Office on 4 April 1943, a directive to the U-boats to take action against lifeboats or shipwrecked crews was considered impossible by the Naval Operations Staff, since that would go against the grain of every sailor. In June 1943 Grossadmiral Dönitz, on receiving reports from Korvettenkapitän Witt about British aviators having fired on shipwrecked crews of German submarines, most decidedly rejected the idea of attacking a foe rendered defenseless in combat, stating that this was incompatible with our principles of warfare.

Summing up, I am convinced that the assertion of the Prosecution that German submarines had received an order to murder shipwrecked men has been strikingly disproved. Grossadmiral Dönitz stated here that he would never have allowed the spirit of his submarine men to be endangered by mean acts. With losses ranging from 70 to 80 percent, he could only

replenish his troops with volunteers if he kept the fight clean, in spite of its being tough. And if the Tribunal will recall the declaration of the 67 commanders in British captivity, it will have to admit that he created an attitude and morale which survived defeat.

I have endeavored to present to the Tribunal the most important facts supplemented by a number of legal considerations regarding naval warfare in order to clarify the most important problems to be discussed here from the point of view of the Defense. We are concerned with the examination of the behavior of admirals in naval warfare, and the question of what is permissible according to international law is intimately connected with what is necessary according to the military standpoint. Therefore, in examining this particular point of the Indictment, I deeply regret that the Charter of this Tribunal deprives the accused officers of a privilege guaranteed to them as prisoners of war by the Geneva Convention, namely, the passing of judgment by a military tribunal applying the laws and regulations binding on its own officers. According to Article 3 of the Charter, I am not allowed to question the competency of this Tribunal. I can therefore only request the Tribunal to make up for the unfairness that I see in the afore-mentioned article of the Charter by applying the same standards, where the military appreciation and moral justification of the actions of these German admirals is concerned, as the Tribunal would apply to admirals of their own countries. A soldier, out of practical knowledge of the procedure in warfare as applied not only by his own country but also by the adversary, is keenly sensitive to the dividing line between combat and war crimes. He knows that the interpretation of international law concerning what is allowed or forbidden in naval warfare is in the last resort governed by the interests of his country. An insular power like Great Britain, having long and vulnerable sea lanes, has always looked upon these questions from a different angle than the continental powers. The attitude of the United States from the renunciation of submarine warfare by the Root Resolution of 1922 to unrestricted submarine warfare against Japan in 1941, reveals how a change in strategic position can entail a change in legal evaluation. No one can tell to what extent a changed strategic position at sea will cause a modification of legal conception. No one can know to what degree the development of air forces and the efficacy of bombs will increasingly force navies under water and render obsolete all previous conceptions of submarine warfare.[33] For a naval officer these are obvious reflections, and they should prevent a man of law from settling controversial questions of law and policy pertaining to naval war at the expense of those whose professional duty it is to direct navies.

In the first World War German submarine warfare was accompanied by a storm of indignation. It seems significant to me today that the British historian, Bell, in a paper intended only for official use of the Foreign Office, judges the right to such indignation as follows:

> "It is an old rule of military honor never to belittle the deeds of an enemy who has put up a stiff and brave fight. If this rule had been followed in England, the public would better appreciate the place which the war between submarines and commerce will occupy in the history of strategy and of war. It is unfortunate that the cries of terror as well as the unseemly insults of journalists were repeated by responsible people, with the result that the slogans 'piracy' and 'murder' entered the vocabulary and have engendered the corresponding feelings in the hearts of the people."[34]

I must now treat the other points of the Indictment against Grossadmiral Dönitz which are not concerned with naval war. To begin with, there is the charge of preparation of aggressive wars. It is known how much contradiction this very accusation has aroused on the part of professional officers of probably all Allied countries. In answer to such attacks in public, Justice Jackson formulated for the press (*The Stars and Stripes*, European Edition, 5 December 1945) the ideas of the Prosecution regarding this subject as follows:

> "I have made it clear that we do not prosecute these militarists because they served their country, but because they dominated it and led it into war. Not because they conducted the war, but because they have been driving to war."

If this standard is used, then for the defense of Admiral Dönitz against the charge of preparing aggressive wars I need only point to the result of the evidence. At the beginning of the war he was a relatively young commander; his only task was the training and commanding of submarine crews; he did not belong to the General Staff in the meaning of the Indictment and did not participate in any of the addresses which were presented here as proof of war intentions. The charge that he had advocated the occupation of submarine bases in Norway is likewise disproved. The same applies to the allegation that in 1943 he had proposed an attack upon Spain in order to capture Gibraltar. The conquest of Gibraltar against the will of Spain was absolutely impossible and out of the question during the entire war, and especially so in 1943.

For Germany the war had already reached a stage of defense, even of dangerous setbacks, on all fronts at the time when Admiral Dönitz was appointed Commander-in-Chief of the Navy on 1 February 1943. This fact may be significant for his participation in the so-called conspiracy. The Prosecution is not very clear about the precise moment at which they want to fix the beginning of such participation. In the individual Indictment intimate connection with Hitler since 1932 is mentioned. This, however, is obviously an error. Admiral Dönitz did not become acquainted with Hitler until the autumn of 1934, on the occasion of the submission of a military report, and in the following years talked to him briefly and always only about military problems, altogether eight times, and never alone. Since, aside from this fact, the defendant never belonged to any organization which is accused of conspiracy by the Prosecution, I see no connection of any kind with this conspiracy prior to 1 February 1943.

All the more important is the question of the retroactive effects of joining the conspiracy, as has been illustrated by the British Prosecutor by the example of the perpetrators of railway sabotage. This idea of guilt, retroactive on past events, is very difficult for the German jurist to understand. The continental concept of law is reflected by the formulation of Hugo Grotius: "To participate in a crime a person must not only have knowledge of it but also the ability to prevent it."[35]

While the entire legal concept of the conspiracy in itself represents a special creation of Anglo-Saxon justice in our eyes, this applies even more to the retroaction of the so-called conspiracy. A judgment laying claim to international validity, one which should be understood by the peoples of Europe and especially by the Germans, must be based upon generally recognized principles of law. This, however, is not the case regarding a retroactive guilt. Though such a legal construction may seem fitting in dealing with certain typical crimes, it seems to me entirely inapplicable in judging events such as are being discussed here.

Admiral Dönitz became the Commander-in-Chief of the Navy in the course of a normal military career entirely free of politics. The appointment was based upon the proposal of his predecessor, Grossadmiral Raeder, for whom his proven abilities in the guidance of U-boat warfare alone were the determining factor. Specific acceptance of the appointment was no more required than in the case of an appointment to any other military position. Admiral Dönitz entertained the sole thought, as any officer might well have done in a similar position, whether he would be equal to the task and whether he could accomplish it in the best interest of the Navy and of his people. All other considerations which the Prosecution apparently expected

of him during this period, namely, as to the legitimacy of the Party Program and of the policy of the Party from 1922 on, as well as German internal and foreign policy since 1933, can be but fictitious; they have nothing to do with the facts. Fictions of such nature are not limited by time nor by reality. Is the responsibility for past measures on taking over a high position to extend only to acts of the present cabinet, or is it to extend to acts of former cabinets, and over what period? Is it to comprise only one's own internal and foreign policy or is it to include one's allies? Such considerations cannot be refuted logically; however, they lead to unacceptable results and show the impracticability of the idea of retroaction regarding the so-called conspiracy.

To measure by exact standards the participation in such a conspiracy is difficult enough, if events not of a criminal but of a military and political nature are involved. Of what meaning are such concepts as "voluntary accession" and "knowledge of the criminal plan" when in times of greatest danger an officer assumes the task to prevent the collapse of his nation's maritime warfare?

Even the Prosecution seems to realize this. For, corresponding to their general idea, they attempt to link Admiral Dönitz with the conspiracy in a political way. This is accomplished by the assertion that he became a member of the Reich Cabinet by virtue of his appointment to the High Command of the Navy. This allegation is based upon the decree whereby the Commanders-in-Chief of the Army and of the Navy were invested with the rank of Reich Minister and upon the order of Hitler were to participate in Cabinet meetings.

It is evident that one is not actually a Reich minister merely by being invested with the rank of Reich minister. Also one is not a member of the Cabinet if one is only permitted to participate in it upon special orders. This obviously indicates that he was only to be consulted on technical matters, but never had authority to gain information about other departments, much less to give advice. One cannot, however, speak of a political task and a political responsibility without the existence of such an authority. For an activity as a minister all legal basis is lacking. According to the Reich Defense Law there existed for the entire Armed Forces but one minister, the Reich War Minister. This post remained unoccupied after the resignation of Field Marshal Von Blomberg. The business of the ministry was conducted by the Chief of the High Command of the Armed Forces. A new ministry was not created either for the Army or for the Navy. The Commanders-in-Chief of the Army and of the Navy therefore would have had to be ministers without portfolio. Since, however, they each headed a department, namely, the Army and the Navy, such an appointment would have constituted a

contradiction to all legal customs of the State. The countersigning of all laws in which the minister participates according to his jurisdiction must be considered the basic criterion of all ministerial activity. There exists not a single law which was countersigned by the Commander-in-Chief of the Navy. I have demonstrated this to the Tribunal by the example of the Prize Ordinance. That is to say that, even applying the legal standards of a democratic system, the Commander-in-Chief of the Navy cannot be designated as a member of the Reich Cabinet, because he lacked all authority of participation in legislative acts and every collective responsibility for policies assumed. His task was, and remained, a military one even though for reasons of etiquette he was put on an equal basis in rank with other Reich ministers.

The Prosecution themselves realized that a Reich Government in the constitutional sense no longer existed during the war, and consequently stated that the actual governing was carried out by those who participated in the situation conferences at the Führer's headquarters. As all witnesses examined here stated, we are concerned here with events of a purely military nature, where incoming reports were presented, military measures discussed, and military orders issued. Questions of foreign policy were only very rarely touched upon if they had any connection with military problems; they were, however, never discussed and no decision was rendered on them in these Führer conferences on the situation. Internal policy and the security system were never on the agenda. Insofar as nonmilitary persons participated, they were attendants or listeners who gathered information for their respective departments.

The Reichsführer SS or his deputy were present for the command of the Waffen-SS, and during the last year of war also for the Reserve Army. Admiral Dönitz always participated in these Führer conferences when he was at the Führer's headquarters. Notes taken down by whoever accompanied him on all these meetings and discussions of the Commander-in-Chief are all in the possession of the Prosecution. As the Prosecution has not presented a single one of these notes from which it would appear that the Commander-in-Chief of the Navy participated in reporting on or in discussing and deciding affairs of a political nature, one can assume that such notes do not exist.

Thus the testimony of witnesses has been confirmed according to which the Führer conferences had nothing whatever to do with governing in a political sense, but were exclusively an instrument of the military leadership. Therefore, an over-all responsibility of Grossadmiral Dönitz for all events that occurred since 1943, which in the course of this Trial have been

designated as criminal, certainly does not exist. Consequently, I shall deal only with those individual allegations by which the Prosecution tries directly to connect Admiral Dönitz with the conspiracy. I believe I am all the more justified to proceed in that manner, as a short time ago the Tribunal refused the cross-examination of witnesses in the Katyn case with the argument that no one was accusing Admiral Dönitz in connection with this case. I conclude, therefore, that at any rate in the eyes of the Tribunal he is only accused of such cases wherein he allegedly directly participated.

To begin with, this does not apply to the Führer's order for the extermination of sabotage Commandos, dated 18 October 1942. The Prosecution has tried to establish that this order had been presented to Admiral Dönitz in detail, together with all possible objections, shortly after his assumption of the position of Commander-in-Chief of the Navy. It has failed to establish this assertion. In fact Dönitz, as he himself admits, did read or have presented to him the order in question in the autumn of 1942 in his capacity of Commander of U-boats, and in the same form in which the front-line commanders received it.

I do not wish to speak here of the circumstances which led to objections against this order on the part of the High Command of the Armed Forces. Indeed, all these circumstances could not be discernible to one who received this order at the front. For such a man it was a matter of reprisal against saboteurs who seemed to be soldiers, but did not fight according to the regulations which are binding upon soldiers. Whether such reprisals were admissible at all according to the Geneva Convention, and to what extent, could not be judged by, nor did that come within the competence of, the recipient of the order. Every superior officer, at any rate, probably recognized that the order not to grant any pardon, and to hand over such persons in certain cases to the SD, was in itself an infringement of the rules of war. However, since the essence of any reprisal is to avenge a wrong on the part of the enemy with a wrong on one's own part, this does not prove anything concerning the legitimacy or illegitimacy of the reprisal order. If no one but the leadership of the State is competent to order reprisals, then hundreds or thousands of German officers cannot be required today to have considered themselves also competent, and to have been presumptuous enough to verify orders whose actual and legal basis was entirely unknown to them. In this case the principle prevails, at least for the front-line commanders, that the subordinate may, when in doubt, rely on the order as given.[36]

Now, the Prosecution seems to be of the opinion that Admiral Dönitz a few months later, when he had become Commander-in-Chief of the Navy,

had the opportunity and also the obligation to inform himself as to the basis of the Commando Order. This conception fails to appreciate the duties of a Commander-in-Chief of the Navy. He has to wage naval war. The whole German naval war, especially submarine warfare, in the spring of 1943, owing to huge losses inflicted by the enemy air force, was on the verge of collapse. These were the worries with which the new Commander-in-Chief had to cope, in addition to an abundance of new problems concerning the Navy which were coming up. How can one require such a man as in the quietest of times to cope with an order of remote date, which had nothing whatever to do with naval warfare? On the contrary, a special paragraph explicitly excluded prisoners taken during naval operations.

A word or two on the channels of command. The naval units were under the control of the Naval Operations Staff only in those matters which belonged to the duties of the Navy, that is to say, naval warfare and coastal defense by artillery. Concerning so-called territorial questions they were not subordinate to the Naval Operations Staff but to the Armed Forces commander of the theater of war in which their basis was established. Orders concerning such measures of war on land were given without collaboration on the part of the Naval Operations Staff and their execution was not reported to them. Just as hardly anyone can think seriously of holding a general responsible for German submarine warfare, just as little, in my opinion, does it seem justified to hold an admiral responsible for orders given in land warfare.

Mr. President, I have come to the end of a section.

THE PRESIDENT: Certainly. We will break off.

[*The Tribunal recessed until 1400 hours.*]

Afternoon Session

FLOTTENRICHTER KRANZBÜHLER: Before the noon recess I was discussing the fact that units of the Navy were not subordinate to the Naval Operations Staff in matters affecting warfare on land.

This channel of orders for territorial questions also explains the complete ignorance of Admiral Dönitz and of his colleagues in the Naval Operations Staff about the delivery to the SD of the crew of the Norwegian motor torpedo boat *MTB 345* after its capture by units under Admiral Von Schrader. As the testimony of witnesses and the records of the Oslo War Crimes Court show, the Naval Operations Staff only received an operational report about the capture of the boat and the number of prisoners. All other details, the discovery on board of material for sabotage, of civilian suits and sabotage orders, and the treatment of the crew as saboteurs according to the Commando Order were regarded as territorial matters, and as such dealt with by Admiral Von Schrader and the Armed Forces commander in Norway. The decision regarding the fate of the crew came from the Führer's headquarters in reply to an inquiry from Gauleiter Terboven. Not only is there no proof that the Naval Operations Staff took part in those territorial questions, but this must in fact be considered refuted on the basis of the evidence submitted and the chain of command as explained.

I regard as the second attempt of the Prosecution to establish a participation in the alleged conspiracy to commit war crimes the submission of Admiral Wagner's minutes on the question of withdrawal from the Geneva Convention in the spring of 1945. The details are contained in Wagner's testimony, according to which the Führer pointed out in a conference on 17 February that the enemy propaganda about the good treatment of prisoners of war was clearly having an influence on the units fighting on the Western Front, and that many cases of desertion to the enemy were being reported. He ordered that the question of a withdrawal from the Geneva Convention be investigated. In this way he wanted to convince his own soldiers that they could no longer rely upon receiving good treatment as prisoners of war, and thus create a countereffect against enemy propaganda. Two days later Hitler returned to this idea, although he then put forward another reason as the main one. He termed enemy warfare in the East and the bomb attacks on the German civilian population an outright renunciation of international law by the enemy, and he, for his part, also desired to free himself from all obligations by withdrawing from the Geneva Convention. Once more he asked for the opinion of the Armed Forces in this matter and

addressed himself directly to Grossadmiral Dönitz, who did not answer. The attitude of the military leaders on this matter was unanimously negative.

On the next day, just before the daily conference on the situation, a 10-minute conversation took place between Grossadmiral Dönitz, Generaloberst Jodl, and Ambassador Hewel; in the course of this conversation Dönitz expressed his negative attitude. According to the notes of Admiral Wagner he said that "it would be better to take the measures considered necessary without previous announcement and, at any rate, to save face before the world." The Prosecution sees in this a readiness and a design to expose hundreds of thousands of Allied prisoners of war to arbitrary murder.

Admiral Dönitz himself has no recollection of this sentence. That is not surprising, as this is not a record, but a summary of a lengthy conversation in four sentences, the summary being worded on the day after the conversation by Admiral Wagner. This summary admits that the Grossadmiral disapproved of any "wild measures" which would put us in the wrong from the beginning, and considered justifiable only measures actually warranted by the conduct of the enemy in each case. Since Wagner himself, as the author of the transcript, should know best what he meant thereby, I personally cannot add anything to this statement. The interpretation of the Prosecution is equally little supported by other circumstances. There was no question at all of keeping any measures secret; they had to be made known, regardless of whether they were meant to deter our own deserters or as reprisals. But Wagner's note does not mention any kind of concrete measures to be taken, and all witnesses present at this situation conference in Hitler's headquarters state that not a word was spoken on that subject. The idea of killing prisoners of war could not, therefore, have been present in the minds of any of the participants in this discussion which Wagner noted down.

Now it has come to light here, through the statements of the Defendants Ribbentrop and Fritzsche, that apart from the action for which he was preparing the ground during the discussion with the generals, Hitler had evidently at the same time planned a second action, in which only Goebbels and Himmler were to participate, and which by chance also came to Ribbentrop's knowledge. In this action the shooting of thousands of prisoners of war seems to have been contemplated as a reprisal against the air attack on Dresden. Hitler, very wisely, did not give the slightest indication of such a plan to the generals. This plan was not followed up and no reprisals were taken.

And now I return to the facts. It is a fact that Admiral Dönitz disapproved of the withdrawal from the Geneva Convention, and that Hitler, in view of the attitude of all military leaders who clearly opposed it did not follow up the idea any further. It is also a fact that no measures in violation of international law were taken by the Germans as a result of this remark which the Prosecution has criticized, and finally it is a fact that enemy sailors who were captured were sent to a prisoner-of-war camp of the Navy where they were treated in an exemplary way up to the last day of the war.

Whoever, in his own sphere, behaved as Admiral Dönitz did with regard to the prisoners of war of the Navy, cannot reasonably be charged with having thrown overboard all standards of law and ethics applying to prisoners of war. A British commander has certified that when the prisoner-of-war camp of the Navy was taken over by British troops, all prisoners without exception said that they had been treated with fairness and consideration. The Tribunal will, no doubt, appreciate such unanimous expression of views, especially after what has come to light elsewhere in these proceedings with regard to the breakdown not only by Germans in the proper treatment of prisoners of war.

I shall now deal with the conspiracy to commit Crimes against Humanity, and I should like first of all to point out that Admiral Dönitz is not accused, under Count Four of the Indictment, of direct commission of Crimes against Humanity. Not even participation in the conspiracy to commit Crimes Against Humanity was contended in the detailed charges. That, I would say, is an admission that there was in fact no relation, between his activity and the Crimes against Humanity of which the Prosecution has brought evidence. Nevertheless the Prosecution presented some documents which are apparently meant to prove his participation in the responsibility for certain Crimes against Humanity.

In judging these documents the most important question always is: What did Admiral Dönitz know of those alleged crimes? On this subject I should like to make one point clear. During the entire war he resided and lived at his staff headquarters, first on the North Sea coast, after 1940 in France, in 1943 for a short time in Berlin, and then in the Camp Koralle near Berlin. When he was at the Führer's headquarters, he stayed with the naval staff there. Even outside his duty, his time was thus spent almost exclusively with naval officers. This may have been a weakness, but it is a fact which gives an additional explanation of his lack of knowledge of many events.

The fact that the defendant forwarded a proposal by the Ministry for Armaments to employ 12,000 men from concentration camps as workers in the shipyards proves, according to the Prosecution, that Admiral Dönitz

knew and approved of the arrest of countless innocent people and their ill-treatment and extermination in concentration camps.

He actually knew, of course, that concentration camps existed and he also knew that, apart from the professional criminals, people arrested for political reasons were kept there. As has already been explained here, the protective custody of political adversaries for reasons of safety is a measure adopted by all states, at any rate in an emergency, and knowledge of such a measure can therefore incriminate no one. However, an unusually high number of political prisoners—out of proportion to the number of the population—may stamp a regime as a regime of terror, but taking into account a population of 80 million in the fifth year of a grim war, even twice or three times the number of 12,000 men, which is the number mentioned by Admiral Dönitz, would not indicate a regime of terror, and the Prosecution will hardly claim that.

Admiral Dönitz stated here that the Commander-in-Chief of the Navy, as well as his collaborators and the overwhelming part of the German people, did not know of the abuses and killings that occurred in the concentration camps. All that the Prosecution has put forward against this are assumptions, but no proofs.

On this point, therefore, I will only refer to the statement of the then Minister for Armaments, Speer, according to which the inmates of concentration camps were much better off in industrial work than in camp, and that they tried with all means to obtain employment in such work. The proposal forwarded therefore did not imply anything inhuman, but rather the opposite.

The same request also contains a suggestion to take energetic measures against sabotage in Norwegian and Danish shipyards, where seven out of eight vessels under construction had been destroyed. If need be, the personnel should be entirely or in part employed as "KZ workers" because, so it says, sabotage of such dimensions can only occur if all the workers silently condone it. This therefore amounts to a proposition for security measures to consist in keeping the workers who actively or passively participated in sabotage in a camp close to the shipyard, so that their connections with sabotage agents would be cut off. I do not believe that juridical objections can be raised against such measures of security. According to the practice of all occupation troops even measures of collective punishment would be justified in such cases.[37]

Actually the measures proposed were never carried out and the Prosecution presumably presents them only to accuse Admiral Dönitz quite generally of a brutal attitude toward the inhabitants of occupied territories.

For this same purpose it even refers to a statement of the Führer at a conference on the military situation in the summer of 1944, according to which terror in Denmark must be fought with counterterror. Admiral Dönitz's only connection with this statement was that he heard it and that his companion, Admiral Wagner, wrote it down. The Navy had no part in this statement, nor did it take any measures as a result of it.

In contrast to this line of evidence of the Prosecution, I should like to emphasize the attitude which Admiral Dönitz actually showed toward the population of the occupied territories. There is before the Tribunal a survey of the administration of justice by the naval courts in protecting the inhabitants of the occupied territories against excesses by members of the Navy. The survey is based on an examination of about 2,000 files on delicts and some of the judgments given are quoted with the facts and the reasons of the verdicts. Judging from that survey, one can fairly say that the naval courts protected the inhabitants in the West and in the East with justice and severity, including their lives as well as their property and the honor of their women. This administration of justice was constantly supervised by the Commander-in-Chief of the Navy as the Chief Court Administrator. Under terms of legal procedure it was his duty to confirm death penalties imposed on German soldiers.

The time at my disposal does not permit a more detailed discussion of some of these judgments. A phrase expressed in one of them may be taken to apply to all: All soldiers must know that in occupied territory as well the life and property of others will be fully safeguarded. This was the general attitude in the Navy, and the severity of the penalties inflicted proves how seriously it was taken.

I need only say a few words about the order issued in the spring of 1945, in which a German prisoner of war, a noncommissioned officer, was cited as an example, because he had unobtrusively and systematically done away with some Communists who were attracting attention to themselves in their prison camp. As Admiral Wagner recalled, it was actually an informer who was liquidated. But the facts were camouflaged as described in order to avoid giving enemy intelligence a clue to the camp and the person of the noncommissioned officer. There cannot be any doubt that this order in its true background could be justified in view of the enormous number of political murders which have been committed with the connivance or assistance of governments engaged in the war, the perpetrators being today extolled as heroes. I cannot, however, consider as serious the argument that the unfortunately camouflaged wording could be proof of a general plan to liquidate Communists. A court judgment for the protection of Communists

will reveal the true circumstances. A sergeant had stolen hospital blankets which were intended for Soviet prisoners of war and had extracted a dead prisoner's gold teeth. This sergeant was sentenced to death by a naval court and executed after the sentence had been confirmed by the Commander-in-Chief.

Finally, the Prosecution also established a connection with the Jewish question through a remark in which Grossadmiral Dönitz speaks of the "creeping poison of Jewry." On this point I should like to add some comments. Dönitz knew as little of the plan for the destruction of the Jews as he did of its execution. He did know of the resettlement in the Government General of Jews living in Germany. I do not think that a resettlement of this sort can be condemned at a time when expulsions of Germans on a much larger scale are taking place before the eyes of a silent world. Here, too, I refer to a sentence of long penitentiary terms against two German sailors who, together with some Frenchmen, had robbed French Jews. From the findings of the court I again quote a sentence which characterizes the general attitude: "That the crimes were committed against Jews does not excuse the defendants in any way."

Similarly, it seems to me that the efforts of the Prosecution to include Admiral Dönitz in its construction of the conspiracy by terming him a fanatical Nazi have failed. He was neither a member of the Party nor was he ever politically prominent before his appointment as Commander-in-Chief of the Navy. The assertion of the Prosecution that he became Commander-in-Chief of the Navy because of his political attitude lacks all foundation. As a professional officer, to whom every political activity was forbidden by the Reich Defense Law, he had no reason for dealing with National Socialism in any way. However, he, too, like millions of other Germans, recognized the unique success of Hitler's leadership in social and economic fields and, of course, also the liberation from the obligations of Versailles which Hitler had brought about and which particularly concerned Admiral Dönitz as a soldier. Therefore, at the time of his appointment as Commander-in-Chief of the Navy, he was politically in no way active, although loyal to the National Socialist State.

This appointment introduced two new elements into his relations with National Socialism. There was first of all his personal contact with Adolf Hitler. Like almost everyone else who had personal dealings with this man, he too was most deeply impressed by him. The respect for the head of the State and loyalty to the Supreme Commander inherent in the professional officer were complemented by admiration for the statesman and strategist. It is difficult fully to appreciate such an attitude in view of the information

which has come to light in the course of this Trial. I feel neither called upon nor able to judge a personality like Adolf Hitler. But one thing seems to me certain, namely, that with a consummate art of camouflage he skillfully concealed the repulsive traits of his character from those of his collaborators to whom he did not dare reveal this part of his nature. The Hitler with whom the new Commander-in-Chief of the Navy became acquainted at that time, and whom he admired, was therefore an entirely different man from the one which the world—rightly or wrongly—pictures today.

The second new element in the relations between Grossadmiral Dönitz and National Socialism was that in the performance of his military duties he necessarily came into contact with the political authorities of the Reich. Whether he needed more men, more ships, or more arms, in the end he always had to discuss these matters with the political authorities, and in order to be successful in his demands, he had to make sure that any political mistrust was eliminated from the very start. This he deliberately did, and he demanded the same of his subordinates. To him the Party was not an ideological factor, but rather the actual exponent of political power. He was linked with it in the common aim to win the war, and for the achievement of this aim he considered it his ally. But to obtain the advantages which one expects of an ally, one must be willing to make certain sacrifices, especially sacrifices in overlooking faults and in ignoring conflicting issues.

However, his connection with the Führer and his contact with the Party, which were concomitants of his position and of his duties as Commander-in-Chief of the Navy, never led him to participate in anything for which he could not assume responsibility before his conscience. Some points of the Prosecution even go to prove this. The Führer demanded action against shipwrecked crews; Admiral Dönitz rejected it. The Führer asked for withdrawal from the Geneva Convention; Admiral Dönitz rejected it. He stubbornly and successfully resisted the Party's influence upon the Armed Forces. Thanks to his resistance the National Socialist Führungsoffiziere did not become political commissars, but were, as genuine officers, merely advisers to their commander, who retained the sole responsibility for the leadership of his unit. The transfer of proceedings against soldiers on political grounds from the military courts to the People's Courts, which had been advocated by the Party, was prevented by Grossadmiral Dönitz until the winter of 1944-45, and a Führer order to this effect issued at that time was never carried out in the Navy. Thus he never identified himself with the Party and can therefore surely not be held responsible for its ideological endeavors or its excesses, just as in foreign politics a government would not

be ready to assume responsibility for such things if they had been done by an ally.

I do not by any means want to give the impression that Admiral Dönitz was not a National Socialist. On the contrary, I just want to use him as an example to disprove the theory that every National Socialist as such must be a criminal. This Tribunal is the sole instance in which authoritative personalities of the great Allied Powers are dealing directly and in detail with the last 12 years of the German past. It is, therefore, the only hope of very many Germans for the removal of a fatal error which is causing the weaker elements of our nation to become hypocrites and is thus proving a decisive obstacle on the road to political recovery.

And now I should like to deal with the charge that in February 1945 Admiral Dönitz protracted the inevitable surrender out of political fanaticism, and I wish to do so for a particular reason. This charge, which seems hardly to have anything to do with the Indictment before an International Tribunal, weighs particularly heavily in the eyes of the German people, for this nation truly knows what destruction and losses it endured in those last months from February until May 1945. I have submitted declarations of Darlan, Chamberlain, and Churchill from the year 1940 in which those statesmen, in a critical hour for their countries, called for desperate resistance, for the defense of every village and of every house. Nobody will conclude from this that these men were fanatical National Socialists. The question of unconditional surrender is indeed of such colossal import to a nation, that in fact it is not possible until after the event to judge whether a statesman who had to face this question did or did not do the right thing. Admiral Dönitz, however, was not a statesman in February 1945, but the Commander-in-Chief of the Navy. Should he have asked his subordinates to lay down their arms at a time when the political authority of the State still considered military resistance as opportune and necessary? Nobody will seriously demand that.

Much more difficult seems to me the question of whether, in view of the high esteem Hitler had for him, he should not have considered it his duty to point out clearly to Hitler the hopelessness of prolonged resistance.

Personally, I would have affirmed this to be his duty toward his nation, if Admiral Dönitz himself at that time had considered that surrender was justified. He did not consider it justified, and he gave his reasons: Surrender implied a halt of the armies and of the population; the German Army on the Eastern Front—still numbering more than 2 million men in February 1945—and the entire civilian population of the German eastern provinces would thereby have fallen into the hands of the Soviet armies, and in a bitterly cold

winter month, too. Admiral Dönitz, therefore, was of the opinion, shared by Generaloberst Jodl, that the losses in men suffered in that way would be far greater than the losses which would necessarily be caused if the capitulation were postponed until the warmer season. Only in future years, when more exact data regarding casualties of the Army and of the civilian population both before and after the surrender in the East and in the West are available, will it be possible to view this opinion objectively. But it may already be said today that such considerations arose entirely from a full sense of responsibility for the life of German men and women.

The same sense of responsibility caused him, when he became head of the State on 1 May 1945, to cease hostilities against the West, but to protract the surrender in the East for a few days, days in which hundreds of thousands were able to escape to the West. From the moment when—to his own complete surprise—he was given a political task, he calmly and intelligently averted a threatening chaos, prevented desperate mass action without a leader, and assumed responsibility before the German people for the gravest action which any statesman can take at all.

Thus, to revert to the beginning of the Indictment, he did nothing to start this war, but he took the decisive steps to end it.

Since that moment the German nation has learned of many things which it did not expect, and more than once it has been referred to the unconditional surrender which the last head of the State carried through. It is for this Tribunal to decide whether in the future this nation will be reminded of the binding value of the signature of a man who is being outlawed as a criminal before the whole world by his partners in the agreement.

At the beginning of my speech I mentioned the doubts which any trial of war criminals is bound to call forth in the mind and heart of any lawyer. They must weigh upon all who bear any responsibility in such a trial. I could not more fittingly describe the task of all the responsible persons than in the words of a British attorney speaking of the trials before the German Supreme Court in the year 1921. I quote:

> "The war criminals' trials were demanded by an angry public rather than by statesmen or the fighting services. Had public opinion in 1919 had its way, the trials might have presented a grim spectacle, of which future generations would have been ashamed. But thanks to the statesmen and the lawyers, a public yearning for revenge was converted into a real demonstration of the majesty of right and the power of law."[38]

May the verdict of this Tribunal stand in a similar way before the judgment of history.

THE PRESIDENT: I call on Dr. Siemers for the Defendant Raeder.

DR. WALTER SIEMERS (Counsel for Defendant Raeder): Gentlemen of the Tribunal, in my final speech for the Defendant Grossadmiral Dr. Raeder, I should like to keep to the order I chose for my document books and for the whole presentation of my evidence. I think a survey of the whole case will thus be made easier.

Raeder, who has just turned 70 years of age, has been exclusively a soldier, body and soul, ever since the age of 18, that is to say, for nigh on half a century covering an eventful period. Although he was never concerned with anything but his duties as a soldier, the Prosecution has accused him, in this great Trial against National Socialism, not only as a soldier, namely, as Commander-in-Chief of the German Navy, but, a singular and decisive point, as a politician, as a political conspirator, and as a member of the Government, three things which in truth he never was.

I am, therefore, faced with the singular task of defending Raeder as a politician, although it was precisely, as I shall demonstrate, his life principle as an officer to keep aloof from politics, and to command an officers' corps and a Navy likewise committed to remain entirely free from politics.

If the Prosecution levels such manifold and grave accusations against Raeder, this is primarily because it has conceived a notion entirely foreign to the German Armed Forces, namely the notion of an admiral being responsible for foreign policy and for the outbreak of a war.

I shall disprove this conception and show that it was unjustified and unfounded even in Hitler's National Socialist State. True, Hitler again and again placed politics in the forefront of the nation and endeavored to give the nation a one-track political education. Foreign countries knew this, and they may well therefore be all the more surprised by the fact that Hitler refrained from such political shaping in one single instance. Every administration, every organization, and every police institution was directed by Hitler on political principles, with the single exception of the Armed Forces. The Armed Forces, and the Navy in particular, remained for a long time and far into the war absolutely unpolitical. And not only did Hitler give Raeder an assurance to this effect, but he had also given the same assurance to Hindenburg as Reich President. This explains the fact, which has also been made clear in this Trial, that up to 1944 no officer could be a member of the Party, and if he was, then his membership was suspended.

After these preliminary reflections it will be understood why Raeder, as his interrogation showed, was disconcerted and amazed at these accusations which amount to a political charge. A man who is nothing but a soldier cannot understand why he should suddenly and without any relation to his military duties be made responsible for things which at no time came within the compass of his activity.

I shall naturally also discuss the military accusations, with the exception of submarine warfare, which, for the sake of uniformity, has already been dealt with by Dr. Kranzbühler on behalf of Raeder, too.

It will be seen from other military accusations, as for instance in the cases of Norway and Greece, that again and again there arises this discrepancy between the political and the military aspects: Raeder acted as Commander-in-Chief on the basis of military considerations, whereas the Prosecution now calls him to account on the basis of political considerations, by evaluating the military actions as political ones.

The first instance of this discrepancy already lies in the accusations raised against Raeder with regard to the period before 1933, that is, before National Socialism. In connection with these accusations it must not be overlooked that Hitler, the head of the alleged conspiracy for the waging of wars of aggression, did not rule Germany at that time, and yet already at that time there is supposed to have existed a common conspiracy between Hitler and a part of the defendants.

This is all the more surprising because Raeder, as a naval officer and after 1928 as Chief of the Naval High Command, at that time had nothing, absolutely nothing at all, to do with National Socialism, and did not even know Hitler and his co-workers in the Party. The accusations concerning the violations of the Versailles Treaty are included by the Prosecution in the conspiracy, although the violations did not take place under Hitler's leadership, but under the leadership or with the approval of the democratic governments in Germany at the time. This shows that the Prosecution does not only want to attack National Socialism through this Trial, as has been emphasized again and again during the war and after the collapse, but that the Indictment extends its scope to large circles in Germany which had nothing to do with National Socialism, some of whom were even direct enemies of National Socialism.

(1) For this very reason it seemed to me extremely important to clear up the question of the violation of the Treaty of Versailles in the course of the presentation of evidence in the Raeder case. I have endeavored to do so with the approval of the Tribunal, and I am firmly convinced that I have succeeded. I need not discuss each of the violations, which have been treated

in detail and which the Prosecution has produced in Document C-32. It should be sufficient if I refer to the extensive evidence as well as to the following facts:

Every single point was either a mere trifle or else a military measure—such as for example the antiaircraft batteries—based exclusively on the notion of defense. Raeder has plainly admitted that treaty infractions did occur, but the trivial nature of the infractions showed that these measures could not possibly have been connected with an intention to wage wars of aggression.

Moreover, I need only point out that from the legal point of view a treaty violation cannot *ipso jure* be a crime. Certainly the violation of a treaty between nations is no more permissible than the violation of a contract between private firms in commercial law. Such a violation is, however, not ä punishable action, much less a crime. Even on the basis of the argument of the Prosecution, such action would be punishable only if the violation had been undertaken with criminal intent, that is, if it had been aimed at a war of aggression in contradiction to the Kellogg Pact. However, not even the Prosecution will be able to maintain this, and it has already indirectly intimated as much by refraining from taking up these points during the cross-examination of witnesses.

(2) The position is somewhat different with regard to a charge which the Prosecution discussed in detail only during cross-examination, namely, the charge concerning the participation of the German Navy in U-boat constructions in Holland; in this connection the Prosecution has relied upon Document C-156, the book by Kapitän zur See Schüssler entitled, *Der Kampf der Marine gegen Versailles*, as well as on statements contained in the notes of the naval historian, Admiral Assmann, found in Document D-854.

These documents prove that the German Navy had a share in a U-boat designing office in Holland, the firm N. V. Ingenieurskantoor voor Scheepsbouw. This participation occurred during the period before the Navy was under Raeder's command. The Tribunal will recall that Raeder did not become Chief of the Naval Command until 1 October 1928, whereas participation in the designing office in Holland dates back to 1923 and the following years.

May I emphasize, however, that in not a single instance was a U-boat built for the German Navy, and that consequently no U-boats were obtained or put into commission by the German Navy. In this connection I refer to the Versailles Treaty, Exhibit Number Raeder-1; Article 188 *et sequentes* of the Treaty of Versailles contain the terms with regard to the Navy. According to

Article 188, Germany was bound to deliver her U-boats to the Allied nations or to dismantle them. This obligation Germany fulfilled completely. Moreover, Article 191 stipulates the following; I quote: "The construction and purchase of all submarine vessels, even for commercial purposes, is forbidden in Germany."

It appears from this clear treaty clause that participation in the Dutch firm was not a violation of the Treaty of Versailles. According to Article 191, Germany was only forbidden to construct or purchase U-boats, moreover, strictly speaking, only in Germany.

As a matter of fact, no U-boat was built in Germany in violation of the Treaty, and no U-boat was built for Germany abroad either. Participation in a foreign designing office was not forbidden, nor was this the purpose of the Treaty of Versailles. The point was merely that Germany should not create a U-boat force for herself. The Navy, however, was permitted to participate in a designing office so as to keep abreast of modern submarine construction, to gather information for the future, and to lay the foundation for an eventual construction of submarines, when permitted, by training technical experts (See Exhibit Number Raeder-2, Lohmann Affidavit). The afore-mentioned documents, submitted by the Prosecution, prove that the submarines designed by the Dutch firm and built abroad were put into service abroad, namely by Turkey and Finland.

Even if one were to take the view that designing work also was prohibited, then what was said under Figure (1) also applies. The designing was limited to only a few submarines, so that this small number in itself proves that there cannot have been any intention of waging wars of aggression.

(3) In case the High Tribunal should be unable to follow this train of thought as a sole argument, I may point out in addition that the lack of an aggressive intention is also evident from the fact that the trivial violations of the treaty were in a certain way compensated. I refer to the second affidavit of Admiral Lohmann, Exhibit Number Raeder-8, which shows that according to the Treaty of Versailles Germany was allowed to build 8 armored ships, whereas in fact she only built 3; it shows also that instead of 8 cruisers only 6 were built up to 1935, and that instead of 32 destroyers or torpedo boats, only 12 destroyers and no torpedo boats were built. In fact, with regard to the really important weapons, and especially those which may be considered as offensive weapons, the Navy kept far below the maximum permitted by the Treaty of Versailles, and this indeed to such an extent that by comparison the trivial violations in naval matters hardly count.

(4) According to the Weimar Constitution of 11 August 1919, Articles 47 and 50 (Exhibit Number Raeder-3), the President of the Reich had supreme command of all the Armed Forces. In order to be valid, the decrees of the Reich President required the countersignature of the Reich Chancellor or the Reich ministers concerned, in this case, the Minister of Defense. I quote: "Responsibility is assumed through the countersignature." Thus, from the point of view of constitutional law it is absolutely clear that the responsibility rests with the Minister of Defense or the Reich Government and the President of the Reich. It is, of course, true that before 1928, that is, before Raeder became the responsible Chief of the Naval Command, the Navy took a number of measures without the knowledge of the Reich Cabinet. But the evidence which I presented, especially the statement of the former Reich Minister Severing, shows that, contrary to the statements of the Prosecution, no secret measures were taken after Raeder became Chief of the Naval High Command. Severing has confirmed that the Müller-Stresemann-Severing Cabinet, in a Cabinet meeting of 18 October 1928, obtained a clear picture of the secret measures of the Armed Forces by interrogating Raeder as Chief of the Naval High Command and Heye as Chief of the Army Command.

Both Raeder and Heye, after they had given an explanation, were obliged and directed by the Cabinet, in conformity with the afore-mentioned paragraphs of the Reich Constitution, to take no future measures without the knowledge of the Minister of Defense or the Cabinet. At the same time the Cabinet established that the secret measures taken before Raeder's time were only trifling matters, and expressly assumed responsibility for them. If the Cabinet, in conformity with the Constitution, assumed the responsibility, this amounted to a legally and constitutionally effective procedure which exonerated Raeder as Chief of the Naval High Command and relieved him of responsibility. It appears, therefore, to be inadmissible that the defendant, who no longer bears the responsibility, should be made responsible for actions for which the Cabinet assumed responsibility.

The attitude of the Cabinet in the Cabinet meeting of 18 October 1928 further shows that none of these actions can have had as their basis any criminal intent to wage a war of aggression, for even the Prosecution will not desire to assert that men like Stresemann, Müller, and Severing intended to wage wars of aggression, but instead will have to believe Severing when he says that Stresemann, Müller, and he himself assumed responsibility for these violations only because they were based purely on conceptions of defense. One will also have to believe Severing's words that such conceptions of defense were justified, since in the twenties the danger that

Germany might be attacked, for instance by Poland, was quite real, and she would then not have been in a position to defend herself with the small Armed Forces allowed her by the Versailles Treaty. This danger was particularly evident in connection with Polish border incidents in East Prussia and Silesia and during the occupation of Vilna, and it even increased when all attempts of Stresemann and Müller failed to achieve adherence to the promise to disarm which the other powers had given in the Versailles Treaty.

How difficult Germany's position was and how justified measures of defense were, Justice Jackson himself admitted in his opening speech, when he said, I quote:

> "It is quite possible that Germany in the twenties and thirties was confronted with desperately difficult tasks, tasks which would have justified the boldest measures, but not war."

I shall not even go as far as Mr. Justice Jackson, but I believe that these measures taken by the Navy are certainly covered by his own concept of "boldest measures."

The British prosecutor, Mr. Elwyn Jones, attempted during the cross-examination of Severing to prove that Raeder did not observe the obligations imposed on him in the Cabinet meeting of 18 October 1928, because Severing, according to his testimony, was not informed of the construction abroad of the small submarines for Turkey and Finland. In this connection, two things must be considered:

a. During his testimony Severing did not remember the details, but only the fundamental and decisive questions; with regard to the details, he naturally relied on the competent minister, in this case, the Reich Defense Minister.

b. According to Severing's testimony it was an exception that the Chief of the Naval High Command appeared before the entire Cabinet on 18 October 1928. Raeder as Chief of the Naval High Command was not obliged to inform all the members of the Cabinet, but was, in accordance with the Constitution, merely obliged to inform the Reich Defense Minister, and that Raeder did. What the Reich Defense Minister then for his part submitted to the other members of the Cabinet and to the Reichstag was not only beyond Raeder's knowledge, it was also outside Raeder's responsibility, and solely within that of the Reich Defense Minister and the Cabinet.

In conclusion may I point out the following: If, despite all this, the Prosecution wishes to look upon these violations of the Treaty of Versailles

on the part of the Navy as evidence of an intention to wage a war of aggression, then the Social Democrat or Democrat governments of that time bear the responsibility. Thereby the Indictment on this point collapses, for to take the governments of that time to task for the intention of waging wars of aggression would lead the Prosecution on this point to an *ad absurdum*.

(5) The treaty violations during the period from 1933 until the Anglo-German Naval Agreement of 1935 show the same factual and juridical picture. During these 2 years no important expansion of naval armament took place either. The only disputable accusation made by the Prosecution in this respect is contained in Document D-855, which was submitted during cross-examination. This is the report of Flottenintendant Thiele. According to this it was decided in March 1935, that is, a few months before the naval agreement, to prepare plans for the *Scharnhorst* and the *Gneisenau* with a displacement of 27,000 tons, although the maximum of 10,000 tons fixed by the Treaty of Versailles was still formally in force at that time for another 3 months, in contrast to a maximum displacement of 35,000 tons provided for in the Naval Agreement of 1935.

Here it should be taken into consideration that in March 1935 Germany could already count on the speedy conclusion of an Anglo-German agreement, whereas the period between the planning and the completion of a battleship is a much longer one, which cannot be counted in months, but only in years. As a matter of fact, the *Scharnhorst* and *Gneisenau* were only commissioned in 1938 and 1939, 3 and 4 years respectively after the naval pact (see Exhibit Number Raeder-2, Lohmann Affidavit).

The other matters submitted by the Prosecution are again trifles; for instance, the selection (not the construction, as the Prosecution says) of four or five merchantmen (see C-166), or the construction of 5 E-boats of 40 tons each (see C-151), which for technical reasons were built in place of 12 torpedo boats of 200 tons each. The Prosecution cannot in all seriousness turn these facts into grave accusations, especially as the afore-mentioned deviations from the Versailles Treaty were known to foreign technical specialists or—as the witness Schulte-Mönting correctly put it—were an "open secret."

(6) And now I come to the decisive juridical aspect of all developments up to the summer of 1935. In the field of international law the same principle applies as in the field of internal commercial law: Breaches of agreement are considered adjusted and settled with the signing of a new agreement. In the present case the Anglo-German Naval Treaty of 18 June 1935—Exhibit Number Raeder-11—represents the new agreement. This naval agreement deviates completely from the Versailles Treaty both with

regard to high-tonnage vessels and with regard to U-boats. It is only on the basis of what is permitted Germany by this new agreement that the insignificance of earlier violations of the Versailles Treaty, not at the time covered by existing agreements, becomes apparent.

10,000-ton cruisers were replaced by 35,000-ton battleships, and the ban on the construction of U-boats was replaced by the acknowledgement of equal rights with regard to U-boat tonnage. Germany's demands were not unreasonable; on the contrary, in the document mentioned, His Majesty's Government in the United Kingdom explicitly confirmed the German proposal to be "... an exceedingly important contribution to future limitation of naval armaments."

This agreement between Britain and Germany concluded the debate on the Versailles Treaty both factually and juridically, as far as the Navy is concerned. This naval agreement was generally welcomed in Britain and Germany at that time, and it was supplemented by a new agreement on 17 June 1937 (see Exhibit Number Raeder-14). As proof of the fact that the Navy violated the naval agreement, too, with aggressive intentions, the Prosecution has raised two charges:

(1) In the Agreement of 1937 both contracting governments were bound to a mutual exchange of information, which was to take place annually, within the first 4 months of every calendar year, and was to contain details of the building program. According to Document C-23, the Navy violated this obligation insofar as it gave lower figures for the displacement and the draught of the battleships *Bismarck* and *Tirpitz* which were being built at the beginning of 1938, namely, as 35,000 tons instead of 41,700 tons. That this violation of the treaty did occur is openly admitted by Raeder, but again it is not such a serious violation as the Prosecution contends, that is, it is not a violation which shows proof of criminal intent. That is clear from the detailed evidence I have presented and from the testimonies of witnesses which I need not repeat here; it will be sufficient if I refer to the absolutely convincing expert testimony of the ship-building director, Dr. Süchting, which I have submitted as Exhibit Number Raeder-15. According to this, the increase in tonnage demanded by the Navy during the construction served a purely defensive idea, namely, that of increasing the armor plating of the battleships and of arranging the bulkheads in such a way that the battleships would be virtually unsinkable. This defensive idea, Dr. Süchting emphasizes, actually proved to be correct during the attack on and sinking of the battleship *Bismarck*. If it was only a question of a defensive idea, no aggressive intentions can be construed from this treaty violation.

With regard to the juridical aspect, it must be added that in the Naval Agreement of 1937, Articles 24, 25, and 26 conceded to the contracting governments the right to deviate, under certain circumstances, from the contracted agreements and especially from the tonnage limitation of battleships, if any other sea powers should build or acquire larger battleships. This case, stated in Article 25, had actually arisen, and so the violation of the agreement consisted in the fact that the Navy, although now entitled to build larger battleships, neglected to inform Britain of her desire to make use of that right. It was, therefore, only a violation of the obligation to exchange information. How meaningless this measure was is proved by the alteration of the Anglo-German Naval Agreement by virtue of the London Protocol of 30 June 1938, which I have submitted as Exhibit Number Raeder-16.

Already on 31 March 1938, that is, only 6 weeks after the date of Document C-23, Britain on her part had stated, according to the London Protocol of 30 June 1938, that she must make use of the afore-mentioned right granted by Article 25, and therefore proposed that the battleship tonnage be increased from 35,000 to 45,000. This agreement was then signed by both countries on 30 June 1938, and thus the violation of the treaty evident from Document C-23, became illusory.

(2) The British prosecutor raised a second charge by submitting Document D-854 during cross-examination. It consists of notes made by Admiral Assmann for his historical writings; on Sheet 15 of these notes he writes that Germany abided by the terms of the Anglo-German Naval Agreement least of all in the sphere of U-boat building and that 55 U-boats were allowed by the treaty up to 1938, but 118 were actually completed or begun. These statements by Assmann are actually incorrect, and in reality Germany strictly followed all the stipulations of the Anglo-German Naval Agreement with regard to U-boat building. Despite the assurance of equality of rights Germany by the Naval Agreement of 1935 voluntarily limited herself to 45 percent; but the right to increase this percentage at any time by friendly agreement with Britain was reserved for her. The presentation of evidence has shown (see the testimony of Raeder and Schulte-Mönting) that in December 1938 corresponding negotiations took place between the British Admiral Lord Cunningham and Grossadmiral Raeder, during which His Majesty's Government approved the increase to 100 percent. It was not clear at the time when this evidence was presented, whether this approval had also been given in writing, as was to be assumed. Meanwhile I have been able to establish that such a document must have existed; I was able to gather this from the afore-mentioned Assmann Document D-854 in which

on Page 169, in connection with Page 161, the letter in question dated 18 January 1939 is mentioned. In conclusion it remains to be said that the figure of 55 U-boats mentioned by Assmann corresponds to 45 percent, whereas the figure of 118 U-boats corresponds to 100 percent; accordingly Assmann, and therefore the Prosecution as well, are wrong. Actually there was no violation at all of the naval agreement with regard to U-boats.

[*A recess was taken.*]

DR. SIEMERS: I now come to the allegation of the Prosecution that Grossadmiral Raeder took part in a conspiracy to wage wars of aggression, and in particular supported Hitler and National Socialism despite his alleged knowledge that Hitler from the beginning had the intention of waging wars of aggression.

(1) How did Raeder establish contact with Hitler, and was he able, or even bound, at that time to realize an intention on the part of Hitler to wage wars of aggression?

As I have said, it is a fact that Raeder before 1933 had nothing to do with National Socialism and knew neither Hitler nor his Party collaborators; he met Hitler on 2 February 1933, when he and the other commanders were introduced to Hitler by Baron von Hammerstein. As Chief of the Naval High Command Raeder had only one superior, Reich President Von Hindenburg, who, according to the Constitution and the Defense Law,[39] was the Supreme Commander of the whole Armed Forces. Hindenburg, as Reich President, had appointed Hitler Reich Chancellor, and thus a connection was of necessity created between Hitler and the Armed Forces. There was thus no question of any decision on the part of Raeder. As Hindenburg's subordinate, he had as a soldier to submit to the political decision which Hindenburg had taken as President of the Reich. The constitutional basis with regard to the Armed Forces was in no way altered by the fact that Hitler came to power. As Chief of the Naval High Command Raeder took as little part in this political decision as he had done on previous occasions when Müller, who was a Social Democrat, or Brüning, who belonged to the Center Party, became Reich Chancellors.

Nor was there any cause for Raeder to resign his post on account of this internal political decision, for Hitler had explained to him and the other high officers at the first conference on 2 February 1933, and particularly also on the occasion of the first naval report in the same month, that nothing in the Armed Forces would be changed and that the Armed Forces must remain aloof from politics, as laid down in the Constitution and the Defense Law.

The testimony of Raeder and Schulte-Mönting proves that during the naval report Hitler explained his fundamental ideas in regard to a peaceful policy, in which connection, in spite of the amicable revision of the Versailles Treaty to which he aspired, it was essential to come to an understanding with England by means of a treaty providing for the development of the Navy within the general limitations of naval armament. During this conversation Hitler clearly indicated that he did not want a naval armament race and that the development of the Navy should take place only in friendly agreement with England. This principle was absolutely in line with the viewpoint of Raeder and the Navy, and it was therefore quite out of the question for Raeder to tell his superior, Hindenburg, that on account of Hitler he could no longer head the Navy.

Now the Prosecution maintains that the leading personalities in Germany at that time already knew Hitler's true intentions from his book *Mein Kampf*, and has cited as proof several quotations, partly torn from their context, from Hitler's propaganda book of 1924. This argument of the Prosecution does not seem to hold good, because Hitler wrote this book as a private individual belonging to an opposition party. In this Trial it has several times been pointed out that the statements of foreign private individuals are irrelevant even when these foreigners are well known, and subsequently—as in Hitler's case—received a position in the government. Raeder could assume, as could anyone else, that as Reich Chancellor Hitler would not uphold all the Party doctrines which years before he had defended as a member of the opposition, particularly since the statements of Hitler on military matters contradicted these former Party ideas. Moreover, the Navy relations with England were always of foremost importance and in this connection Hitler himself had said in his book *Mein Kampf*, Page 154: "But for such a policy there was only one possible partner in Europe: England." (Document Book 2, Document Number Raeder-20, Page 119.)

In rebuttal of the quotations submitted by the Prosecution it must also be said that they are all taken from the 1933 edition and that, in spite of great pains, the General Secretary's office has been unable to procure an earlier edition, particularly the first edition of 1925 and 1927. It is a known fact that in later years Hitler himself made changes on many points in numerous places in his book, consequently the quotations from the 1933 edition cannot be taken as a basis on their face value.

Ought Raeder in the following years to have realized that Hitler desired to abandon the fundamental idea of an understanding with England, and is it possible to agree with the argument of the Prosecution that Raeder should have refused further collaboration at some time before 1939? I believe that

this question must be answered in the negative for reasons which appear quite naturally from various facts which the Prosecution or the Defense submitted in evidence:

Hindenburg died on 2 August 1934, and the Prosecution reproaches Raeder because he thereupon took an oath in which he named the Führer in the place of the fatherland. (Record of 15 January 1946, Volume V, Page 262.) This point was sufficiently clarified in the presentation of evidence. Therefore I need only refer to the error which the Prosecution made in its assertion; the Prosecution itself produced Document D-481 which shows the oath of allegiance taken by the soldiers of the Armed Forces on Hitler's orders. The document is a law signed by Hitler, Frick, and Blomberg and it shows that it was not Raeder who replaced the word "Vaterland" by "Hitler," but that Hitler himself demanded that all soldiers should take the oath to him as Commander-in-Chief of the Armed Forces. Before Hitler demanded this oath, which he had cleverly devised and which proved so fateful in the future, Raeder had neither been informed nor had his advice been asked on the wording. He was simply summoned to the Reich Chancellery without knowing the reason. The question as to what kind of oath is to be taken by a soldier is again a political one, a question of legislation, upon which Raeder as a soldier and Commander-in-Chief of the Navy had no influence.

The Prosecution charges Raeder with having been informed of many political decisions and with having, as Commander-in-Chief of the Navy, made strategic plans and preparations on the occasions of such political measures. The Prosecution referred to the withdrawal from the League of Nations on 14 October 1933, the occupation of the Rhineland on 7 March 1936, the Austrian Anschluss in March 1938, the incorporation of the Sudetenland in the autumn of 1938, and the establishment of the Protectorate of Bohemia and Moravia in March 1939.[40]

The documents in question are in the main those marked in the footnote, and I can refer to them jointly in this connection. There is one fact common to all of these decisions, namely, that Raeder did not politically take part in any of them. Raeder was never consulted beforehand and as Commander-in-Chief of the Navy he had no authority to participate in such decisions. Raeder did nothing more than take note of these documents and reports, and then issue the orders necessary for precautionary military measures in case the country became involved in war. It seems quite incomprehensible that the commander-in-chief of a branch of the Armed Forces should be reproached for having made strategic preparations in the event of political complications. I imagine that it is customary all over the world that an admiral never takes part in political decisions, while at the

same time he is obliged to make certain precautionary preparations depending upon such political decisions of the government. This is another example of the discrepancy I have already mentioned affecting the position of a military commander, which, although the Prosecution considers it to be a political one, is in reality purely military. There is hardly any doubt that the military commands of foreign countries involved in these political decisions or interested in them were also at the same time taking precautionary military measures.

A military commander could not judge whether these political decisions of Hitler were crimes or even violations of international law, all the less since he was never summoned to the consultations. Neither the withdrawal from the League of Nations, as a result of the failure of all endeavors to induce the other countries to disarm in the spirit of the Versailles Treaty, nor the occupation of the Sudetenland or the establishment of the Protectorate of Bohemia and Moravia, can be regarded as criminal activities, in the sense of the Indictment, of a disinterested commander-in-chief. They were certainly deviations from the Versailles Treaty, but even the British Prosecutor, Sir Hartley Shawcross, declared on 4 December 1945 in this courtroom that "many objections against Versailles were possibly justified."[41] And even Justice Jackson, as quoted above, said that the boldest measures would have been justified for the purpose of revising this treaty, but not a war.

All these measures taken by Germany were in fact carried out without a war, and therefore come under the heading of measures which Justice Jackson considers justified, all the more so since they were all silently condoned by foreign countries, or even agreed upon by treaty, as for instance in the case of the incorporation of the Sudetenland by the Munich Agreement of September 1938, or, as in the case of Austria, by agreement with that country.

In the cases of Austria and of the establishment of the Protectorate of Bohemia and Moravia, the Prosecution quite justifiably, looking at these cases objectively and retrospectively, points out that Hitler employed extremely dubious and possibly criminal means to achieve his aims; however, this can have no significance as far as the Commander-in-Chief of the Navy is concerned, since it has been firmly established that he was not informed of these activities, much less of the means employed therein. It has been established in particular that Raeder was neither informed of the details of the Austrian Anschluss nor of the kind of conference which ultimately led to an agreement with President Hacha. He was not told of the discussions with Hacha, nor of the threat of a bombardment of Prague, which was made

in the course of these discussions; I refer in this connection to the testimony of the witnesses Raeder and Schulte-Mönting. In the eyes of Raeder, therefore, these constituted measures permissible under international law, or else agreements which gave him no cause to interfere or to question Hitler, quite apart from the fact that as a military commander he had no right whatsoever to do so.

Moreover, had military complications arisen, land operations only would have been involved, as is quite obvious from the location of the countries concerned. It would have amounted to an impossible situation if the disinterested Commander-in-Chief of the Navy had seen fit to concern himself with these things although hardly any naval preparations were required. In the case of Czechoslovakia, for example, Document 388-PS lays down, as far as the Navy was concerned, only that it was to participate in possible Army operations by commitment of the Danube flotilla which for this purpose was placed under the orders of the High Command of the Army; this flotilla consisted of very small ships, a few gunboats, if I remember correctly.

In this connection I also quote Sir Hartley Shawcross when on 4 December 1945 he spoke of the German-Polish Non-Aggression Pact of 1934: "By entering into it"—Hitler—"persuaded many people that his intentions were genuinely pacific ..."[42]

Accordingly, Raeder too had reason to be convinced. It is true that Raeder belonged to the Secret Cabinet Council created in February 1938. But it is also true, and has been proved in the meantime, that the Secret Cabinet Council was just a farce. It is therefore unnecessary to deal with this point which the Prosecution originally considered so important.

The claim of the Prosecution that Raeder was a member of the Government and a Reich minister has been refuted in the same way. This assertion of the Prosecution has from the outset been somewhat incomprehensible. Document 2098-PS, presented by the Prosecution, only states with absolute clarity that Von Brauchitsch, the Commander-in-Chief of the Army, and Raeder, the Commander-in-Chief of the Navy, held—I quote—"a rank equivalent to that of a Reich minister." This proves that he was not a minister, although for reasons of etiquette he held a rank equal to that of a Reich minister, and it follows that this decree of Hitler did not assign a political task to Raeder, as the Prosecution would like to have it.

Moreover, this decree does not even give him the right to participate in Cabinet sessions at his own will, but only, as Hitler says in the above-mentioned document, "upon my order." This simply means that Raeder might have been called upon by Hitler to participate in a Cabinet session

when technical naval problems were being discussed. In reality this hypothetical and politically insignificant case never arose.

Nor can membership in the Reich Defense Council—Document 2194-PS[43]—be considered incriminating. In the first place the council was concerned, as the text says, only with "preparatory measures for the defense of the Reich," that is, neither with political activities nor with activities connected in any political sense with aggressive war. Furthermore, according to Document 2018-PS, a later Führer decree of 13 August 1939, and contrary to the claim of the Prosecution, Raeder never belonged to the Ministerial Council for the Defense of the Reich set up at that time, for the simple reason that he was not a minister. Actually other countries, too, possess institutions like a defense council or defense committee. I call attention to the fact that already long before the first World War the British Government had a defense committee which was of much greater importance[44] than the equivalent institution in Germany.

As the final matter in this connection, I wish to point out that the claim of the Prosecution that Raeder was a Party member has also proved untenable. It is true that Raeder received the gold insignia of honor from Hitler; but this was only a decoration; it could not mean anything else, because a soldier could not be a member of the Party. That is clear beyond all doubt from Paragraph 36 of the Reich Defense Law, which forbids soldiers to engage in politics and to be members of a political organization. [45]

I also refer to the evidence, which proved amply that Raeder never had connections with the Party, that indeed he more than once had arguments with Party circles and that he was unpopular with typical National Socialists because of his political and particularly his religious attitude. Goebbels, for instance, positively detested him, and this was not surprising, because on the one hand he always prevented the Party from gaining any sort of influence on the officers' corps of the Navy, while on the other, in contrast to the Party, he supported the Church to the greatest extent, and saw to it that the morale of the Navy was founded on a Christian basis. I refer in this connection to the typical National Socialist phrase of Bormann:

"National Socialist and Christian concepts are incompatible."[46] In the same document Bormann, as he so often did, expressed views devoid of all civilized standards and attacked Christianity so strongly, and so violently advocated the elimination of all Christian ideas, that this attitude by the Party is sufficient proof that Raeder, as a devout Christian, could never have entertained relations with the Party.[47]

I have already stated that in 1933 Hitler said that it would be one of the fundamentals of his policy to make Germany sound and strong by peaceful means, and that for such peaceful development it was absolutely necessary to acknowledge British hegemony and come to an agreement with Britain about the size of the German fleet—if possible, even to come to an alliance. These ideas coincided with Raeder's fundamental attitude, which he explained in detail during his examination here. As far as my defense is concerned, it may remain an open question whether and when Hitler abandoned that basic thought. In any case, Hitler always emphasized this basic thought to Raeder and actually supported it with deeds; this ever-recurring thought can be traced through all the years up to the outbreak of war, and it was in the pursuit of this basic principle that the Anglo-German Naval Agreement was concluded in 1935 and the second Anglo-German Naval Agreement in 1937, that an agreement on submarines was reached with Lord Cunningham in 1938, and that the London protocol on the subject of battleships was signed on 30 June 1938. Thus, throughout the years of the reconstruction of the German Navy the same idea was always predominant, namely, of achieving agreement with Britain, of acknowledging Britain's supremacy and of avoiding any difference which might lead to a break with Britain.

Looking back now in cognizance of all the documents and all the facts proved during this Trial, Hitler may be assumed at some time, probably in 1938, to have become unfaithful to his own principles and thereby guilty of bringing about the tragic fate of Germany. However, in judging the accusations made against Raeder, the decisive issue is not what must subsequently, in the light of all known facts, be acknowledged as objectively true; the real issue is only whether Raeder realized, or was even able to realize, Hitler's deviation from his own ideas, and the answer to that is "no." Raeder could not have guessed, much less have known, that Hitler at some time became untrue to his own political ideas which he had repeatedly stressed and demonstrated, and thus guilty of kindling the frightful conflagration of World War II.

Raeder could not have suspected or known that during the period immediately preceding the war Hitler spoke to him, too, in words which were at variance with his thoughts and also different from his actions. As far as the Navy in particular was concerned, the relatively slow rebuilding of the German fleet showed that Hitler proposed to remain faithful to the ideas which I described. There was no indication at all of a change of mind on Hitler's part in this field, for a change of mind would surely have resulted in a naval rebuilding program bigger than the one which Hitler actually carried

out. At the very least he would then have made full use of possibilities offered by the Anglo-German Naval Agreement. According to the Naval Agreement, the German fleet was allowed a total tonnage of 420,595 tons,[48] yet actually this maximum was never utilized. Even with regard to battleships, Germany remained short of the Naval Agreement, with the result that the battleships *Bismarck* and *Tirpitz* were not available in the first year of the war, and thus could not take part in the occupation of Norway; the *Bismarck* was completed only in August 1940, and the *Tirpitz* in 1941.

According to the Naval Agreement, Germany was allowed the same tonnage in submarines as England. In reality, however, U-boat construction was so slow that at the beginning of the war in 1939, as the evidence has proved, Germany had only the small number of 26 U-boats available for Atlantic service. And further, according to Document L-79, known as the "Little Schmundt," it was laid down as late as the end of May 1939 that—I quote—"no change will be made in the ship-building program."

All this must have firmly convinced the Commander-in-Chief of the Navy from his personal point of view and his sphere of work that Hitler wanted to stand by his much-stressed basic principle of avoiding war.

Raeder's firm conviction in this respect—this seems to be an important consideration—was to a large extent confirmed by the attitude of foreign countries. Winston Churchill, in his book *Great Contemporaries*, wrote in 1935:

> "It is not possible to form a just judgment of a public figure who has attained the enormous dimensions of Adolf Hitler, until his lifework as a whole is before us ... We cannot tell whether Hitler will be the man who will once again let loose upon the world another war in which civilization will irretrievably succumb, or whether he will go down in history as the man who has restored honor and peace of mind to the great Germanic nation, and brought it back serene, helpful, and strong to the forefront of the European family circle."

One year later, at the Olympic Games in Berlin in 1936, the representatives of the foreign countries appeared in a body and greeted Hitler in a manner which, in its approval bordering on enthusiasm, appeared incomprehensible to many skeptically inclined Germans. Subsequently, the foremost politicians and members of various governments visited Hitler and reached complete understanding with him, and finally, in the autumn of 1938, agreement was again reached under Chamberlain and Lord Halifax; an agreement which strengthened Hitler immeasurably, and by which he sought

to prove to the Germans how expedient all his actions had been, since they were thus approved by foreign countries. The joint declaration, which Chamberlain and Hitler issued in Munich on 30 September 1938, can never be overestimated in its importance. I would, therefore, like to quote the first two decisive sentences from it:

> "We have had a further discussion today, and are agreed that the question of Anglo-German relations is of primary importance for both countries and for Europe.
>
> "We regard the agreement signed last night and the Anglo-German Naval Treaty as symbolic of the desire of our two nations never again to wage war against each other."

I think that these references are sufficient. Now, can one demand of a German admiral, who has never been a politician, but always only a soldier, that in judging Hitler he should have looked farther ahead than the great British statesmen, Chamberlain and Churchill? Surely the very question indicates that the answer is "no."

The Prosecution can seriously confront these numerous aspects only with a few documents which might indicate Raeder's knowledge of Hitler's aggressive plans. The Prosecution has indeed presented innumerable documents of which Raeder or the Naval Operations Staff or the High Command of the Navy were stated to have received copies, but in a considerable number of instances the Prosecution could not say anything beyond the fact that Raeder received a copy of the documents; for the most part no real connection existed, nor was it alleged by the Prosecution. Naturally, it is not surprising that for the sake of uniformity military documents went to all branches of the Armed Forces, even if in certain cases one branch of the Armed Forces was not at all, or only vaguely, concerned with them. Of all these documents which have been submitted in the case of Raeder, only the four documents which, because of their importance, the Prosecution described as key documents, could be really incriminating. These are Hitler's four speeches to the Commanders-in-Chief of 5 November 1937, 23 May 1939, 22 August 1939, and 23 November 1939.[49]

The Prosecution claims that these speeches prove participation in the conspiracy, and that it is clearly evident from them that Hitler wanted to wage wars of aggression. I would therefore like to deal with these documents individually and in detail, and in doing so, show why they cannot modify the general picture I have presented.

Undoubtedly these key documents are of the utmost importance for the subsequent historical findings on what trains of thought motivated Hitler;

they are important because they are expressions of Hitler's opinion and because, in spite of the tremendous amount of captured documentary material, there are hardly any written notes of Hitler. One is tempted, of course, to accept the conclusion that the contents of these documents must be true because they are statements made before a small circle, where Hitler would naturally express himself more openly than in his public speeches. Even though I by no means fail to recognize their value, I nevertheless believe that the Prosecution overestimates the importance of these four documents by far. Certainly, they are to some extent key documents, since they provide the key to an understanding of Hitler's mind and methods, but they are not a key to the real intentions of Hitler, and more particularly they do not provide a scale for any conclusions which those who listened to the speeches must, in the opinion of the Prosecution, needs draw from them.

Therefore, in order fully to explain the value of the documents, I would like first of all to mention several general points which apply generally to each of these four documents and limit their evidential value, which the Prosecution has overestimated. None of these speeches was taken down in shorthand, so that the actual text of the speeches is not available. Accordingly, in the record of the address of 5 November 1937, Hossbach correctly chose the indirect form of speech, and Generaladmiral Böhm in his record of the speech of 22 August 1939[50] did the same. Surprisingly and not quite correctly, Schmundt chose the direct form of speech in his record of 23 May 1939, although it was not a verbatim record; however, he was at least careful to state at the beginning that Hitler's words were being reproduced "in essence."

The feeblest documents, that is to say, the two versions of the speech of 22 August 1939 which the Prosecution has submitted, are written in the direct form of speech, and the authors of these documents, whose names are unknown, have not even deemed it necessary to add some sort of note as Schmundt did. However this may be, in considering the documents it must be kept in mind that they were not reproduced word by word and that therefore the reliability of the reproduction depends on the manner of work and attitude of the author of the document, especially on whether and to what extent he made notes during the speech, and when he prepared his record. In this connection it is important to note that, as Document 386-PS shows, Adjutant Hossbach wrote the record a full 5 days later, namely on 10 November, though the speech itself had already been made on 5 November. In the case of Schmundt, the date of the record is missing altogether, and in the two Prosecution documents on the speech of 22 August 1939 there is also no date. The last two documents also lack any signature, so that in this

case it is not even possible to say who bears the responsibility for the record. The same applies to the document on the speech of 23 November 1939. All these formal deficiencies allow considerable doubt concerning evidential value and reliability of the documents to be entertained.

It is different in the case of the Böhm document, who in his affidavit certifies that he wrote down Hitler's speech as it was being made, that he noted down the exact text of particularly important passages, and that he edited the final draft, submitted here, on the same evening. Since in all these documents the true text is not available, it is obvious how important it is if one can at least establish that the record was made simultaneously with the speech, or at least on the same day and not, as in the case of Hossbach, 5 days later. Even with the best of memories the best adjutant, who has to handle many new matters every day, cannot possibly after 5 days give an absolutely reliable reproduction of a speech.

The second point is just as important, namely, that unlike other military documents these are not official documents with a distribution list, that is, they are not documents which were subsequently sent to those concerned. That the documents were not sent to Raeder was established in the evidence by him and by the witness Schulte-Mönting, apart from the fact that it is already apparent from the lack of a distribution list on the document. This point, in particular, seems to me of great importance. Listening to a speech once—and it will be recalled that Hitler spoke extremely quickly—does not induce the listener to draw conclusions in a way which the reading of the record might, since the record allows for a check and recheck of the contents of the speech. We who have come to know these speeches in the proceedings in their written form and have again and again checked their wording, naturally invest certain words and phrases with more importance than we would have done if we had heard them as part of a quickly delivered address. In addition, all of us are readily inclined to lend more importance to the various phrases, because from our present standpoint and in view of our more extensive knowledge we can now survey everything much more easily; for we have not only one speech on which to base our opinions, but all of them and in addition all the many other documents showing the historical development. In discussing these documents it must always be borne in mind that listeners are inclined to react to the spoken word quite differently, and that often, even after only a few hours, the reports of various listeners differ from one another.

The Prosecution considers these speeches of Hitler to be the basis of the conspiracy, and says that on these occasions Hitler consulted with the commanders, reached a certain decision, and concluded a certain plan of

conspiracy with them. The Prosecution is bound to maintain this, because one can only speak of a conspiracy when something is being planned in common. In reality, the assertion of the Prosecution that an influential group of Nazis assembled to examine the situation and make decisions is incorrect; the occasion took the form of an address by Hitler alone, and no discussion and no consultation took place. Nor was any decision reached, either; Hitler just spoke quite generally about—I quote—"possibilities of development."[51] If one can speak of decisions at all, it was a decision solely on the part of Hitler. All this contradicts the existence of a real conspiracy. Altogether I have the impression that, in its conception of a conspiracy to wage wars of aggression, the Prosecution has conceived an entirely false picture of the real distribution of power within the National Socialist State. In my opinion the Prosecution fails to recognize the characteristics of a dictatorship, and indeed it may be very difficult to understand the immeasurable dictatorial power of Hitler if one has not personally lived through all of those 12 years in Germany, in particular the growth of Hitler's power from its first beginnings until it finally developed into a dictatorship wielding the most cruel and horrible terror. A dictator like Hitler, who moreover quite obviously exercised immense powers of suggestion and fascination, is not a president of a parliamentary government. I have the impression that in judging the situation as a whole the Prosecution has never completely relinquished the idea of a parliamentary government nor taken the uncompromising ways of a dictator into account.

The idea of a conspiracy between him and the members of the Cabinet or between him and the commanders was quite contrary to Hitler's own nature, as the testimony of several witnesses showed in the course of the Trial. This was proved with particular emphasis by the testimony of the Swedish industrialist, Dahlerus, who by reason of his excellent and extensive connections both with Britain and Germany was in the course of time able to obtain an objective picture of both countries, and who during his negotiations with Chamberlain and Halifax on the one hand, and Hitler and Göring on the other, was best able to recognize the difference between the parliamentary British Government and the German dictatorship of Hitler. The account of Dahlerus proves convincingly that the difference was irreconcilable. After he had spoken with Chamberlain and Halifax, a discussion with the Cabinet naturally took place before a final decision was taken. On the other hand, when in the night of 26 to 27 August 1939[52] Dahlerus had a discussion of decisive importance with Hitler, at which only Göring was present, Hitler at once made six propositions, without saying a word to any of the Cabinet members or any of the military commanders,

without even consulting Göring who sat by silently; proposals, moreover, which did not exactly tally with what he himself had told Sir Nevile Henderson a short time before. A stronger argument against a conspiracy with commanders or members of the Cabinet can hardly exist, unless it be the equally important fact which the witness Dahlerus added, namely, that during the entire 2½ hours Göring did not dare say a single word, and that it was humiliating to see the degree of servility which Hitler demanded even of Göring, his closest associate.[53]

All these Hitler speeches are full of contradictions. Such contradictions naturally impair clarity of thought, and they rob individual ideas of their importance. When reading the documents in their entirety, the number of contradictions becomes evident, as the witness Admiral Schulte-Mönting correctly pointed out during his examination and cross-examination. It is just because of such contradictions and often illogical thinking that the evidential value of the documents is diminished. Naturally it is difficult for a military adjutant like Hossbach or Schmundt to record unclear and contradictory trains of thought; and it is also easy to understand that a military adjutant will be inclined to introduce as clear a line of thought as possible, and will in consequence be misled into applying to certain ideas which have become clear to him more stress than they were actually given in the speech itself. To this can be added a remark of Raeder, who not only points to the contradictions, but especially to Hitler's overactive imagination, and very appropriately calls him a "master of bluff."[54]

Moreover, in every speech of that type Hitler followed a very definite tendency. He had a definite purpose in view, namely, to bring about the desired impression on all or some of his hearers, either by intentional exaggeration or by making things appear deliberately harmless. While he spoke, Hitler followed the intuition of the moment; as Schulte-Mönting termed it, he wandered from his notes. He thought aloud and wished to carry his hearers away, but he did not want to be taken at his word.[55] Everyone will agree with me that such practices and such purposefully designed speeches give no clear indication at all of Hitler's true views at the time. In addition, there is this to be said about all these documents in general:

Following his address of 23 May 1939—known as the "Little Schmundt"—Raeder had an interview with Hitler alone in which he called Hitler's attention to contradictions in his address and also to the contradiction arising out of Hitler's assurance to Raeder personally that he, Hitler, would under all circumstances settle the case of Poland equally peacefully. Hitler thereupon put Raeder's mind completely at rest and told him that he had a firm hold on matters, politically. This was stated by the

witness Schulte-Mönting[56] who added that Hitler allayed Raeder's misgivings about the contradiction between the speech of 23 May 1939 and his other statements by telling him that for him, Hitler, there were three grades of keeping matters secret: Firstly, by private conversation with one partner; secondly, the thoughts he kept to himself; and thirdly, some ideas which he himself did not fully think out.

I believe this way of thinking as explained by Hitler himself illustrates most strikingly how little reliance could ultimately be placed on statements which he made before a small or a large group of people. It seems to me quite plausible, therefore, that Raeder based his deliberations neither on Hitler's general speeches nor on the address before the commanders which was discussed here, but went solely by what Hitler told him in private discussion. In this respect, the statements of Sehulte-Mönting, Böhm, and Albrecht[57] all prove that as late as 1939 Hitler was still, in private conversation, repeatedly giving Raeder the explicit assurance that there would be no war; and he did this whenever for some reason or other Raeder was particularly anxious and drew Hitler's attention to the dangers ahead.

In conclusion, therefore, I believe it may be said that the so-called key documents are extremely interesting in assessing Hitler from a psychological point of view, but that their evidential value as regards Hitler's real intentions is very limited and slight. One cannot reproach Raeder for not letting himself be guided by the tendentious and deliberate speeches which Hitler made before his commanders on the spur of the moment, and preferring to rely on assurances which Hitler himself gave him and on the fact that until the summer of 1939, until the very outbreak of the war, these assurances were in perfect accord with the facts and with Hitler's actions, that is, with the four naval agreements and the Munich Pact.

It is understandable that Raeder did not permit this basic attitude to be shaken by these speeches to the commanders-in-chief, though they were undoubtedly of a questionable nature, but that he held steadfastly to his belief that Hitler would not deceive him. The fact that we now subsequently realize that Hitler did after all deceive Raeder in his private conversations with him, and also by his special second and third grade of secrecy, does not indicate any guilt on Raeder's part, but solely on Hitler's. The vast amount of material in this connection does not indicate that in 1938 and 1939 Raeder planned a war of aggression in violation of international law, but reveals only that Hitler planned a war of aggression in violation of international law.

This completes my general treatment of the key documents and I now ask the Tribunal's permission to add a few points on each individual

document, since the Prosecution again and again stressed these documents as the basis for the charge of conspiracy.

Hossbach Document, discussion of 5 November 1937 in the Reich Chancellery:

The crucial passages of this document are obvious, and the Prosecution has cited them often enough. But in dealing with this document it should be taken into consideration that both Göring and Raeder stated here that Hitler announced in advance his intention of following a certain trend or purpose in his speech. Hitler was dissatisfied with the measures taken by Field Marshal Von Blomberg, and especially by Generaloberst Von Fritsch, the Commander-in-Chief of the Army, and felt that progress in the rearmament of the Army was too slow. Hitler therefore intentionally exaggerated, and since this was known only to Göring and Raeder, it is natural that the impression which the speech made on Neurath, who had no idea of this intention, was entirely different and considerably alarming.

It is interesting to note that apparently Hitler did not fully get what he wanted, because the last two paragraphs of the document indicate that to some extent Blomberg and Fritsch saw through Hitler's scheme, and that his exaggerations did not deceive them. Though Hitler did not permit discussion on such occasions, Blomberg and Fritsch intervened in this instance and pointed to the need for preventing Britain and France from becoming Germany's adversaries. Blomberg explained the reasons for his protest, and in the penultimate paragraph of the document Fritsch showed unmistakably that he was skeptical of Hitler's words by remarking that under such circumstances he would not be able to take his planned vacation abroad scheduled to begin on 10 November. It is also significant that Hitler thereupon came round and, in contrast to his earlier statements, said that he was convinced of Britain's nonparticipation, and that consequently he did not believe in military action against Germany on the part of France either.

That Hitler's ideas in this document are quite impossible is also evident from the fact that he based his statements on a truly fantastic notion, namely, an Italian-French-British war or, equally fantastic, a civil war in France. In contradictory terms Hitler spoke in his speech on the one hand of an application of force, on the other of an attack by Poland against East Prussia, which could only refer to a defensive aspect—and in regard to Czechoslovakia he said that in all probability Britain and France had already privately written that country off. This reference is an indication that Hitler was prepared to negotiate, which was borne out by actual developments. He said that Austria and Czechoslovakia would be brought to their knees, but nevertheless in the following year, in March and September 1938, he carried

on negotiations and settled both questions without war. This fact in particular seems significant, because it proved to Raeder in the course of later events that he was right in not ascribing undue importance to Hitler's strong words of 5 November 1937, for in spite of these words Hitler in reality did carry on negotiations at a later date.

During his interrogation Raeder also rightly pointed out that the second extensive naval pact had been concluded with England only a few months earlier and that as a result he could not seriously expect Hitler to abandon a line of policy which he himself had initiated.

And finally, there is this point: The whole document deals with political questions on the one hand, and with possible land operations on the other. Raeder had nothing to do with political questions because he is no politician, while Neurath as Foreign Minister naturally had reason to give Hitler's political attitude more consideration. It is also significant that Neurath testified here that as a result of this speech he too asked Hitler about his personal attitude, and that he refused to remain Foreign Minister because Hitler told him that those were his true intentions. To me it seems typical of Hitler to tell one person, Neurath, that perhaps he would go to war, and to tell another, Raeder, that he would under no circumstances wage war. This divergence in explaining his position was obviously caused by the fact that at that time he no longer relished Neurath as Foreign Minister, because he realized that with regard to the foreign policy which he proposed to follow, Neurath would not be as submissive as the successor whom he had in view, Ribbentrop. On the other hand at that time he still wanted at all events to retain Raeder as Commander-in-Chief of the Navy. This is another instance of how Hitler's actions were determined by a certain ultimate purpose, and how he always and without the slightest inhibition followed the principle that the end justifies the means.

Hitler's speech of 23 May 1939, the so-called "Little Schmundt," USA-27: Here again Hitler expressed himself in a highly questionable fashion; he speaks of a program of attack, of the preparation of a systematic attack, and of the decision to attack Poland. I fail in no way to recognize that there is good reason for the Prosecution to consider this document as particularly good evidence. I believe, however, that taking into account the numerous aspects which I pointed out, the value of this document as evidence in the case of Raeder is very much smaller than the Prosecution maintains, and very much smaller than a first glance at the wording of the Schmundt version might warrant. Schmundt obviously made an endeavor to formulate Hitler's contradictory, fantastic, and incongruous statements in a clear way in accordance with his own precise military manner of thinking. This gives

the document a clarity which does not correspond to Hitler's speech. We do not know when Schmundt prepared the document, and he neglected to show the record he had made to the other participants.

During his examination and cross-examination the witness Admiral Schulte-Mönting pointed to the contradictions in this particular document, which I need not repeat here. Paramount importance must however be given to the contradiction between these words and the words which Hitler at the same time again and again used in conversation with Raeder, and which always followed the same line, namely, that he did not intend to wage war and that he would not make excessive demands.

Raeder was shocked by this speech, and was only calmed by the private conversation which he had with Hitler directly after the speech, when Hitler assured him that he would under all circumstances settle the case of Poland in a peaceful manner, too. Raeder believed him, and he had every right to assume that Hitler was telling him the truth in answer to his very precise question. I draw attention to the very exact statements made on this document during the examination of Raeder and the examination of the witness Schulte-Mönting.[58] I especially refer to the statement of Schulte-Mönting that Hitler used the comparison that nobody would go to court if he had received 99 pfennig when claiming one mark, and added that in the same way he had obtained what he had demanded politically, and that consequently there could be no question of war on account of this last political question, that of the Polish Corridor. That Raeder himself was absolutely opposed to a war of aggression, and that in this respect he relied on Hitler's assurances, is proved by the statements of all witnesses, not least by the deposition by Dönitz that on the occasion of the U-boat maneuvers in the Baltic Sea in July 1939 Raeder, expressed his firm conviction that there would be no war. Raeder, furthermore, knew that the Navy was absolutely unfit for a war at sea against Britain; he had explained that to Hitler again and again. But he was confident that in the Polish question Hitler, as he had said, would again negotiate; the testimony of the witness Dahlerus shows that negotiations did in fact take place, and they were even successful at the beginning. The reason why nevertheless the attempt finally failed and the second World War began, was explained in detail by the witness Dahlerus who illustrated the terrible tragedy of this event.

It seems to me important that up to August 1939 not only the witness Dahlerus, but also Chamberlain still believed in Hitler's good will. It must be said again therefore that one cannot expect Raeder as a soldier to have been more farseeing and to have recognized Hitler's dangerous ideas, if men

like Chamberlain, Halifax, and Dahlerus did not even at that time see through Hitler.

I have myself referred to the seriousness and the incriminating character of this document, but I ask the Tribunal to take into consideration that the incriminating material in this document, just as in the document of 5 November 1937, is of a political nature. As defense counsel for the Commander-in-Chief of the Navy, I have to judge the facts not from a political but from a military point of view. From a military point of view, however, it is absolutely impossible to follow the arguments of the Prosecution, because military leaders are not authorized to take part in decisions about war and peace, but merely obliged to carry out such military preparations as the political leaders consider necessary. In no country of the world does an admiral have to give his opinion on whether some future war, for which he has to make plans, will be a war of aggression or a defensive war. In no country of the world does the decision of the question whether war will be waged rest with the military, but on the contrary it is always left to the political leaders, or to the legislative bodies.

Accordingly, Article 45 of the German Constitution stipulates that the Reich President shall represent the Reich in international relations and continues: "The declaration of war and the conclusion of peace are decreed by a law of the State."

Therefore, the question whether a war was to be waged against Poland rested with the Reichstag, not with the military leaders. Professor Jahrreiss has already explained that in view of the constitutional development of the National Socialist State this decision rested in the last analysis exclusively with Hitler. For the case of Raeder it is of no consequence whether Hitler could be regarded as constitutionally authorized to start a war on his own decision, as he actually did in the autumn of 1939. The decisive factor is only that at all events the military leaders were not authorized, either in practice or constitutionally, to participate in this decision. The Prosecution cannot possibly maintain that every act of military planning on the part of Germany was a crime; for the military leaders, who merely receive the order to work out a certain plan, are neither authorized nor obliged to determine whether the execution of their plans will later on lead to an aggressive or a defensive war. It is well known that the Allied military leaders rightly hold the same view. No admiral or general of the Allied armed forces would understand a charge being brought against him on the basis of the military plans which were made on the Allied side, too, a long time before the war. I do not have to elaborate this point; I believe it will suffice if I refer to Document Number Ribbentrop-221. This is a secret document, which,

according to the title, deals with the "Second Phase of the Anglo-French General Staff Conferences." This document shows that exact plans, regarding the Allied forces, were worked out for a war embracing many countries; plans which, according to this document, include a war in Europe and a war in the Far East. The document expressly says that the French and British commanders-in-chief in the Far East—I quote—"worked out a joint plan of operations," and it expressly speaks about the importance of possessing Belgian and Dutch territories as a starting point for the offensive against Germany. The decisive point about this parallel military case seems to me to be the fact that this document bears a date from the same month as Hitler's much-discussed speech to his commanders-in-chief, namely, May 1939. The document bears the caption: "London, 5 May 1939."

I now come to the address of Hitler to the commanders-ih-chief on 22 August 1939 at the Obersalzberg.[59] Regarding the evidential value of Documents 1014-PS and 798-PS submitted by the Prosecution, I should like first of all for the sake of brevity to refer to the statements which I made to this Tribunal in connection with the formal application to withdraw Document 1014-PS. Although the Tribunal denied this application, I still maintain that the evidential value attached to these documents, and particularly to Document 1014-PS, is infinitesimal. The American Prosecution, in presenting these documents pointed out at the time[60] that the Tribunal should take into consideration any more accurate version of this speech which the Defense might be able to submit. I therefore submitted Exhibit Number Raeder-27,[61] the version of the witness Generaladmiral Böhm, and I believe that when I submitted it, I showed convincingly that it is in fact a more accurate version than those provided by the Prosecution documents. Sir David Maxwell-Fyfe then put in two documents where Böhm's version is very scrupulously compared with the versions 1014-PS and 798-PS; in this way he considerably facilitated the comparison of these documents for all of us. So as on my part to assist the Tribunal and the Prosecution in making this comparison, I requested Generaladmiral Böhm in the meantime to compare these versions himself and in doing so to use the compilation of the British Prosecution which I mentioned just now. The result is contained in Böhm's affidavit.

When surveying all this material, it becomes clear that Document 1014-PS is extremely incomplete and inaccurate, all the more so as, apart from its formal deficiencies, it covers only one and a half pages, and for this reason alone cannot be an adequate reproduction of a 2½ hour speech.

Document 798-PS is no doubt more satisfactory, but it also contains numerous errors, as Böhm's affidavit shows. Not every sentence may be of

importance, but the point is that some of the most important passages from which a charge against the commanders-in-chief might at best be deduced were actually, according to Böhm's sworn statement, never spoken at all. According to Böhm's affidavit, it is not true that Hitler said that he had decided as early as the spring of 1939 to attack the West first and the East later. Nor did he use the words: "I only fear lest at the last moment some swine will come to me with an offer of mediation; our political aims reach further." And, most important of all, the following words were never used either: "Annihilation of Poland ranks foremost; the aim is to liquidate the living forces, not to reach a certain line;" Hitler only spoke of the breaking-up of the military forces.

These differences in individual words and phrases are very important, because they concern the sharp phrases to which the Prosecution has frequently drawn attention, and from which the intention of a war violating international law, and even the intention to murder civilians, can be derived. If these phrases had been spoken, one could justly accuse the commanders-in-chief who were present of having waged the war and carried out Hitler's orders in spite of the criminal end in view. However, if these sentences were not used but, as Böhm testified under oath, other sentences referring merely to military aims, then the Prosecution cannot reproach any of the commanders-in-chief present for having remained at their posts. No one can in earnest demand of an admiral that he should resign his post a few days before the outbreak of a war, and thus shake the military power of his own country. I am quite aware of the fact that the most serious reproaches can be made against Hitler's attitude following the time of the Munich Agreement until the outbreak of the war in Poland, although, and this is decisive for the Raeder case, not against the military command, but exclusively against the political leader. We know that Hitler himself realized this and for that reason evaded all responsibility by his suicide without, either during or at the end of the war, showing the slightest regard for the life and the welfare of the German people.

I come now to Hitler's speech to the commanders-in-chief on 23 November 1939.[62] I shall deal with it quite briefly, and if you will permit me, Mr. President, I should like to do this now before the Tribunal adjourns, because the subject which follows is rather longer.

THE PRESIDENT: Yes.

DR. SIEMERS: I think I can be relatively brief with regard to this last key document, which again fails to give the date on which the record was made and lacks a signature; we do not therefore know the author of this document. It is not an official transcript; and it again pursues a special

objective. Early in November 1939 a serious difference had arisen between Hitler and the generals because Hitler wanted to start the offensive in the West immediately, whereas the generals were of a different opinion, and apparently hoped that the outbreak of a real World War might still be avoided. Hitler's dissatisfaction and annoyance with his generals are clearly evident. In consequence, by repeating, as usual, his past deeds, he strives to show what he has accomplished, and also to show that he has always been right. It is an absolutely typical Hitler speech reminiscent of his public speeches, in which he also loved to boast and to glorify himself as a genius. Hitler, after all, belonged to those people who always believe themselves to be right, and avail themselves of every opportunity to prove it. He also took the opportunity of using threats in order to nip in the bud the resistance in high military circles which had become known to him, thus strengthening his dictatorship. It is absolutely typical when he says in this document, literally: "I shall not shrink from anything and I shall destroy anyone who is against me." This was recognized by foreign military leaders, too. I draw attention for example to General Marshall's official report,[63] which speaks about the "lack of far-reaching military planning" and about the fact that the German High Command did not have an all-embracing strategic plan, and points out in this connection that "Hitler's prestige reached the stage at which one no longer dared to oppose his views."

Finally it remains to be mentioned that this last key document dates from a time when the war was already in progress, and that the military leaders cannot be blamed if in all their plannings during a war they strove to attain victory. The Allies too were planning at the same time. I refer to Documents Number Ribbentrop-222 and Exhibit Number Raeder-34; the former dates from 1 September 1939 and is a secret letter from General Gamelin to Daladier containing the basic idea that it was necessary to invade Belgium in order to wage the war outside the French frontier. The other document also deals with military plans; it is a secret letter from General Gamelin to General Lelong, Military Attaché to the French Embassy in London, dated 13 November 1939, and also concerns the operation which the Allies had planned in Holland and Belgium.

[*The Tribunal adjourned until 17 July 1946 at 1000 hours.*]

NOTES

[12] Vanselow, Völkerrecht, Berlin, 1931, Figure 226 i.

[13] In 1935, the American Senator Ney demanded the prohibition of operational areas. In 1937 Charles Warren made a request for discussion of the subject in the Society for International Law. And also the aforementioned draft of a convention by American jurists of 1939 deals with this question.

[14] Théories stratégiques IV, Page 323: "Même en zone de guerre n'aura-t-on pas contre sol le damné article 22 du traité de Londres?"

[15] Bauer, Das U-Boot, 1931, Report on it by Captain G. P. Thomson, R.N. in The Journal of the Royal News Instruction 1931, Page 511.

[16] Sperrgebiete im Seekrieg, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, Volume VIII, 1938, Page 671.

[17] French Yellow Book, La Conférence de Washington, Page 88.

[18] Report of 8 October 1940, Page 3: "One thing is certain, namely, apart from vessels in declared war zones, destruction of a merchant vessel is envisaged if even only after capture."

[19] Commander Russel Grenfell, R.N., The Art of the Admiral, London, 1937, Page 80. "The neutral merchants, however, are not likely to relinquish a highly lucrative trade without a struggle and thus there arises the acrimonious wrangle between belligerents and neutrals which is a regular feature of maritime warfare, the rules for which are dignified by the name of international law."

[20] De jure pacis ac belli, Book III, Chapter I, Paragraph 6, citation Augustin: "One may conceal the truth wisely," and Cicero: "Dissimulation is absolutely necessary and unavoidable, especially for those to whom the care of the state is entrusted."

[21] Admiral King, Report of the American High Command.

[22] John Chamberlain, "The man who pushed Pearl Harbor," Life, of 1 April 1946.

[23] Manual for Courts Martial U.S. Army, 1928, Page 10.

[24] In this connection I mention the extensive literature dealing with the right of self-preservation in cases of urgent necessity. The surprise attack on the Danish fleet, 1807, as well as the hunger blockade against Germany are based on that.

[25] Freiherr von Freytagh-Loringhoven, Völkerrechtliche Neubildungen im Kriege, Hamburg 1941, Page 5.

[26] Quoted from "Neue Auslese," 1946, Number 1, Page 16.

[27] Not always acknowledged by English authors. Compare for instance A. C. Bell, A History of the Blockade of Germany, et cetera, London, 1937, Page 213: "The assertion that civilians and the Armed Forces have been treated only since 1914 as a uniform belligerent body is one of the most ridiculous ever made."

[28] Grenfell, The Art of the Admiral, London, 1937, Page 45: "By the early part of 1918, the civil population of Germany was in a state of semistarvation, and it has been calculated that, as a result of the blockade, over 700,000 Germans died of malnutrition."

[29] See also protest of the Soviet Government to the British Ambassador of 25 October 1939, printed as Number 44 in "Urkunden zum Seekriegsrecht," Volume I, edited by the High Command of the Navy.

[30] See for instance Wheaton's International Law, 5th Edition, Page 727, Liddell Hart, "The Revolution in Naval Warfare," Observer of 14 April 1946.

[31] Oppenheim, Die Stellung des Kauffahrteischiffes im Seekrieg, Zeitschrift für Völkerrecht, 1914, Page 165.

[32] Concerning the execution of these orders in the first World War, Vidaud, in "Les navires de commerce armés pour leur défense," Paris, 1936, Pages 63-64 says as follows: "Les équipages eux-mêmes sont militarisés et soumis à la discipline militaire, ainsi que le capitaine Alfred Sheldon, appartenant à la réserve de la Marine Royale, a été condamné, le 8 Septembre 1915 par le conseil de guerre de Devonport, pour n'avoir pas attaqué un sousmarin allemand."

[33] Compare for instance "Submarines in the Atomic Era" in the New York Herald Tribune, European Edition, of 27 April 1946, Page 2.

[34] A. C. Bell, Historical Section, Committee of Imperial Defense, A History of the Blockade of Germany and of the Countries Associated with Her in the Great War 1914-1918—The introduction contains the remark: "This history is confidential and for official use only." (Quoted from the German edition by Böhmert, Die englische Hunger-blockade im Weltkrieg, Essen, 1943).

[35] Hugo Grotius, De jure pacis ac belli, Book II, Chapter XXI.

[36] Hugo Grotius, De jure pacis ac belli, Book II, Chapter XXVI. Paragraph 4, "He can believe that in a matter of doubt he must obey his superior."

[37] See Wheaton's International Law, 5th Edition, Pages 543-5.

[38] Claud Mullins, The Leipzig Trials, London, 1921.

[39] See Document Book 1, Documents Numbers Raeder-3 and 4, Page 9 et sequentes.

[40] Especially the following documents are concerned:

C-140, USA-51 of 25 October 1933; C-159, USA-54 of 2 March 1936; C-194, USA-55 of 6 March 1936; C-175, USA-69 of 24 June 1937; 388-PS, USA-26 of 20 May 1938; C-136, USA-104 of 21 October 1938.

[41] Record of 4 December 1945, Volume III, Page 95.

[42] Record of 4 December 1945, Volume III, Page 110.

[43] Reich Defense Law of 4 September 1938.

[44] For instance under Balfour and Churchill.

[45] Document Book 1, Document Number Raeder-4, Page 12.

[46] Document Book 6, Document Number Raeder-121, Page 524.

[47] Refer also to Ronneberger Affidavit, Document Book 6, Document Number Raeder-126, Page 543 et sequentes which point to the same subjects, especially to the strong Christian belief of Raeder and to the pronounced opposition to Christianity and Church by Bormann.

[48] Second Lohmann Affidavit, Document Number Raeder-8, Document Book 1, Page 41.

[49] Refer to Documents 386-PS, USA-25; L-79, USA-27; 798-PS, USA-29; 1014-PS, USA-30; 769-PS, USA-23.

[50] Document Book 2, Document Number Raeder-27, Page 144 et sequentes.

[51] See Hossbach Document.

[52] Record of 19 March 1946, Volume IX, Page 463.

[53] Record of 19 March 1946, Volume IX, page 481.

[54] Record of 16 May 1946, Volume XIV, Page 35.

[55] Record of 22 May 1946, Volume XIV, Page 314.

[56] Record of 22 May 1946, Volume XIV, Page 306.

[57] Record of 22 May 1946, Volume XIV, Page 306.

Affidavit Generaladmiral Böhm, Document Number Raeder-129.
Affidavit Generaladmiral Albrecht, Document Number Raeder-128.

[58] Record of 22 May 1946, Volume XIV, Page 306.

[59] See Documents Numbers 798-PS, USA-29; 1014-PS, USA-30, Document Book 2. Page 144, Document Number Raeder-77.

[60] Record of 26 November 1945, Volume II, Page 292.

[61] Raeder Document Book 2, Page 144.

[62] See Document 789-PS, USA-93.

[63] Document Book 2, Pages 116-117, Document Number Raeder-19.

ONE HUNDRED AND EIGHTIETH DAY

Wednesday, 17 July 1946

Morning Session

DR. SIEMERS: Yesterday I dealt with the events before the outbreak of war. Now I shall turn to the events which occurred during the war.

I think I have shown that the Navy had an extremely insignificant part in all events prior to the war, and that the transactions in which the Navy was authoritatively involved were carried out on a peace basis, namely, on the basis of the naval agreements with England. When the war nevertheless ultimately broke out, involving England, too, on 3 September 1939, a regrettable incident occurred on the very first day, through the sinking of the *Athenia*, from which the Prosecution endeavors by the use of exaggerated terms to construe a grave moral charge against Raeder, not so much indeed on the basis of its actual military aspect, that is, the sinking, which my colleague Dr. Kranzbühler has already discussed, as on account of an article published in the *Völkischer Beobachter* of 23 October 1939 entitled "Churchill Sinks the *Athenia*." Were the facts as brought forward by the Prosecution correct, the moral accusations against Raeder and the Navy would be justified, even though, of course, an untruthful newspaper article is no crime. Consequently the accusation brought by the Prosecution is made for the sole purpose of vilifying Raeder's personality in contrast to the lifelong esteem which Raeder has enjoyed in the whole world, in fact especially abroad.

I think the evidence has sufficiently revealed that the statement of facts presented by the Prosecution is not correct. It is quite plausible that at first sight the Prosecution should have believed that the odious article in the *Völkischer Beobachter* could not have appeared without the knowledge of the naval command. The Prosecution believed this because, in view of their conspiracy theory, they are inclined to assume in every case that there was constant discussion and close co-operation among the various departments. The course of the Trial has shown that this assumption is far from correct.

The contrast between the various departments, and especially between the Navy and the Propaganda Ministry, or Raeder and Goebbels, was far greater than the contrast between departments in a democratic state. In addition, the testimonies of the witnesses Raeder, Schulte-Mönting, Weizsäcker, and Fritzsche, together with the documents, establish the following facts absolutely clearly:

(1) In early September 1939 Raeder himself firmly believed that the sinking was not to be imputed to a German U-boat, because it was revealed by the reports that the nearest German U-boat was at least 75 nautical miles away from the spot of the sinking.

(2) Accordingly Raeder, as stated in Document D-912, published a *bona fide* denial and gave statements to this effect to the American Naval Attaché and to the German State Secretary, Baron Weizsäcker.

(3) Raeder did not realize the mistake until after the return of *U-30* on 27 September 1939.

(4) Hitler insisted, as evidenced by witnesses Raeder and Schulte-Mönting, that no rectification of the facts should be made to any other German or foreign department, that is to say, that the sinking should not be acknowledged as caused by a German U-boat. He apparently let himself be guided by political considerations and wished to avoid complications with the U.S.A. over an incident which could not be remedied, however regrettable it was. Hitler's order was so strict that the few officers who were informed were put under oath to keep it secret.

(5) Fritzsche disclosed, that after the first investigation by the Navy in early September 1939, he made no further investigation and that the *Völkischer Beobachter* article appeared as the result of an agreement between Hitler and Goebbels, without previous notice to Raeder. On this point the testimonies of Raeder and Schulte-Mönting coincide. It is consequently clear that Raeder—contrary to the claim of the Prosecution—was not the author of the article and, moreover, knew nothing about the article before its appearance. I regret the fact that in spite of this clarification the Prosecution are apparently intent upon persisting in their claim by the submission, on 3 July 1946, of a new document, D-912. This newly-submitted document only contains radio broadcasts by the propaganda Ministry, which are of the same nature as the *Völkischer Beobachter* article. These radio broadcasts were a propaganda instrument of Goebbels and cannot, any more than the article, be brought up as a charge against Raeder, who in fact was at the time informed only of the article, not of the radio broadcasts. Even the fact that Raeder, after being informed of the article, did not attempt to obtain a rectification, cannot be made a moral charge against

him, since he was bound by Hitler's order and had no idea at the time that Hitler himself had had a hand in the article, which Weizsäcker aptly described as perverse fantasy.

In this connection I would remind the Tribunal that it is a well-known fact that precisely at the beginning of the war inaccurate reports also appeared in the English press about alleged German atrocities, which, even after their clarification, were not rectified, as for instance, the false report about the murder of 10,000 Czechs in Prague by German elements in September 1939, although the matter had been cleared up by a commission of neutral journalists.

The Prosecution professes to possess overwhelming material against all the defendants. If this presumption were correct with reference to Raeder, the Prosecution would scarcely have felt the need of bringing forward this *Athenia* case, of all things, in such ponderous and injurious terms for the sole purpose of discrediting the former Commander-in-Chief of the Navy.

Concerning Greece, the Prosecution accuses Raeder of violation of neutrality and breach of international law on two counts, namely:

(1) On the basis of Document C-12, according to which Hitler decided, basing on a report by Raeder on 30 December 1939, that:

> "Greek merchant ships in the zone around England which the U.S.A. declared prohibited will be treated like enemy ships."

(2) According to Document C-176, on the occasion of the delivery of a report to Hitler on 18 March 1941, Raeder asked for confirmation that "all of Greece was to be occupied, even in case of peaceful settlement."

In the course of the Trial both accusations have turned out to be untenable; in both cases there is no action which violated international law.

With reference to the first accusation it should be pointed out that Raeder and the German Naval Command learned in October or November 1939 that quite a number of Greek merchant ships had been put at the disposal of England, either at the request or with the approval of the Greek Government (Documents Number Raeder-53, 54). This fact cannot be reconciled with strict neutrality, and according to the principles of international law that gave Germany the right to take an equivalent countermeasure. This justified countermeasure consisted in treating Greek ships heading for England as enemy ships from the moment they entered the zone around England which had been declared prohibited by the United States.

With reference to the second accusation it must be noted that Germany, especially the High Command of the Navy, had received reports that certain Greek military and political circles had maintained very close connections with the Allied General Staff ever since 1939. As time went by more and more reports came in. What the Allies were planning in the Balkans is known; the intentions were to erect a Balkan front against Germany. For this purpose local conditions in Greece, as well as in Romania, were examined by Allied officers on behalf of the Allied General Staff in order to establish airplane bases there. Furthermore, preparations were made to land in Greece. As proof I have presented, as Exhibit Number Raeder-59, the minutes of the session of the French War Committee of 26 April 1940, which shows that the War Committee was at that time already examining the question of possible operations in the Caucasus area and in the Balkans and which further reveals the activity of General Jauneaud in Greece for the purpose of continuing investigations and preparations and shows how he endeavored to camouflage his trip by making it in civilian clothing (Document Number Raeder-63).

This attitude of Greece, and especially her falling in with Allied plans, represents a violation of neutrality on the part of Greece; for Greece did not appear as England's ally but formally continued to maintain her neutrality. Therefore, Greece could no longer expect that Germany would fully respect Greek neutrality. Germany nevertheless did do so for a long time. The occupation of Greece took place in April 1941 only after British troops had already landed in southern Greece on 3 March 1941.

The fact that Greece agreed to the British landing is, according to generally recognized rules, without significance in international legal relations and with regard to the international legal decision between Germany and England and between Germany and Greece; it has importance only in the legal relations between England and Greece.

The British Prosecution tried to justify the occupation of Greece by pointing to the fact that Greek neutrality was menaced by Germany, especially by the occupation of Bulgaria on 1 March 1941. In this connection the Prosecution is overlooking the fact that not only did the occupation of Greece by British forces start considerably earlier than the German planning, but also the planning of the Allies. But be that as it may, in any case, no accusation whatever can be made against Raeder, because the date of the document submitted by the Prosecution is 18 March 1941, which means that it is 14 days later than the landing of the British in southern Greece. At that time Greece could certainly no longer demand that her alleged neutrality be respected. It is also an unjustified charge when the

Prosecution points out that Raeder asks for confirmation that all of Greece will be occupied. This request by Raeder cannot be made responsible for the fact that all of Greece was occupied, for Hitler had already provided in his Directive Number 20 of 13 December 1940 that the entire Greek mainland was to be occupied, in order to frustrate British intentions of creating a dangerous basis for air operations under the protection of a Balkan front, especially for the Romanian oil district. In addition to that, the inquiry of Raeder on 18 March 1941 was justified on strategic grounds, because Greece offered many landing possibilities for the British and the only possible defense was for Greece to be firmly in the hands of Germany, as the witnesses Raeder and Schulte-Mönting have explained.

This strategic conception of Raeder had nothing to do with plans of conquest or thirst for glory, as the Prosecution thinks, for the Navy won no glory whatsoever in Greece, since the occupation was a land operation. The occupation of an originally neutral country is simply the regrettable consequence of such a large-scale war; it cannot be charged to one belligerent if both belligerents had plans concerning the same state, and carried out these plans.

I should like now to go on to the subject of Norway. On 9 April 1940 troops of all three branches of the German Armed Forces occupied Norway and Denmark. From this and the preceding plans, the Prosecution have brought the gravest accusation against Grossadmiral Raeder, together with the collective charge of participation in a conspiracy.

The British prosecutor pointed out that it was Raeder who first suggested the occupation of Norway to Hitler, and believes that Raeder did so out of a spirit of conquest and vainglory. I shall demonstrate that this argumentation is incorrect. One thing is true, that is that in this single instance Raeder took the initiative of first approaching Hitler on the subject of Norway, namely on 10 October 1939. However, I shall show that in fact in this connection he acted not as a politician but exclusively as a soldier. Raeder sensed purely strategic dangers and pointed out these strategic dangers to Hitler, because he assumed that the Allies were contemplating the establishment of a new front in Scandinavia and in Norway, in particular, and realized that an occupation of Norway by Britain might have militarily disastrous consequences for Germany. I shall show that Germany committed no violation of international law by the occupation of Norway. Before I state the legal foundation and connect the facts established by the appraisal of evidence with the principles of international law, I should like first to state an important fact:

As Raeder's examination shows and as disclosed by Schulte-Mönting's interrogations, he very reluctantly advocated the Norwegian campaign as Commander-in-Chief of the Navy. Raeder had the natural feeling born of justice that a neutral state could not be drawn into the existing war without an absolutely imperative emergency. During the period between October 1939 and spring 1940, Raeder always upheld the theory that by far the best solution would be for Norway and all Scandinavia to remain absolutely neutral.

Raeder and Schulte-Mönting were in agreement on this point during their interrogations; and it is, moreover, proved by documents. For this, I refer to Exhibit Number Raeder-69 where the conviction of Raeder is expressed that the most favorable solution would undoubtedly be the preservation of the strictest neutrality by Norway; this is entered in the War Diary on 13 January 1940. Raeder clearly saw that an occupation of Norway by Germany, for reasons of international law or strategy, could only be conceivable if Norway could not or would not maintain absolute neutrality.

The Prosecution has referred to the treaties between Germany and Norway, in particular to Document TC-31, by which the Reich Government, on 2 September 1939, expressly assures Norway of her inviolability and integrity. In this memorandum, however, the following legitimate remark is added:

> "As the Reich Cabinet makes this declaration, it naturally also expects that Norway in turn will observe irreproachable neutrality toward the Reich and that it will not tolerate breaches of Norwegian neutrality, should attempts along that line be made by third parties."

If, despite this fundamental attitude, Germany decided to occupy Norway, this was done because the plans of the Allies made imminent the danger of an occupation of Norwegian bases by them. In his opening speech Sir Hartley Shawcross declared that Germany's breach of neutrality and her war of aggression against Norway remained criminal in the sense of the Indictment even if Allied plans for the occupation had been correct, and he added that in reality such plans were not true. I believe that the argument advanced here by Sir Hartley Shawcross is contrary to accepted international law. If Allied plans for the occupation of Norwegian bases existed and there was a risk that Norway neither would nor could maintain strict neutrality, then accepted standards of international law did sanction Germany's Norwegian campaign.

I would first like to bring up the juridical viewpoints based on prevailing international law in order to create a foundation for my own statements, and thereby at the same time to set forth those legal viewpoints which contradict the Prosecution's interpretation. In order to save time in this legal exposition and make the subject matter clearer I have submitted as Exhibit Number Raeder-66 an opinion on international law with regard to the Norway campaign by Dr. Hermann Mosler, professor of international law at the University of Bonn. The High Tribunal will remember that I was given permission to make use of this opinion for purposes of argumentation, and I would therefore refer at this point to this detailed scientific compilation and findings. For the purpose of final plea I shall confine myself to a summary of the essential concepts of the opinion.

Articles 1 and 2 of the Hague Convention on Rights and Obligations of Neutrals in the event of warfare at sea stipulate that the parties at war are bound to respect the rights of sovereignty of neutral powers in the territory and coastal waters of the neutral power, and all hostile acts of warships of the belligerent parties within the coastal waters of a neutral power are strictly banned as violations of neutrality. Contrary to these stipulations Great Britain violated Norway's neutrality through the laying of mines in Norwegian coastal waters for the purpose of obstructing the legitimate passage of German warships and merchantmen, especially in order to cut off shipments of iron ore from Narvik to Germany. In the letter from the British Foreign Office which I received in reply to my petition for authorization to submit files of the British Admiralty, confirmation as per Exhibit Number Raeder-130 was received to the effect that His Majesty's forces laid mine fields in Norwegian waters, and in addition it was stated that this was a well-known fact (Documents Number Raeder-83, 84, 90).

The fact is presumably uncontested that thereupon Germany was justified in restoring the equilibrium between the belligerent parties, in other words by setting her Armed Forces to wrest from the enemy the benefit he was deriving from a violation of neutrality. Reaction against such a violation of neutrality is directed primarily against the enemy, not against the neutral. The legal relationship to neutrality ...

PRESIDENT [*Interposing*]: Dr. Siemers, the Tribunal would like to know what your contention is on this subject. Do you contend that any breach of neutrality of a warring state entitles one of the warring nations to enter that neutral state?

DR. SIEMERS: Mr. President, in this general way one certainly could not say that. It is a principle of international law that a violation of international law committed by one state only entitles the other warring

nation to a countermeasure in proportion to the breach of neutrality committed. Certainly an occupation of Norway on the part of Germany would not be justified because Britain mined the coastal waters. The fact does not justify an occupation.

PRESIDENT: Would it be your contention that it made any difference on the rights of Germany if Germany were to be held to be an aggressor in the original war?

I will repeat it. According to your contention, would it make any difference that Germany was held, if it were held, to be the aggressor in the original war out of which the occupation of the neutral country occurred?

DR. SIEMERS: Mr. President, I beg to apologize, but I am afraid I cannot quite understand the sense as it comes through in translation.

PRESIDENT: I will say it again more slowly. According to your contention, would it make any difference if the Tribunal were to think that Germany had been the aggressor in the war which led to the occupation of the neutral state?

DR. SIEMERS: My apologies, Mr. President. Now, if I understood that correctly, you wish me to answer the question whether the fact that previously a war had been begun by Germany against Poland would influence juridical attitude toward the question of Norway.

PRESIDENT: Assuming, I only say assuming that the war begun by Germany against Poland were to be held to be an aggressive war.

DR. SIEMERS: Mr. President, I believe that I must answer in the negative, because the individual facts under international law must be dealt with separately. The fact that the Tribunal may possibly assume that an aggressive war was conducted against Poland cannot, from the point of view of international law, have any effect upon subsequent years.

That, incidentally, is the point of view which, I believe, was adopted by the Prosecution, for Sir Hartley Shawcross also, dealt with the question of Greece and the question of landings entirely under the aspect of Greek events and did not contend that Britain could occupy Greece because Germany had occupied Poland. He said, just as I did, that from the legal standpoint of international law Britain could occupy Greece because Greece was threatened by a German occupation. That is what I am saying from the point of view of international law with reference to Norway; as my further remarks will show, I am not trying to draw any other parallels.

PRESIDENT: Yes. There is one other question which I should like to ask you. Is it your contention that Germany was entitled under international

law to use the territorial waters of Norway, either for her warships or for the transport of ore, or for the transport of prisoners of war?

DR. SIEMERS: In my opinion, from the standpoint of international law, the situation is that Germany was entitled to use the coastal waters, observing at the same time the various international rules, such as for instance, only brief stays in ports and similar rulings like the obligation to submit to investigation by neutrals in the case of the *Altmark*. But basically, carrying on shipping operations from Narvik was justified according to international law as far as I know.

PRESIDENT: Continue.

DR. SIEMERS: Mr. President, with reference to the last point, may I add one thing? Should the view be adopted that Germany was not allowed to use these coastal waters, then the mining of these coastal waters would have been a justified breach of neutrality on Britain's part, so that, as far as I am concerned, the mining operation as grounds for this would have to be left out of my plea, though not the other facts I am citing. Mining the waters is in equivalent proportion to the use of the coastal waters. I myself consider that the mining operation was not permissible, while passage through coastal waters was; but this does not affect the entire subject of the occupation of Norway. I hope I shall be understood as not meaning that Germany was justified in occupying Norway because Britain had mined the coastal waters.

PRESIDENT: But you are saying, are you, that Germany was entitled to use the coastal waters, first of all, for the transport of ore; secondly, for her warships?

DR. SIEMERS: Yes.

PRESIDENT: And thirdly, for the transport of prisoners of war?

DR. SIEMERS: Yes. It is my opinion, Mr. President, that as to ore shipments there is no prohibitive clause in international law, so that this shipping was permissible.

With reference to prisoners of war, may I point out that only one case arose and that is the case of the *Altmark*. If Germany was not deemed authorized to use coastal waters for the transport of prisoners of war, then that could at most lead to Britain's adopting an equivalent single countermeasure; but she would not be justified in mining the entire coastal waters. The mining of the entire coast, from the point of view of international law, is only justified if you adopt the point of view that Germany's merchant shipping was prohibited from entering those coastal waters by international law. But that, in my opinion, is not the situation.

PRESIDENT: You may continue.

DR. SIEMERS: Reaction against such violation of neutrality is primarily directed against the adversary, not against the neutral party. Legal relationship deriving from neutrality exists not only between the neutral party and the two belligerent parties, but the neutrality of the state in question is at the same time a factor in direct relations existing between the belligerent parties. If the relationship of neutrality between one of the belligerent parties and the neutral power suffers disturbance, the neutral power can in no way file complaint if the other belligerent power takes appropriate action; at the same time it is entirely immaterial whether the neutral state is unable or unwilling to protect its neutrality (Document Number Raeder-66).

The legal title under which the belligerent power thus placed at a disadvantage can proceed to take countermeasures is the "right of self-defense" (*das Recht der Selbsterhaltung; le droit de défense personelle*). As brought out in detail by this opinion, this right of self-defense is generally recognized by international law. It suffices to point out here that this basic law is not affected by the Kellogg Pact, which has so often been mentioned in this Court. In this connection I ask permission to offer the following brief quotation from the circular memorandum of the U.S. Secretary of State, Kellogg, dated 23 June 1938:

> "There is nothing in the American draft of an antiwar treaty which restricts or prejudices the right of self-defense in any manner. That right is inherent in every sovereign state and is implied in every treaty."

Justice Jackson will permit me to mention that he himself, in his opening speech of 21 November 1945, referred to the "right of legitimate self-defense."

It is interesting that in his address before Parliament on 8 February 1940, the Swedish Foreign Minister, Guenther, recognized this concept, although he represented the interests of a state whose neutrality was endangered at the time, and in addition was speaking before Germany proceeded to retaliatory measures in Norway (Document Number Raeder-66). In that address Guenther expressed his opinion with regard to the British declaration that Sweden's neutrality would be respected only as long as it was respected by Britain's enemies. Guenther recognized the fact that Sweden, in her relationship to England, would lose her neutrality should Germany violate Sweden's neutrality and should Sweden be neither willing nor able to prevent such violation of her neutrality by Germany. Consequently, Guenther said, Great Britain would no longer be required to

treat Sweden as a neutral country. It is obvious that the conclusions drawn by Guenther in the event of a breach of Sweden's neutrality by Germany must also apply to the three-cornered legal relationship between Great Britain, Germany, and Norway. What was involved, however—and this I shall set forth in my presentation of evidence—was not Great Britain's mine-laying activity in Norwegian coastal waters but a much more far-reaching Anglo-French scheme aiming at the occupation of Norwegian bases and of a portion of the Norwegian home territory. The mine-laying activity enters into the picture merely as a part of the total plan.

According to Mosler's opinion and in the light of the above remarks, it is absolutely clear that Germany was justified in occupying Norway had the Allies carried part of their plan into effect by landing at a Norwegian base before German troops made their appearance. This, however, was not the case. Rather, as I will show, was the situation such that Germany anticipated an Anglo-French landing; in other words, she decided on countermeasures in anticipation of the imminent danger which threatened.

Another legal question arises therefrom: Assuming the same conditions, are countermeasures by a belligerent permitted only after the opposing belligerent has proceeded to violate neutrality, or is a reaction permitted beforehand in view of the imminently threatening violation of neutrality, in order to head off the enemy's attack which can be expected at any moment?

According to the well-founded opinion of Dr. Mosler preventive countermeasures are permissible; and an impending violation of neutrality, which can be expected with certainty, is considered equal to a completed violation of neutrality.

The well-known English specialist on international law, Westlake, states with regard to the question of measures:

> "Such a case in character resembles one where a belligerent has certain knowledge that his opponent, in order to gain a strategic advantage, is just about to have an army march through the territory of a neutral who is clearly too weak to resist; under the circumstances it would be impossible to refuse him the right to anticipate the attack on the neutral territory."

The justification for such a preventive measure, according to Westlake, lies in the right of self-defense, which applies equally against a threatening violation of neutrality. Any other concept would fail to meet the facts of life and would not correspond to the character of the society of nations as an aggregation of sovereign states with an as yet incompletely developed

common code of law. In the domestic law system of every civilized country the prevention of an immediately threatening attack is a permissible act of defense, although in such a contingency even the help of the state against the law-breaker is available. In the community of international law, where this is not the case—at any rate not at the beginning of and during the second World War—the viewpoint of self-defense must apply to an even greater extent. In keeping with this concept, the British Government during this war also considered the preventive measure justified when it occupied Iceland on 10 May 1940. The British Government justified this measure clearly and correctly in accordance with international law in an official announcement of the Foreign Office, as follows:

> "After the German occupation of Denmark it has become necessary to count on the possibility of a sudden German raid on Iceland. It is clear that the Icelandic Government, in case of such an attack, even if it were only carried out with very small forces, would be unable to prevent the country from falling completely into the hands of the Germans."

The preventive measure was carried out by Britain, although Iceland expressly protested by a note against the occupation. I also ask to note that the United States agreed with this standpoint of law, as is proved by the well-known message from the President of the United States to Congress of 7 July 1941, and the subsequent occupation of Iceland by armed forces of the American Navy.

In accordance with these basic principles of law, the facts at hand must be examined. I have tried to clarify the facts in the presentation of evidence, and I would like to summarize the major factors which actually indicated a closely impending violation of neutrality on the part of the Allies by a partial occupation of Norway, and thereby justified the German campaign in Norway.

At the end of September and early in October 1939, Admiral Raeder, as the evidence has shown, received various items of information through the regular reports of Admiral Canaris as chief of intelligence and through Admiral Carls, which gave reason to believe in the danger of the Allies' proceeding to occupy bases in Norway, in accordance with their plans to encircle Germany in order to put a stop, in particular, to ore imports from Scandinavia.

British flying personnel camouflaged in civilian clothing had been seen in Oslo; and survey work by Allied officers on Norwegian bridges, viaducts, and tunnels up to the Swedish border had been identified. Furthermore, the

quiet mobilization of Swedish troops, owing to the danger to Swedish ore territories, had become known. Raeder was justified in considering himself obliged to report these facts to Hitler and to point out to him the danger which would arise for Germany if British and French armed forces were to gain a foothold in Scandinavia. The dangers were clear. They consisted of the cutting-off of all imports from the industrial areas of Scandinavia, in particular of the ore imports, as well as in the fact that the Allies would obtain a favorable base for air attacks, and last but not least, in the fact that the German Navy would be threatened on its flank and its operational potentialities would be limited.

The blockade of the North Sea and Baltic would have had strategically disastrous consequences. As the information did not yet allow of a final over-all picture, Raeder did not suggest immediate occupation, but only pointed out the dangers, intending to await further developments for the time being. Neither did Hitler make a final decision during this discussion of 10 October 1939 but agreed to wait. Similar information was received during the months of October and November, this time also from the naval attaché, Korvettenkapitän Schreiber, who had in the meantime been sent to Oslo, whose affidavit (Document Raeder-107) I would like to cite. It shows that the Norwegian shipping association had made tanker tonnage of about one million tons available to Britain with the consent of the Norwegian Government (Document Number Raeder-68).

In the winter of 1939-40, information took on a more definite form concerning espionage missions given by the British and French Secret Service to Norwegian agents and British harbor consulates for the purpose of reconnoitering landing facilities and examination of Norwegian railroads with regard to their capacity, particularly the Narvik line, and missions concerning information about land and sea airports in Norway. From the fact that the information from two different sources, namely, the naval attaché in Oslo and Admiral Canaris, checked and became more and more certain during the period from October to December 1939, the danger indicated appeared to keep increasing.

In addition, in December 1939 Quisling and Hagelin sent to Rosenberg —entirely independently of the sources of information which had existed up to that time—the same and similar information concerning the landing intentions of the Allies. This did not go to Raeder for the sole reason that Raeder did not know either Quisling or Hagelin at that time. Since the question involved was a purely military-strategic one, Rosenberg asked Raeder to discuss things with Quisling so that Raeder could examine the military-technical possibilities in consideration of the fact the aggression by

the Allies in Scandinavia must be expected according to the information received. This is evident from the letter from Rosenberg to Raeder of 13 December 1939, which I submitted as Exhibit Number Raeder-67. Raeder considered it his duty from the purely military point of view to inform Hitler, with whom he had not discussed this question in the meantime, that coinciding information had since been received from Canaris, the naval attaché in Oslo, and Quisling. Hitler asked to speak with Quisling personally, whereupon he decided, in order to meet the threat, to make the necessary preparations for an eventual preventive measure, namely, the occupation of Norway (Document C-64, Exhibit Number GB-86).

The final decision was still deferred, and further information was awaited as to whether the danger appeared to increase. This caution and delay will readily be understood in the case of Raeder. As I have already observed, Raeder would have preferred to see the neutrality of Norway maintained, especially since he was against any conquest just for the sake of conquest. He knew, on the other hand, that an occupation required the commitment of the whole Navy, thus involving the fate of the entire Navy, and that the loss of at least a third of the whole fleet had to be reckoned with. It must surely be clear how difficult, from such political and strategic viewpoints, such a decision was for a responsible man and soldier.

Unfortunately, during the first months of the year 1940, the reports multiplied and kept becoming more certain. In March 1940 uncommonly many English-speaking persons could be seen in Oslo, and Raeder received very serious and credible information about impending measures by the Allies against Norway and Sweden. As far as landing intentions were concerned, Narvik, Trondheim, and Stavanger were mentioned. In this manner the military planning actually was not undertaken until February and March 1940, and final instructions were issued to the Wehrmacht only in March 1940. In addition, numerous violations of neutrality occurred in March 1940, which have been collected in the War Diary (Documents Raeder-81 and 82), and also the mine-laying in Norwegian territorial waters at the beginning of April.

The Prosecution has put in only a few documents against this comprehensive informative material, according to which the German Minister in Oslo, Breuer, did not look upon the danger as being so great but believed that British activities, which he also reported, tended merely to provoke Germany into opening war operations in Norwegian waters (Documents Number D-843, Exhibit GB-466; D-844, Exhibit GB-467; D-845, Exhibit GB-486).

Baron Weizsäcker's point of view in cross-examination was that at first he did not consider the danger so great either; but he admitted that later on the facts proved that he and Breuer were wrong, while Raeder had been right in his apprehension.

This objective accuracy of the opinion of Admiral Raeder, and of the information on which he based his opinion, is shown in the various documents submitted by me and accepted by the Court.

Since 16 January 1940, the French High Command had been working on a plan which had in view, among other things, the occupation of harbors and airfields on the west coast of Norway. The plan provided, in addition, for an eventual extension of operations to Sweden and occupation of the mines of Gallivare (Document Number Raeder-79). Efforts have been made to justify this plan by stating that it was elaborated solely to help Finland against the Soviet Union.

To begin with, it might be argued in contradiction to this that an action in support of Finland does not justify any occupation of Norwegian territory. Moreover, the documents show that it was not only a question of altruistic measures in favor of Finland. During the inter-Allied military conferences on 31 January and 1 February, which preceded the meeting of the Supreme Council on 5 February, the question of direct help for Finland was relegated by the British to second place; they showed themselves to be determined supporters of an enterprise against the mines of northern Sweden. This is confirmed by General Gamelin in a note of 10 March 1940 (Document Raeder-79), and he adds that this opinion obtained the majority vote in the Supreme Council and that preparations for the Scandinavian expedition should be started immediately.

And so it came about that the Franco-British fighting forces had been ready for transportation since the first days of March; according to Gamelin, the leadership of the proposed operations in Scandinavia was in the hands of the British High Command. Gamelin adds finally that the Scandinavian plans must be resolutely pursued further in order to save Finland—I quote, "or at least to lay hands on the Swedish ore and the northern harbors."

Lord Halifax informed the Norwegian Minister on 7 February that Britain wished to obtain certain bases on the Norwegian coast in order to stop German transports of ore from Narvik (Document Raeder-97). By mid-February, British and French General Staff officers were, in agreement with the Norwegian authorities, inspecting landing places (Document Raeder-97). According to a report by the German Legation in Stockholm, dated 16 February 1940, British intentions in this respect were to land troops simultaneously at Bergen, Trondheim, and Narvik. On 21 February 1940

Daladier communicated to the French Ambassador in London, Corbin, that the occupation of the most important Norwegian ports and the landing of the first body of the Allied fighting forces would give Norway and Sweden a feeling of security; and he goes on to say that this operation must be planned and executed at shortest notice, "independently of Finland's call for assistance." In the event of this *démarche* meeting with refusal by Norway, which was likely, the British Government was to take note of the Norwegian attitude and immediately seize control of the bases it needed for the safeguarding of its interests, doing so in the form of a "surprise operation." Whether Sweden would refuse passage through to Finland did not appear important; what is being emphasized is rather—and I quote:

> "... the advantage of having secured a dominating position against Germany in the North, interrupted the sea transport of Swedish ore, and brought the Swedish ore districts within range of our aviation" (Documents Raeder-77 and 80).

On 27 February 1940, Churchill declared in the House of Commons that he was "tired of considering the rights of neutrals" (Document Raeder-97).

It is interesting to note that unanimity was achieved in the sixth session of the Supreme Council on 28 March 1940—I quote:

> "Every endeavor on the part of the Soviet Government to obtain from Norway a position on the Atlantic coast runs counter to the vital interests of the Allies and results in appropriate counteraction" (Document Raeder-83).

The view thereby adopted by the Supreme Council with reference to the vital interests of the Allies coincides exactly with the legitimate notions of the "right of self-defense" as presented by me and is in complete contradiction to the interpretation of international law propounded by the Prosecution.

The ultimate execution of the operation in Norway, that is, the landing and the construction of bases, was decided on 28 March 1940 between the authoritative British and French offices. This date was indicated at a session of the French War Council by the French Prime Minister (Document Raeder-59); and General Gamelin added that he had, on 29 March, impressed upon General Ironside the necessity of having everything ready for a swift occupation of the Norwegian ports. He said he had also informed Mr. Churchill to the same effect on the occasion of a visit to Paris.

One day later, 30 March, Churchill declared on the radio—I quote, "It would not be just if, in a life-and-death struggle, the Western Powers adhered to legal agreements" (Document Raeder-97).

On 2 April 1940 at 1912 hours, London notified Paris by telegram that the first transport was "to sail on J. 1. day," and that J. 1. day was in principle 5 April (Document Raeder-85). On 5 April, Earl de la Warr stated that neither Germany nor the neutrals could be certain that "England would allow her hands to be tied behind her back in complying with the letter of the law" (Document Raeder-97).

The British Minister of Labor, Ernest Brown, on 6 April 1940 declared that neither Germany nor the neutrals could count on "the Western Powers' adhering to the letter of international law" (Document Raeder-97).

On the same day—this was one day after the laying of mines by British combat forces in Norwegian territorial waters—a secret British operational order was given "concerning preparations for the occupation of the northern Swedish ore field from Narvik" (Document Raeder-88).

In this order it was specified that the mission of the "Avon" Force consisted first of all in "securing the port of Narvik and the railway to the Swedish border." It was added that it was the intention of the commander "to advance into Sweden and to occupy the Gallivare ore fields and important points of that territory as soon as an opportunity occurs," a formulation strikingly reminiscent of the words in the Prosecution Document L-79, "to attack Poland at the first suitable opportunity."

The original plan of dispatching the first transport to Norway on 5 April was changed; for on the evening of 5 April the British High Command informed the Commander-in-Chief of the French Navy that—I quote:

> "... the first British convoy could not depart before 8 April which with respect to the time schedule established would mean that the first French contingent would leave its embarkation port on 16 April" (Document Raeder-91).

To complete the story it may be mentioned that the Norwegian operation was designated by the Allies by the camouflage name of "Stratford Plan," while the German Norwegian operation was referred to by the camouflage name of "Weser Exercise" (Weserübung) (Document Raeder-98).

All these facts go to show that, since the autumn of 1939, preparations for possible action in Norway were made by studying landing possibilities, *et cetera*. As from January and February 1940 the danger of an occupation of bases in Norway by the Allies was imminent. In March 1940 the

execution of the scheme was ultimately decided upon and the departure of the first convoy was scheduled for 5 April. Simultaneously, mine-laying was carried out in the Norwegian territorial waters and troops were at the same time concentrated in British and French ports for the Norwegian operation. Thus factual evidence of imminent neutrality violations existed from the point of view of international law; and neutrality violations had indeed been already committed to a certain extent, as by mine-laying. This was the point where Germany, in accordance with the international concept of the right of self-defense, was entitled to resort to equivalent countermeasures, that is, to occupy Norway in order to prevent the impending occupation by other belligerent states. It was, in fact, as was shown later, high time; for Germany forestalled the Allies only because the British High Command had postponed the departure of the first convoy, originally scheduled for 5 April. The German operation in Norway must therefore be considered as legitimate according to the principles of international law.

I have the firm conviction that the High Tribunal, in view of the circumstances just presented in connection with existing international law, will conclude that Admiral Raeder, with regard to the occupation of Norway, acted from purely strategic points of view and in due consideration of international legal standards, and accordingly will acquit him of the charge made by the Prosecution.

With reference to Norway, the Prosecution has moreover charged against Raeder—and also against Dönitz—that a violation of international law is involved in the fact that, according to an order dated 30 March 1940, the Naval Forces were to fly the British ensign until the troops had been landed (Documents C-151, Exhibit GB-91; C-115, Exhibit GB-90).

This too is an error of the Prosecution as regards international law in sea warfare. The Hague Regulations on Land Warfare do expressly forbid the misuse of flags. In sea warfare, on the other hand, the answer to this question according to prevailing international law is definitely that, until hostilities begin, ships may sail with their own or with enemy or neutral flags or with no flags at all. I take the liberty, in this respect, of availing myself of Dr. Mosler's juridical treatment of the question in his opinion (Document Raeder-66), appearing under Item 7, and in particular of his references to legal literature on the subject, according to which the use of a foreign flag is universally considered as a legitimate ruse of war and is allowed and especially condoned by British practice; this is in accordance with the historical precedent when Nelson, in the Napoleonic wars, flew the French flag off Barcelona to lure Spanish ships. This dispute is, however, superfluous in the present case, because actually these orders to fly the

British flag were according to documentary evidence canceled on 8 April, that is to say, prior to the execution of the Norway operation (Document Raeder-89).

In conclusion I wish to emphasize, with reference to the subject of Norway, that after the occupation of Norway Raeder and the German Navy did everything they could to give a friendly character to the relations with Norway, to treat the country and the people decently during the occupation, and to spare them every unnecessary burden. Raeder and the commanding admiral in Norway, Admiral Böhm, moreover endeavored to conclude a peace with Norway guaranteeing Norwegian national interests. Their efforts were frustrated through the creation by Hitler and Himmler of a so-called civil administration under Reich Commissioner Terboven which, unlike the Armed Forces, was linked with the Party, the SS, SD, and Gestapo (Documents Number Raeder-107 and 129). As confirmed by Böhm in his affidavit, Raeder repeatedly intervened with Hitler in favor of treating the Norwegian people well and for an early conclusion of peace and, together with Böhm, proceeded with the utmost vigor against Terboven. Here again, the tragic fact is that the Armed Forces, despite its utmost efforts, was neither able to oppose Hitler's dictatorial methods nor the dictatorial methods employed, with Hitler's knowledge, by such a mediocre Reich Commissioner as Terboven. The Norwegian people who had to suffer under the occupation know—and this is the only gratification for Raeder—that the Navy was not the cause of these sufferings. On the other hand, it is interesting to know that the differences which cropped up between Hitler and Raeder with reference to Norway are precisely among the chief motives which ultimately caused Raeder to insist upon his resignation in September 1942. Other motives were that Raeder also had differences with Hitler over France, because here again Raeder urged the conclusion of peace, while Hitler, with his extreme nature, was opposed to conciliatory steps of that kind in occupied territories. Raeder also had differences with Hitler regarding Russia, because he was in favor of observing the German-Russian treaty, and declared himself opposed to breaking the Treaty and going to war with Russia.

THE PRESIDENT: We will adjourn now.

[*A recess was taken*.]

DR. SIEMERS: I now come to the charge of the Prosecution with regard to a war of aggression against Russia. The charge of the Prosecution on this subject cannot be very well understood. Land warfare only was

concerned, so that the Navy did not have to make any preparations, with the exception of a few in the Baltic Sea. The Prosecution itself has furthermore stated that Raeder had been opposed to the war against Russia. The only thing which might be left of the charge of the Prosecution is its claim that Raeder had fundamentally been in favor of the war against Russia also and had only been opposed to Hitler with regard to the time factor. With reference to Document Number C-170 the Prosecution states that Raeder had only recommended the postponement of the war against Russia until after the victory over Britain. In the light of Document C-170 this actually might appear plausible. In reality, however, the case is different, and the true state of affairs has been cleared up by the detailed presentation of evidence. The witness Admiral Schulte-Mönting has clearly stated, without being contradicted in cross-examination, that Raeder not only raised objections with regard to the time but that he argued with Hitler about a campaign against Russia and did so for moral reasons and reasons of international law, because he was of the opinion that the Non-Aggression Pact with Russia as well as the trade agreement should be observed under all circumstances. The Navy was especially interested in deliveries from Russia and always tried to observe the treaties strictly. Besides this basic principle of observing treaties, that is, besides this general reason, Raeder was of the opinion that a war against Russia would also be wrong from the strategic standpoint. His own testimony and that of Schulte-Mönting show that in September, November, and December 1940 Raeder tried again and again to dissuade Hitler from contemplating a war against Russia. It is correct that in Document C-170 only the strategic justification for his opposition has been recorded. However, this is not at all surprising because in the papers of the Naval Operations Staff naturally only justifications were recorded which were of naval-technical and strategic importance, but not political reasons.

I have already shown that as a general principle Hitler did not permit Raeder, as Commander-in-Chief of the Navy, to intervene in questions concerning foreign policy, that is to say, in things which did not belong in his department. If Raeder did on occasion undertake this contrary to the will of Hitler in cases of special importance, then he could do so only privately, and was then unable to record these conversations in the War Diary. However, he always told everything to his Chief of Staff as his closest confidant. As a result Schulte-Mönting could absolutely confirm that Raeder in this case opposed Hitler because of misgivings with regard to morality and international law, and furthermore also employed strategic reasons in the hope of thus being able to bring more influence to bear on Hitler. Schulte-Mönting even stated—just like Raeder—that in November the latter had

gained the impression, after a discussion, that he had dissuaded Hitler from his plans. I believe that this has clarified the matter, and only the tragic fact remains that Hitler paid just as little attention to Raeder's political objections with regard to Russia as with regard to Norway and France.

A similar situation obtains with regard to the charge of the Prosecution referring to the war of aggression against the United States and the violation of the neutrality of Brazil. Both of these charges are sufficiently refuted within the framework of the evidence, so that I am only going to discuss them very briefly.

According to the statement of the Prosecution, Raeder somehow collaborated in the plan to induce Japan to attack the United States. As a matter of fact no naval strategic conferences were held between Japan and Raeder. Raeder always held the conviction that a war against the United States must be avoided just as much as a war against Russia. This attitude is understandable seeing that he had always held the opinion that Hitler should under no circumstances wage a war against Britain. Since the war against Britain had now come about, it was Raeder's duty as Commander-in-Chief of the Navy to use all his strength to fight successfully against Britain. Raeder knew the limitations of the fighting capacity of the Navy; and it was, therefore, quite out of the question that he should have collaborated in an extension of the naval war, considering, as he did, that the conduct of a war against Britain was already a too difficult task. Document C-152 submitted by the Prosecution therefore mentions only a proposition that Japan should attack Singapore and is based on the assumption that the United States should be kept out of the war. This suggestion made to Hitler that Japan should attack Singapore was correct in every respect. After all, we were at war with England, and Raeder was forced to try to concentrate all his forces against that country. He was thus justified in suggesting that Japan—as Germany's ally—should attack England. Moreover this, the only discussion by Raeder, was not held until 18 March 1941, while Hitler had already in his Directive Number 24 of 5 March 1941 established the guiding principle that Japan must attack Singapore, which he considered a key position of Britain (Document C-175).

I should like to interpose one sentence here. It can be seen from the report by General Marshall that no common plan had been found to exist between Germany and Japan.

As Schulte-Mönting has affirmed, Raeder was just as surprised by the sudden attack by Japan on Pearl Harbor as every other German. The attempt of the Prosecution to discredit this statement during the cross-examination of Schulte-Mönting by introducing a telegram from the naval attaché in Tokyo

to Berlin, dated 6 December 1941 (Document D-872), failed. In the first place Raeder probably only received this telegram after the Japanese attack on Pearl Harbor on 7 December had already started; and besides, Pearl Harbor is not mentioned at all in the telegram.

The charge of the Prosecution with regard to Brazil has been refuted just as effectively because, after my statements during the hearing of evidence, the Prosecution did not revert to this point in any of the cross-examinations of Raeder, Schulte-Mönting, and Wagner. The charge was that, according to Jodl's diary, the Naval Operations Staff authorized and approved the use of arms against Brazilian warships and merchant vessels fully 2 months before the outbreak of war between Germany and Brazil (Document 1807-PS).

Apart from the testimony of witnesses, this case is refuted by documents, namely, the complete excerpt from Jodl's diary which I submitted as Exhibit Number Raeder-115, as well as by Documents Number Raeder-116 to 118. These documents reveal that Brazil had violated the rules of neutrality by permitting the United States to make use of Brazilian airfields as a base for attacks on German and Italian U-boats. The Brazilian Air Ministry had furthermore officially announced that attacks had been made by the Brazilian Air Force. Considering such conduct, which is against all the rules of neutrality, the demand of the Naval Operations Staff for armed action against Brazilian vessels is justified. So here again the Prosecution failed to prove Raeder to have committed a crime or even a violation of international law.

The Prosecution has very painstakingly submitted an exceedingly large amount of material, and the wealth of detail called for great care in the submission of evidence for the Defense. I have endeavored to deal with all the charges in the submission of evidence or in my final plea, and have made efforts to show as clearly as possible that none of them, partly on factual, partly on legal grounds, comply with the requirements of a criminal case within the meaning of this Charter. Insofar as I have not, in spite of my desire for great exactitude, dealt with certain documents, it was because they seemed to me of small importance and in any case of no importance in criminal law; for instance, the many cases in which Raeder was only mentioned because—without officially taking any part—he received a copy of the documents for routine reasons. It would have been tedious to go into such recurrent cases, even if the Prosecution reiterated these formal indications, so that one was often tempted to recall the saying of Napoleon that repetition is that turn of speech which acts as the best evidence.

I further believe that in my final plea for Admiral Raeder I may forego argumentation regarding genuine war crimes, the crimes against humanity, since I am unable to establish any connection between these and Raeder from the material submitted by the Prosecution. Also no particular charge is made against Raeder in this connection, with the exception of the two cases connected with the Commando Order, namely, the shooting of two soldiers in Bordeaux and the shooting of the British soldier Evans, who was made a prisoner by the SD on the Swedish border after he had previously participated in the midget submarine attack on the *Tirpitz*. Thus far the charge has been refuted by testimony insofar as it concerns the Navy. Both cases did not come, or came only later, to the knowledge of the Naval Operations Staff—just before Raeder's departure. In both cases action was taken on the basis of the Commando Order by Hitler himself or by the SD without the knowledge and will of the Naval Operations Staff; and what is most important, in both cases the documents of the Prosecution showed that these soldiers were in civilian clothes and, therefore, were not entitled to the protection of the Geneva Convention (Document Number D-864, Exhibit GB-457 and Document UK-57, Exhibit GB-164).

All the other criminal facts which the Prosecution submitted, especially applying to the East, I need not deal with, as Raeder did not participate in them. I hope that here also I shall have the approval of the Court in mentioning the handling of the Katyn case, in which the Court pointed out that Raeder was not involved and therefore refused to allow me to act as defense counsel in this connection; from this I draw the legal conclusion that Raeder cannot even by implication through the conspiracy be considered as burdened with these criminal facts, since he did not know of these events and had nothing to do with them.

The case for the Prosecution is founded on a desire to see its basic theory accepted and acknowledged, namely, the conception that so many crimes cannot have emanated from the will of a single individual but rather that they result from a conspiracy, a plot, involving many persons. These conspirators could logically, in the first place, only have been Hitler's own collaborators, that is to say, the real National Socialists. Since however, Hitler wished to achieve and did achieve concrete results of military and economic import, something peculiar transpired: There were no specialists among the National Socialists for these tasks. Most of the National Socialist collaborators had not previously followed a trade providing technical education. Hitler, therefore, despite his desire to have only National Socialists around him, took on as key people in particular fields specialists who were not National Socialists, such as for instance Neurath for politics,

and Schacht for economics; and for military tasks, Fritsch for the Army and Raeder for the Navy. The Prosecution followed this process from the angle of its conspiracy theory, without paying attention to the fact that these people, not being National Socialists, could in no way be counted among the conspirators and without taking into account that Hitler used these non-National Socialists only as technicians in a well-defined field, and only as long as it seemed absolutely necessary to him; therefore he agreed to the departure of these men, who were essentially not in sympathy with him, as soon as the differences between them seemed unbridgeable, which was bound to happen sooner or later with each of them, depending on the particular field involved.

By this all-embracing conception of the idea of conspiracy and by this extension of the Prosecution's fight to non-National Socialists, the Prosecution abandoned the basic concept formerly propagated abroad, namely, that of fighting National Socialism but not against the whole of Germany—two ideas which at no time and in no place have been really identical, as the Prosecution now tries to make out. I do believe that thereby the Prosecution is also going back on President Roosevelt's basic idea.

Yet another factual and legal point of view has not been taken into consideration by the Prosecution. I mean the concept of the division of competence under state law, that is to say the subdivision into individual departments. This division of competence, founded on the idea of division of labor, is essentially separative in character; it divides the field of work according to local, functional, and technical points of view. Thereby it defines positively the limits within which each division is to become active, and at the same time it defines negatively the boundaries of such activity by specifying which problems no longer concern the agencies in question, that is to say, where they must not exercise any official activity.

In a democracy additional contacts exist by virtue of general Cabinet meetings and through the Prime Minister, the Reich President, or the Reich Chancellor, as the case may be. In a dictatorship it is different, particularly if the dictator, as was the case with Hitler in the National Socialist State, exploits the segregation of the various departments with extreme skill and sees to it that they are kept as isolated as possible, with the result that all power of decision rests finally with him as the dictator, who may even play off one department against the other. The strict partitioning into governmental departments as carried out in the National Socialist State in itself refutes the concept of conspiracy and renders it extremely difficult for the individual to exceed the limits of his own department in any manner.

This significance may be illustrated by the following example: The maintenance of political relations with other states, the contracting or cancellation of agreements or alliances with other states, the declaration of war and conclusion of peace, are matters within the jurisdiction of the authority directing foreign affairs; but they are not within the jurisdiction of the agencies concerned with domestic tasks, such as for instance the Reich Finance Administration, Justice, or the Military.

Thus, since the decision concerning war and peace is not a matter for the military, the military has to accept the decisions made by the political leadership, decisions which have a binding material effect on the military authorities. The military commander must assume for his department the consequences resulting from the decision. As soon as war is declared, the military forces must fight. They do not bear any responsibility for the war, since they were not able to take part in the decision that war should be declared. Consequently, for an army the concept of war of aggression exists in the strategic sense only. Aside from that, any war it may be obliged to wage is, to the army, simply war, regardless of how it may be qualified legally (Article 45 of the Reich Constitution).

Responsibility, from the point of view of state law and criminal law, is in proportion to the extent of jurisdiction. Therefore, if the commander-in-chief of a branch of the Armed Forces is responsible solely for the waging of war, though not for the causes leading to war, his responsibility in respect to a strategic plan must be confined to the plan as such, but not to the possible origin of the war for which the strategic plan was worked out.

This officially and legally important segregation of governmental departments and the distribution of authority was, in the interest of strengthening his own power in a particularly emphatic manner, carried out by Hitler in many domains, such as for instance the creation of the "Delegate for the Four Year Plan," whose field of work should have belonged to the Ministry of Economics; the creation of Reich Commissioners in the occupied territories, whose activity really should have come under military administration; and, finally, a fact of interest in the Raeder case, the very precise delimitation of the three branches of the Armed Forces and the elimination of the Reich Defense Minister or Minister of War who held the three branches of the Armed Forces together and unified them. The greater the number of governmental departments became, the stronger Hitler became as dictator, being the only person with authority over all the innumerable agencies. But along with this the official as well as the legal responsibility for strategic plans on the part of any one individual department decreased; in this instance, that of the Navy.

Consequently, the commander-in-chief of a branch of the Armed Forces, for instance the Navy, can in case of strategic planning only be responsible for the planning of naval strategy; he is not afforded an over-all picture of the total plan. The total plan was discussed nowhere; politically and militarily it was in Hitler's hands exclusively, because he alone was the center where all threads, all activities of the individual departments joined.

May I add a sentence here and remind you that, for instance, in the case of the Norway action even Göring was not informed until March 1940, which is one proof of the extreme segregation of the individual departments within the Armed Forces. In addition, purely strategic planning as such cannot be criminal, because it is customary in every country and because in every country the military commander of a branch of the Armed Forces does not and cannot know to what end the political leadership will use the plan prepared by him, whether for a war of aggression or a defensive war.

The documents submitted in my document books prove convincingly that the military agencies in Allied countries as well as in Germany worked out strategic plans in the same manner, for the same areas, and at the same times, namely, in regard to Norway, Belgium (Documents Number Raeder-33 and 34), Holland, Greece, Romania; moreover, the Allied plans included the destruction of the Romanian oil fields and especially of the oil sources in the Caucasus (Document Number Ribbentrop-221 and Number Raeder-41). Particularly the plans concerning the Caucasus on the part of the Supreme Council, that is, the combined British and French General Staff, show the correctness of the statements. The Supreme Council would certainly refuse to be made politically responsible for these strategic plans, although the Soviet Union was still neutral at the time and the execution of the plans was to strike a blow not only at an enemy country, Germany, but also at a neutral, the Soviet Union, as the documents show.

The similarity of the documents concerning such plans is absolutely convincing and shows a strong parallel trend. May I point in this connection to statements I made here on occasion of the comprehensive discussion regarding the relevance and admissibility of the documents submitted by me; may I point, in addition, to Document Number Raeder-130, the letter of the Foreign Office, in which submission of the British Admiralty files is refused but in which the plans in regard to Norway and the whole of Scandinavia are admitted, with the remark that the plan was not put into effect, which fact was due only to Germany's having forestalled the execution of the plan.

Anyone is entitled to be a pacifist and, therefore, basically opposed to the military. However, one must be consistent and take a stand not only

against German military force but against any military force. One may condemn the fact that the military, as the operational authority, prepares military plans; and one may for the future insist that such planning shall be punishable. But in that case not only German military planning, but foreign military planning also must be punishable.

These points show that the Prosecution misjudges both actual and legal conditions in desiring to make Raeder responsible for political decisions, although he had nothing to do with them but always worked simply as a soldier. Just as there could be no suggestion 130 years ago of bringing before a court an admiral of Napoleon, the dictator, it is impossible now to condemn an admiral of Hitler, the dictator. With dictators, in particular—and this the Prosecution overlooks—not only the power and the influence of a military commander diminishes, but his responsibility must also diminish to the same extent, for the dictator will have seized all power and with it all responsibility—especially if he is possessed of such an extraordinary will and such immense power as Hitler. The French prosecutor stated literally and very aptly on 7 February 1946 before this Tribunal: "Hitler was actually the incarnation of all will."

The resulting strength and power has not been sufficiently appreciated by the Prosecution, and has certainly not been taken into consideration in the presentation of the facts and the legal conclusions. How great this power is, Gustave le Bon shows in his famous book *Psychology of the Masses* (published by Alfred Kröner) in the chapter entitled, "The Leaders of the Masses." I quote from it:

> "Within the class of leaders quite a strict division can be made. The energetic people with strong wills but without perseverance belong to the one kind; the people with a strong, persevering will belong to the other kind, which is much rarer.... The second class, those with a persevering will, exercise a much greater influence in spite of their less brilliant appearance."

Hitler belongs to this second class of leaders, who, in accordance with this quotation, exercised an immense influence while, on the other hand, he was definitely unimpressive in his brown uniform.

Gustave le Bon continues:

> "The unyielding will which they possess is an exceedingly rare and exceedingly powerful attribute which subdues everything. One does not always realize what a strong and persistent will can achieve. Nothing can resist it, neither nature, nor gods, nor men."

These words make it clear enough that Raeder could not resist either.

Accordingly, only the question remains: Is it ever a soldier's duty to revolt—to resort to open mutiny? This question will be denied by every commander all over the world and likewise by every other person with a sole exception, namely, if it concerns the case of a dictator commanding the commission of a crime, the criminality of which is recognized by the military commander himself. Accordingly Raeder could be made responsible for a military crime only, but not for a political one, because for the political crime the dictator himself must answer. When the Prosecution came to the opposite conclusion regarding Raeder, this was due—as I have already emphasized in my introduction—only to their misconception of the actual and juridical facts; they regarded Raeder as politician and soldier. But he was a soldier only. He lived for the Navy alone, for the welfare of the Navy, for which he is now equally prepared to bear responsibility to the full extent. He led the Navy along uniform lines and, aided by his officer-corps, taught it those decent views and that form of chivalrous fighting which humanity expects of a soldier. It must not be allowed to happen that, as a result of the deeds of a Hitler and his National Socialism, the officers and soldiers of this Navy be defamed by hearing their highest-ranking officer declared a criminal. From a historical viewpoint Raeder may be guilty, because he, like many others within the country and abroad, did not recognize or see through Hitler and did not have the strength to resist the dynamic strength of a Hitler; but such an omission is no crime. What Raeder did or left undone in his life occurred in the belief that he was acting correctly and that as a dutiful soldier he had to act in such a way.

Raeder is a highly esteemed officer who is no criminal; and he cannot be a criminal, since all his life he has lived honorably and as a Christian. A man who believes in God does not commit crimes, and a soldier who believes in God is not a war criminal.

I therefore ask the High Tribunal to acquit Admiral Dr. Erich Raeder on all points of the Indictment.

PRESIDENT: I call on Dr. Sauter for the Defendant Von Schirach.

DR. SAUTER: Gentlemen of the Tribunal, Baldur von Schirach, who at that time was Reich Youth Leader, in 1936 welcomed the guests to the Olympic Games in Berlin with the following words:

> "Youth throws a bridge across all frontiers and seas! I call upon the Youth of the World and through them, upon Peace!"

And Baldur von Schirach, then Gauleiter of Vienna, said to Hitler in 1940: "Vienna cannot be conquered with bayonets, but only with music."

Those two utterances are characteristic of the nature of this defendant. It is the task of the Defense to examine the evidence produced in this Trial for the purpose of ascertaining whether the same Baldur von Schirach, who expressed such thoughts, really committed those crimes against law and humanity with which he is charged by the Prosecution.

Schirach is the youngest defendant here. He is also, of all the defendants, the one who was by far the youngest when joining the Party, which he did when he was not yet 18. Those facts in themselves are perhaps of some significance in judging his case. When still at school he came under the spell of rising National Socialism; he was particularly attracted by the Socialist idea, which had already in his country school recognized no difference between the sons of fathers of different classes and professions; those boys around Schirach saw in the popular movement of the twenties in Germany a promise of the resurgence of our fatherland from the aftermath of the lost Great War into a happy future; and fate willed it that as early as 1925, when he was seventeen, Schirach came into personal contact with Hitler in Weimar, Goethe's home. Hitler's personality made a fascinating impression on young Schirach, as he himself admitted; the program for the National Community (Volksgemeinschaft), which Hitler had evolved at that time, met with Schirach's wholehearted enthusiasm, because he thought he saw reproduced therein on a full-size scale that which he had personally experienced in a small way in the comradeship of the country school and in his youth organization. To him and his comrades Hitler appeared as the man who would open for the younger generation the road into the future; of him this younger generation had hopes for its prospects of work, its prospects of a secure existence, its prospects of a happy life. Thus the young man became a convinced National Socialist; this fact was the result of the environment in which he had spent his youth and which formed a soil only too fertile for the growth of that ideology which young Schirach embraced because at that period he held it to be the right one. This environment of his childhood and a vast amount of one-sided political literature, which the young man devoured in his thirst for knowledge, made of him, while still an inexperienced youth, also an anti-Semite. He certainly did not become an anti-Semite in the sense of those fanatics who ultimately did not shrink even from acts of violence and pogroms, of those who finally created an Auschwitz and murdered millions of Jews; but an anti-Semite in the moderate sense, who would merely curb Jewish influence in the government of the state and in cultural life but for the rest would leave untouched the freedom and rights of Jewish fellow citizens and who never thought of exterminating the Jewish people.

At least that is the conception of Hitler's anti-Semitism which young Schirach evolved during those years.

That this was really Schirach's opinion is also substantiated by the statement which Schirach made here on the morning of 24 May 1946, when he described without reservation the crimes committed by Hitler as a shameful episode in German history, as a crime which fills every German with shame; that statement in which he openly states that Auschwitz must signify the end of any and every racial and anti-Semitic policy. That statement here in this courtroom came from the bottom of the heart of the Defendant Schirach; it was the result of the terrible disclosures which this Trial brought to him also, and Schirach made this statement here openly before the public in order to bring back German youth from a wrong path to the road of justice and tolerance.

Gentlemen, I would now like to bring to your attention the more important accusations which have been raised against Schirach, and the major results which the evidence has produced in the various points. The Defendant Schirach is first of all accused of the fact that before the seizure of power, that is, before the year 1933, he actively promoted the National Socialist Party and the youth organization affiliated with it and that he thereby contributed to the rise of the Party to power. He had been, as stated in the trial brief, a close and abject follower of Hitler; he had stood in blind loyalty to Hitler and the latter's National Socialist world of thinking; and he had, as leader of the student's league, led the students ideologically and politically to National Socialism and won them over to it.

All this, if Your Honors please, is not denied by Schirach in any manner. He has done what he is being accused of in this respect; this he confesses openly, and for this he naturally takes responsibility. The only thing which he denies with regard to this, and all the more emphatically with regard to the later period, is the accusation that he participated in a conspiracy. Schirach himself pointed out that the Leadership Principle and dictatorship in their character and their theory are absolutely incompatible with the idea of a conspiracy, and a conspiracy appears to him a logical impossibility if many millions of members are to be included and when its existence and aims lie exposed before the country concerned as well as before the world. We furthermore know from the results of this Trial that Hitler, aside from Bormann and Himmler, did not have a single friend or adviser with whom he discussed his plans and aims; on the contrary he carried the Leadership Principle to the furthest extreme. He dispensed with all advisory meetings or discussions which might have affected his decisions in any way, reaching his decisions all by himself without even listening to

the opinion of those closest to him. For him it was a matter of orders on his own part, and unconditional obedience on that of the others. I wish to refrain from further statements about that chapter, but that is what the "conspiracy" really looked like; and all of us who have witnessed this Trial would never have felt this ultra-radical application of the Leadership Principle to be possible had not all the defendants and all the witnesses familiar with the facts, in complete agreement and without a single exception, presented the same picture to us over and over again.

Now Schirach is not denying at all that already in his very early years he came completely under the influence of Hitler, that he placed himself with his whole young personality at the service of these ideas, and that at the time, as stated quite correctly in the Indictment, he was devoted to Hitler with unconditional loyalty.

If this was a crime on the part of young Schirach, a crime which millions of older, more experienced, mature Germans have committed with him, then you, as his judges, may condemn him for this if our code of law furnishes a legal basis for it. That would be but a further disappointment in addition to the many others which he has been experiencing for years. Schirach knows today that he gave loyal support unto the end to a man who did not deserve it; and he also knows today that the ideas, about which he was enthusiastic in his young years and for which he sacrificed himself, led in practice to ends of which he himself had never dreamed.

But even the Schirach of today, purged by many bitter experiences, cannot see any criminal act in the activity of his younger years which he carried out in good faith, together with millions of other Germans, for Hitler and his Party. For the Party at that time appeared quite legal to him; Schirach never had any doubt that it also came into power by legal means. The seizure of power by the Party, the appointment of Hitler as Reich Chancellor by Reich President Von Hindenburg, the winning of the majority of the people for the Party by repeated elections, all this confirmed to young Schirach again and again the legality of the movement he had joined. If today he were to be punished because he acknowledged as his Führer this same Hitler whom millions of Germans and all the countries of the world recognized as legal head of the State, Schirach would never be able to acknowledge such a decision as being just. In spite of the severe judgment which he himself has pronounced in this courtroom on Hitler according to his personal conviction, he would consider himself a victim of his political convictions if he were to be sentenced because, as a young enthusiastic man, he joined the National Socialist Party and collaborated in its construction

and seizure of power. At the time he did not look upon that as a crime but from his standpoint considered it his patriotic duty.

The second and by far more important accusation which has been raised against the Defendant Von Schirach is to the effect that he, as Reich Youth Leader in the years 1932 to 1940, to quote the Indictment literally, "poisoned the thought of youth with Nazi ideology and especially trained it for aggressive war." Schirach has always contested this claim emphatically, and this claim has not been substantiated by the results of the evidence either.

The law on the Hitler Youth of 1936 described Schirach's task as Reich Youth Leader as being "to educate youth, outside the parental home and outside school, physically, intellectually, and morally for service to the people and to the national community in the spirit of National Socialism through the Hitler Youth movement and its leader," that is, the Defendant Von Schirach. This was the program. This program is repeated word for word in the enactment decree of 1939, which was postponed for so long—3 years—because Schirach did not want to introduce compulsory membership until the movement already practically included the entire German youth on the basis of voluntary membership, so that future joining by compulsion would exist on paper only.

The Hitler Youth program, as it was formulated by Schirach in his speeches and writings—and no other program of the Hitler Youth exists—does not contain a single word which would point toward military education of youth, much less an education in aggressive warfare; nor does in practice the education of youth, in Schirach's opinion, in any way give evidence of a military education of German youth for such a purpose. In that respect the point was stressed by the Prosecution that the Hitler Youth movement was organized in various detachments and divisions. That is true, although the designations listed by the Prosecution are not correct and although they have not the slightest reference to military formations. But in the last analysis every youth movement the world over will show a classification into smaller or larger units; each of these units naturally will also need a name and some responsible leader. As in the other countries, so also in the German Hitler Youth the leader of the unit was discernible by some sign of his rank, be it a leader's cord, stars, or other insignia of rank. This naturally has nothing to do with the military character of youth education.

From personal familiarity with the practice in foreign countries Schirach knows that foreign youth organizations, in Switzerland as well as in France and other countries, have similar classifications and similar

insignia, although it never occurred to us so far to make that a reason for considering such foreign youth organizations as military associations.

It was furthermore stressed that formations of male youth in Germany were also given training in shooting. That is also correct but equally proves very little, in the opinion of Schirach, because the shooting instruction for the Hitler Youth organization took place, without exception, with small-bore rifles, in other words, with a type of short, light target rifle which is nowhere in the world considered as a military weapon and which is not even mentioned in the enumeration of military weapons in the Versailles Treaty. The Hitler Youth movement in Germany did not possess a single military weapon, no infantry rifle or machine gun, no power-driven airplane, no cannon or tank, throughout its whole existence. After all, when speaking of military training, then such training would primarily have had to take place with military weapons such as are used in modern warfare. To be sure, as has been established in the cross-examination of Schirach, in order to give added importance to his office, a certain Dr. Stellrecht, the technical adviser on shooting instruction in the leadership of the Reich Youth movement attempted to ascribe a certain special importance to this particular branch of youth training. Schirach, however, was able to show without being refuted that for this very reason differences of opinion arose between him and this technical adviser and that he therefore finally dismissed Dr. Stellrecht because he, Schirach, opposed any development which might have tended toward military training of youth. In any case, this very Dr. Stellrecht, who was produced by the Prosecution as a witness against Schirach, nevertheless for his part admitted that "not a single boy in Germany was trained in handling weapons of war" and that "not one boy was given a military weapon." That is, word for word, the testimony of Stellrecht.

Also of importance in considering these questions is the fact that Schirach, as a matter of principle, refused to permit young people to be trained by active officers or former officers because he considered these persons entirely unsuitable to educate young people in that spirit which he envisaged as the goal of his activity. Moreover, neither Schirach nor any of his closer associates were officers before the war; and the same holds true for the overwhelming majority of the high or low ranking HJ leaders subordinate to him.

All these facts are firmly established by the testimony of the Defendant Schirach himself and through depositions made by the witnesses Lauterbacher, Gustav Hoepken, and Maria Hoepken during their examination. For many years these witnesses were Schirach's closest collaborators; they are thoroughly familiar with his views and principles and

they have unanimously confirmed that it is entirely incorrect to speak of a military or even premilitary training of the Hitler Youth.

At this point, Gentlemen, I should like to add one thing. I have just mentioned, as a witness, the name Lauterbacher. The Prosecution, during their cross-examination, made an attempt to impugn the credibility of the witness Lauterbacher by asking him, during his interrogation on 27 April 1946, how many people he had hanged publicly and furthermore by charging that he had ordered four or five hundred prisoners from the penitentiary in Hameln to be poisoned or shot. In this connection the American prosecutor had submitted seven affidavits under Exhibit USA-874, among them one by a certain Josef Krämer, who in fact made the assertion in his affidavit that the witness Lauterbacher, who appeared here for Schirach, in his function as Gauleiter of Hanover had given him orders for the murder of the prisoners.

During the Court's session of 27 May 1946, I protested against the use of that affidavit by Krämer and produced, Gentlemen, a newspaper article according to which the witness Krämer, on 2 May 1946, had been sentenced to 7 years' imprisonment by a court of the 5th British Division. Several days ago I submitted as evidence a report from the *Rhein-Neckar Zeitung* of 6 July 1946 which states that the witness Hartmann Lauterbacher in the meantime had been acquitted by the Supreme British Military Court in Hanover. From that it can be seen that the doubts which the Prosecution cast upon the credibility of the witness Lauterbacher and which they based on the affidavit of this Krämer were unfounded.

May I now continue in my presentation on Page 8.

With reference to the premilitary training of the HJ it has also been repeatedly emphasized in rebuttal that the Hitler Youth wore a uniform. That is correct, but proves nothing, for the youth organizations of other countries, too, are accustomed, as is generally known, to wear a common costume, some sort of uniform, without anybody for this reason terming them military or semimilitary organizations; and Schirach and several of his associates have informed me that in many democratic countries, which certainly do not contemplate war, much less a war of aggression, male youth is trained in handling proper military weapons and that every year contests are held in shooting with military rifles.

Why was it that Schirach introduced a uniform for the Hitler Youth—and indeed not only for the boys but also for the girls? We have heard the answer to this from several witnesses. Schirach, I may quote here, saw in the uniform of the boys and in the uniform costume of the girls the "dress of socialism," the "dress of comradeship." Schirach wrote at that time already

that the child of the rich industrialist was to wear the same clothes as the child of the miner, the son of the millionaire the same clothes as the son of an unemployed man. The uniform of the Hitler Youth was to be, as Schirach wrote in 1934 in his book *The Hitler Youth*, the expression of an attitude which did not consider class and property, but only effort and achievement. The uniform of the Hitler Youth was for Schirach, as expressed further in this same book, "not the sign of any militarism, but the symbol of the idea of the Hitler Youth, namely, classless society," in the spirit of the election slogan which he gave the Hitler Youth in 1933: "Through Socialism to the Nation." Schirach remained faithful to the principle expressed in these quotations as long as he was Youth Leader. Thus, in the official publication of the Hitler Youth in 1937, he wrote—I quote word for word:

> "The uniform is not the expression of a martial attitude but the dress of comradeship; it overcomes class difference and re-establishes social equality for the child of the most insignificant laborer; the young generation in our new Germany must be united in an inseparable community."

Schirach had this comradeship and this socialism in mind when, in 1934, he describes in his book *The Hitler Youth* how he conceived this socialism; and I quote again, word for word:

> "Socialism does not mean taking the fruits of his work away from one person in order to give everybody something produced by the work of one individual. Everyone shall work, but everyone shall also harvest the fruits of his work. Nor must one person be allowed to get rich while thousands of others must suffer want for his sake. Whoever exploits his workers and spoliates the community in order to fill his cash box is an enemy of the German people" (Document Schirach-55).

That ends the quotation describing the attitude of Von Schirach at that time.

Schirach has pointed out again and again in his numerous writings, articles, and speeches, which have been collected in the document book and have been submitted to the Tribunal, that, to use his expression, he did not desire any "pseudo-military drill," which would only spoil the joy of the young people in their movement.

The training of the young people in small-bore shooting was in line with the training in all sports activities and corresponded to the inclination of the boys, in all countries, who are particularly interested in the sport of shooting. But this training played a very minor role in volume and

importance by comparison with the greater aims which Schirach pursued in the Hitler Youth movement, about which not only Schirach but the other witnesses examined give as clear a testimony as the writings and speeches of Von Schirach. These aims of the Hitler Youth education shall be listed here briefly as they have been demonstrated by the presentation of evidence; Schirach is naturally not accused in connection with these other aims of the Hitler Youth education, but one must nevertheless consider and evaluate them when desiring to obtain a total picture of his personality, his activity, and his plans.

Apart from this education of youth in terms of comradeship and of socialism in the sense of overcoming class distinction, Schirach had, as he explained here, primarily four aims in mind:

First the training of youth in the various types of sports, and in connection therewith juvenile health supervision; this branch of youth education took up a very large part of Hitler Youth activities, and the fact that German youth obtained such an unexpected success at the Olympic Games in 1936 was to a certain extent due to the activity of the Hitler Youth leadership in co-operation with the Reich Sports Leader Von Tschammer-Osten.

Another aim was postgraduate training and advancement of working youth and the improvement of the position of adolescent wage earners through youth legislation, particularly by prohibiting night work, increasing spare time, granting paid vacations, prohibiting child labor, raising the protected age of adolescents, *et cetera*. Advanced vocational training was promoted so successfully that finally more than a million boys and girls entered for the annual occupational competitions, and from year to year the average performance in each branch rose very considerably.

A third main aim of youth education was the promotion of love of nature, far away from the dens of iniquity of large cities, through hiking trips and in youth hostels. Thousands of youth homes and youth hostels were built in the course of these years on Schirach's initiative out of the Hitler Youth movement's own funds, in order to get the young people out of the large cities with their temptations and vices and return them to rural life to show them the beauties of the homeland and to afford a vacation to even the poorest child.

But Schirach concentrated his chief attention on the fourth goal of youth education, namely, co-operation with the youth of other nations; and this activity is a particularly suitable test for the question as to whether one can accuse the Defendant Von Schirach of having taken part in the planning of wars of aggression and of having committed crimes against peace.

Schirach has told us here on the witness stand that time and again, both in summer and winter of every year, foreign youth groups were the guests of German youth; and it is shown by the documents in Von Schirach's document book that, for instance, already in the year 1936 no less than 200,000 foreign youths received overnight lodgings in German youth hostels, and correspondingly year after year German youth delegations went abroad, especially to England and France, in order to enable young people to get acquainted with and respect one another. Those very endeavors of Schirach's, which would be absolutely incompatible with any intention to prepare wars of aggression, received unreserved recognition abroad before the war. In 1937 in one of the special numbers of the Hitler Youth magazine *Wille und Macht* dedicated to this task of understanding, which was also published in French and circulated very widely in France and which is quoted here only as an example, the French Prime Minister Chautemps—I have the evidence in the document book—declared his willingness, as head of the French Government, to promote these peaceful meetings.

> "I wish"—he wrote—"that the young men of both nations could live every year side by side by the thousands and in this way learn to know, to understand, and to respect each other." And further:
>
> "Our two nations know that an understanding between them would be one of the most valuable factors for world peace; therefore it is the duty of all those on either side of the frontier who have a clear view and human feeling to work for the understanding and *rapprochement* of both nations. But no one could do it more sincerely and more enthusiastically than the leaders of our wonderful youth, of French and German youth. If they could manage to unite this youth, they would hold in their hands the future of European and human culture" (Document Schirach-110).

The mayor of Versailles of that time wrote in the same spirit to Schirach, ending his appeal in the monthly organ of the Hitler Youth with the words:

> "The education of youth in this spirit is one of the most important tasks of the politicians of both our countries" (Document Schirach-111).

The French Ambassador, François Poncet, gave credit to Schirach's efforts no less heartily in the same publication under the title "Youth as a Bridge" and concluded his lengthy article with the words:

"French participation enriches German soil. German influence fertilizes the French spirit.... May this exchange develop further. May also the generations which will at some time benefit from it contribute to bringing the two halves of Charlemagne's empire closer and to create between them those relations of mutual respect, harmony, and good comradeship for which both nations are deeply longing, because their instinct tells them that the welfare of European culture depends on it and because they know for certain, when they look into themselves, that they have many more reasons to respect and admire than to hate each other" (Document Schirach-112).

And Schirach himself answered in the next issue of his monthly publication, which also appeared in French, with an enthusiastic article under the title, "Salute to France!" In it he writes, for instance:

"The *rapprochement* of our two peoples is a European task of such urgent necessity that youth has no time to lose in order to work for its achievement."—He then continues—"Youth is the best ambassador in the world; it is disinterested, frank, and without the eternal distrust of which diplomats can frequently not be cured because, to a certain extent, it is their professional disease. However, there must be no propaganda intentions hidden behind youth exchange."—And he concludes—"I consider it now my task to bring about an exchange of views between German and French youth, which must not, on the German side, consist of nice statements from me, but of many personal conversations of thousands of young Germans with just as many young Frenchmen. One must believe in youth because they, above all, can achieve a true understanding."

At the end Schirach calls attention to the fact that all higher youth leaders of the German Hitler Youth movement had a short time previously expressed their respect in the name of the young generation of Germany to the French Unknown Warrior by placing a wreath under the Arc de Triomphe, and he concludes with the words:

"The dead of the Great War died while fulfilling their patriotic duty and nobly devoting themselves to the ideal of liberty, and Germans as well as French were always filled with respect for a gallant foe. If the dead respected each other, then the living should try to shake hands. If the returned combat veterans of both nations

could become comrades, why should the sons and grandsons not become friends?" (Document Schirach-113.)

These, Gentlemen of the Tribunal, are the words of the same Baldur von Schirach whom the Prosecution tries to brand as a deliberate partner in a Hitlerian conspiracy for war. The Prosecution wants to make a war criminal out of this untiring prophet for international understanding and peace, who is charged with having militarized youth and prepared it, bodily and psychologically, for wars of aggression and of having worked against peace. So far, the Prosecution has not been able to furnish evidence to this effect.

Schirach has written various doctrinal books for youth, which were held against him in the trial brief; he has published a quantity of essays on a vast variety of problems of youth education; his innumerable speeches addressed to youth have been printed; his orders and instructions to youth are available to you and the Prosecution in collected form. Yet it must be concluded that among all these, which constitute his views during the whole of the time when he was active as Reich Youth Leader, not a single item is to be found in which he made inflammatory remarks in favor of war or preached attacks against other countries.

The Prosecution has stated in this very connection that he referred to the "Lebensraum" in his book *The Hitler Youth*, which I have repeatedly mentioned, and by so doing adopted as his own a slogan of Hitlerite aggression policy. This claim is incorrect, for the whole book, *The Hitler Youth*, does not, any more than every other speech and writing of Schirach, contain this word at all. True, he has referred at two points to "Eastern space" in his book, *The Hitler Youth*, published in 1936; but he quite obviously did not in any way employ this term with reference to Polish or Soviet-Russian territories but to the eastern provinces of the former German Empire, that is to say, to territories which formerly belonged to. Germany; they were known to be very thinly populated and well suited for the settlement of excess German population.

Nowhere has Schirach, I would like to state in conclusion with regard to this topic, at any time up to the outbreak of the second World War expressed the idea that he might wish Germany to conquer foreign territories; neither has he ever uttered the odious slogans of the German "Master Race" or the "Sub-humanity" of other nations; on the contrary, he was always in favor of preserving peace with the neighboring nations and always advocated the peaceful settlement of any conflicts that cropped up out of inevitable clashes of interests. Gentlemen of the Tribunal, had Hitler possessed but a fraction of the love of peace which his Youth Leader

preached time and again, then perhaps this war would have been spared us Germans and the whole world.

PRESIDENT: We will adjourn now.

[*The Tribunal adjourned until 18 July at 1000 hours*.]

ONE HUNDRED AND EIGHTY-FIRST DAY

Thursday, 18 July 1946

Morning Session

MARSHAL: May it please the Tribunal, the Defendants Hess, Von Ribbentrop, and Fritzsche are absent.

DR. SAUTER: May it please the Tribunal, yesterday at the end of my statement I dealt with the charge of the Prosecution that the Defendant Von Schirach had trained and educated the youth of the Third Reich in a military sense, that he had prepared them for the waging of aggressive wars and had participated in a conspiracy against peace. Now I turn to a further accusation which has been made by the Prosecution against Defendant Von Schirach.

Since the Prosecution could not prove that the Defendant Von Schirach had ever promoted Hitler's war policy before the war, he is being charged with having had various connections with the SS and SA, and especially with the fact that the SS, the SA, and the Leadership Corps of the Party obtained their recruits from the Hitler Youth. This last fact is quite correct, but it proves nothing as to Schirach's attitude toward Hitler's war policy and is equally pointless as regards the question of his participation in Hitler's war conspiracy. For since 90 or 95 percent or more of German youth belonged to the Hitler Youth movement it was only natural that the Party and its formations as the years went by should receive their young recruits in an ever-increasing measure from the Hitler Youth. Practically no other youth was available.

The Prosecution has referred to the agreement between the Reich Youth Leadership and the Reichsführer SS, dated October 1938, concerning the patrol service of the Hitler Youth, which was submitted to Your Honors as Document 2396-PS; however, no inference can be drawn therefrom, for patrol service in the Hitler Youth was merely an institution designed to check up on and supervise the discipline of Hitler Youth members when they appeared in public. It was, therefore, a kind of organization police which was employed by the Hitler Youth movement entirely within its own ranks.

In order, however, to guard against difficulties with the regular Police, an arrangement with the Reichsführer SS Himmler was necessary because as chief of the whole police organization in Germany he might have made trouble for the institution of the HJ patrol service. This was the only object of the agreement of October 1938, which in reality had just as little to do with providing recruits for the SS as with the conduct and preparation of war. Moreover, it can clearly be seen how resolutely Schirach strove against any influence on the part of the Party over the Hitler Youth from the fact that in 1938 he protested very sharply against having the education of the Hitler Youth during their last 2 years from 16 to 18 taken over by the SA. He emphatically opposed this plan and through personal intervention with Hitler prevented the Führer decree in question from being applied in practice.

As for his attitude toward the SS, we know from the testimony of the witness Gustav Hoepken, who was heard here on 28 May 1946, and from the affidavit of the witness Maria Hoepken, Schirach Document Book Number 3, that Schirach always feared he was being shadowed and spied upon by the SS in Vienna. He always had an uncomfortable feeling because at the beginning of his activity in Vienna a permanent deputy had been appointed for him in his capacity as Reich Governor (Reichsstatthalter) and Reich Defense Commissioner in the person, of all things, of a higher SS leader, a certain Dr. Delbrügge; he was, as Schirach knew, closely associated with the Reichsführer SS who, as has been proved, proposed to Hitler in 1943 that Schirach should be imprisoned for defeatism and brought before the Peoples' Court, which meant in practice that Himmler would have had Schirach hanged. These facts alone are already proof of the real relationship between the Defendant Von Schirach and the SS, and it will be understood why Schirach finally refused even the police protection squad assigned to him and preferred to entrust his personal protection to a unit of the Wehrmacht which was not subordinate to the order of Himmler. (See affidavit of Maria Hoepken in Schirach Document Book Number 3.)

Another accusation which has been made against the Defendant Von Schirach concerns his attitude in the Church question. This attitude corresponds to the impression given by the present proceedings, and while this issue is not given any prominence in the Indictment, it is nevertheless of considerable importance as far as the appreciation of Schirach's personality is concerned.

Schirach himself, as well as his wife, always remained members of the Church. To the foreign critic this circumstance may perhaps appear an unimportant detail, but we Germans know what pressure was exerted upon

high-ranking Party officials in these very matters, and how few in his position ventured to resist such pressure. Schirach was one of those few. He was the one high-ranking Party Leader who constantly and invariably punished with extreme severity any hostile interference and outrages against the Church on the part of the Hitler Youth. He has also been reproached for the fact that various songs were sung by the Hitler Youth which contained offensive remarks about religious institutions, but in this respect Schirach could with a clear conscience confirm on his oath that partly he was unaware of those songs, which is quite conceivable where an organization of 7 or 8 million members is involved; on the other hand, certain songs now considered objectionable date back to the Middle Ages and figured in the song book of the Wandervogel, a former youth organization which the Prosecution surely does not propose to condemn. Schirach has however especially pointed out that during the years 1933 to 1936 several million youths from an entirely different spiritual environment joined the Hitler Youth and that during the first revolutionary years, that is, in the period of storm and stress of the Movement, it was quite impossible to hear of and prevent all lapses of this sort. Whenever Schirach did hear of such things he intervened and remedied abuses of that kind, which after all represented offenses on the part of isolated elements incapable of compromising the youth organization as a whole.

It is Schirach's conviction that the examination of evidence leaves no doubt as to his conciliatory behavior in the matter of the Church, and that he strove to establish proper relations of mutual respect between the Church on the one hand and the Third Reich, and more especially the Reich Youth Leadership, on the other hand, and to observe their respective rights and competences. At his own request Schirach was permitted by the Reich Minister of the Interior to take part in conducting the Concordat negotiations with the Catholic Church in 1934, because he hoped to achieve an agreement with the Catholic Church more easily by his personal co-operation. He honestly endeavored to find a formula for the settlement of the youth question by which agreement with the Catholic Church could be possible. His moderation and good will in this respect were frankly acknowledged by the representative of the Catholic Church at that time. But everything was ultimately frustrated by Hitler's opposition and the complications created for these negotiations by the events of 30 June 1934, the so-called Röhm Putsch.

With the Protestant Church, on the other hand, Schirach achieved an agreement with the Reich Bishop, Dr. Müller, so that the incorporation of the Protestant youth groups into the Hitler Youth was not attained by

constraint but by mutual agreement, not by breaking up these associations by the State or the Party, as the Prosecution assumes, but upon the initiative of the Protestant ecclesiastical head and in complete agreement with him. It must be pointed out here that it was always Schirach's policy that no restrictions were to be imposed on church services by the Youth Leadership, neither then nor later. On the contrary, as he himself has testified and as was confirmed by the witness Lauterbacher, Schirach emphatically stated in 1937 that he would leave it to the churches to educate the younger generation according to the spirit of their faith, and at the same time he ordered that, as a principle, no Hitler Youth service was to be scheduled on Sundays during the time of church services. He gave strict orders to the unit leaders of the Hitler Youth not to schedule duties which might disturb church services. If, however, in individual cases such interference did occur and some religious authorities lodged complaints as the cross-examination revealed, then the Defendant Schirach cannot be blamed for this, nor does it alter the fact that he had every good intention.

During the Trial not a single case could be proved in which he stirred up feeling against the Church or made antireligious statements; on the contrary, at numerous rallies as submitted to the Tribunal in the Schirach document book, he not only repeatedly opposed the allegation that the Hitler Youth were enemies of the Church or atheists, but he always positively impressed upon the leaders and members of the Hitler Youth the necessity of fulfilling their obligation toward God; he would not tolerate anyone in the Hitler Youth who did not believe in God; every true teacher, he told them, must imbue youth with religious feeling, since it was the basis of all educational activities; Hitler Youth service and religious convictions could very well be associated with each other and exist side by side; no Hitler Youth leader was to engender conflicts of conscience whatsoever in his boys. Leave of absence was to be granted to Hitler Youth members for religious services, rites, *et cetera*. Such was Von Schirach's point of view.

Whoever gives such instructions to his subleaders, and continues to do so over and over again, can demand that he should not be judged an enemy of the Church and an enemy of religious life. Incidentally, it is interesting in this connection to note what such a reliable judge as Nevile Henderson wrote in his oft-quoted book *Failure of a Mission* about a speech which he heard Schirach deliver at the 1937 Reich Party Rally, parts of which have been submitted in Schirach's document book. Henderson, who as Ambassador in Berlin knew German conditions intimately, evidently expected that Baldur Schirach would speak against the Church at the Reich Party Rally and would influence the young people in the spirit of enmity to

the Church, as was often done by other leaders of the Party. Henderson writes, and I quote two sentences:

> "That day, however, it was Von Schirach's speech which ... impressed me most, although it was quite short.... One part of this speech surprised me when, addressing the boys, he said, 'I do not know if you are Protestants or Catholics, but that you believe in God, that I do know.'"

And Henderson added:

> "I had been under the impression that all references to religion were discouraged among the Hitler Youth, and this seemed to me to refute that imputation."

What Schirach really thought with regard to religion, and in what sense he influenced youth, is indicated not only by a statement he made on the occasion of a speech before the teachers of the Adolf Hitler Schools at Sonthofen, to the effect that Christ was the greatest leader in the history of the world, but likewise by the small book, submitted to you in evidence, entitled, *Christmas Gift of the War Welfare Service*. This book, which was sent out in large numbers, was dedicated by Schirach to the front-line soldiers who joined from the ranks of the Hitler Youth movement in 1944, at a time when radicalism in all spheres of German life could hardly become more pronounced.

Here also Schirach was an exception: You will find no swastika, no picture of Hitler, no SA song in the book of Reichsleiter Von Schirach, but among other things a distinctly Christian poem from Schirach's own pen, then a picture of a Madonna, and next to it a reproduction of a painting by Van Gogh who, as is generally known, was strictly banned in the Third Reich. Instead of inflammatory words, we find an exhortation to a Christian way of thinking and the "Wessobrunner Gebet," familiar as the earliest Christian prayer in the German language. Bormann stormed when he saw the pamphlet, but Schirach remained firm and refused to withdraw the little book or alter it in any way.

The Defendant Von Schirach has been charged with having once undertaken a hostile act against the Church, and with having thereby taken part in the persecution of the Church. From a letter by Minister Lammers of 14 March 1941 (Document R-146), it appears that Schirach had proposed to keep confiscated property at the disposal of the Gaue, and not to hand it over to the Reich, but this case is no justification at all for connecting the Defendant Von Schirach in some way or other with the persecution of the

Church. The case mentioned by the Prosecution does not concern church property at all, but confiscated property of a Prince Schwarzenberg in his Vienna palace. This affair therefore never had anything to do with the Church. This is also confirmed unequivocally by Minister Lammers' letter of 14 March 1941 (R-146), which mentions only, I quote, "a confiscation of the property (of persons) hostile to the people and the State," whereas Bormann's far-reaching personal intention becomes apparent and betrays his hostile attitude toward the Church when he writes about "church properties (monastic possessions, and so forth)" in his accompanying letter of 20 March 1941 referring to this case. Moreover, the confiscation of Prince Schwarzenberg's property was not caused, pronounced, or carried out by Schirach. Schirach had nothing to do with the confiscation as such; Schirach, however, in agreement with the other Gauleiter of the Austrian NSDAP, and at their request, personally applied to Hitler and asked that such confiscated property should not be taken to the Reich and not be used on behalf of the Reich, but that it should remain in Vienna. This suggestion met with approval. Hitler complied with his request, the result of Schirach's efforts being that, when the confiscation was rescinded later on, the property could be returned to the legitimate owner, whereas it would otherwise have been lost by him. By acting thus, Schirach no doubt rendered a service to the Gau of Vienna and to the owner of the property seized. This instance surely cannot be construed as a charge against the Defendant Von Schirach; on the contrary, it speaks in his favor just as the other case where, disregarding Bormann, he intervened on behalf of Austrian nuns and as a result brought about, by a direct order from Hitler, the discontinuance from one day to the other of the whole project of confiscating church and monastic property in the whole Reich.

If the Prosecution further undertakes to charge the Defendant Von Schirach with the fact that the Vienna authorities subordinate to him proposed to establish an Adolf Hitler School in the monastery of Klosterneuburg in 1941, I must point out that even prior to the requisitioning of this monastery, and entirely independently of Schirach, the Vienna police and several Vienna courts had uncovered a considerable number of criminal offenses in this monastery, furthermore that the confiscation of part of the monastery seemed entirely justified to the Defendant Von Schirach, since the very spacious rooms of this religious establishment were not required for monastery purposes.

It should also be noted that the monastery, as can be seen from documents submitted, did not file any protest with the Reich Minister of the Interior against the decision to confiscate, and thereby recognized the

confiscation as legal, although it had been expressly informed in the confiscation decree of the possibility of lodging a complaint. Moreover, the confiscated quarters were afterward not used for the establishment of an Adolf Hitler School, but for the Museum of Historical Art (thus not for a Party establishment), which again testifies to the fact that the confiscation decree had in no way been issued because of a hostile attitude on the part of Schirach toward the Church. Had it been Schirach's object to attack the monastery because it was an ecclesiastical institution, he would have included in the confiscation the rooms used for religious ceremonies. These, however, he strictly excluded.

Moreover, when appraising this case, attention should be paid to the fact that the justification of the confiscation decree of 22 February 1941 displays remarkable reticence. The decree restricts itself to justifying the confiscation by the fact that on the one hand Vienna badly needed room and that on the other hand the premises confiscated were not required for the purposes of the monastery. Not a single word mentions or even suggests that criminal offenses had taken place in the monastery, as recorded in a police report of 23 January 1941, which is submitted to the Court. If this confiscation had been the result of a hostile attitude of Schirach toward the Church, we could have been sure that somehow or other reference would have been made to these criminal offenses to justify the confiscation. At Schirach's wish a monthly indemnification was paid to the clergy who had occupied some of the confiscated rooms, for which payment there existed no official obligation whatever.

Defendant Von Schirach's further behavior does not reveal any hostile attitude toward the Church, particularly if one considers, when judging this behavior, that during these years even a Reichsleiter was under strong pressure by the Reich Chancellery and by Bormann, and that at that time a considerable amount of courage was necessary to resist this pressure and carry on a policy in opposition to the official Berlin policy.

The witness Wieshofer of Vienna, who had the opportunity of watching Schirach's activities, confirmed before the Court that in Vienna Schirach likewise strove to establish correct relations with the Church, that he was always willing to listen to any complaints of the Cardinal of Vienna and took severe measures against the excesses of individual members of the Hitler Youth or Hitler Youth leaders. In Vienna he thus displayed a policy toward the Church quite different from that which his radical predecessor Bürckel had favored, and it is beyond doubt that ecclesiastical circles in Vienna and the whole of the Viennese population appreciated Schirach's attitude toward the Church. This is also confirmed by the witness Gustav Hoepken who was

examined here and who, by order of Schirach, held regular conferences with a Vienna theologian, Professor Ens, in order to be able to inform the Defendant Schirach of the wishes of the Church and the differences which had arisen with ecclesiastical authorities. Unless he wished to expose himself to the most serious danger, Schirach could do no more under the prevailing political circumstances, which are described in the affidavit of Maria Hoepken, Document Book Schirach Number 3.

I now turn to another point of the Indictment, to the question of the concentration camps. The Prosecution has connected the defendant with concentration camps, although not in the Indictment but during the presentation of evidence; and the witness Alois Höllriegel, who was questioned here, was asked in the witness box whether Schirach had ever been inside the Mauthausen Concentration Camp. To this I should like to remark that the Defendant Von Schirach mentioned his visit to Mauthausen at his interrogation by the American Prosecution before the beginning of the Trial; it would, therefore, not have been necessary to have this visit confirmed again by the witness Höllriegel. He visited the Mauthausen Concentration Camp in the year 1942, not in 1944, as the witness Marsalek erroneously stated; the correct year, 1942, has been confirmed by the witness Höllriegel and also by the witnesses Hoepken and Wieshofer, from whom we heard that neither after 1942 nor at any other time did Schirach visit other concentration camps. The visit to Mauthausen in 1942 cannot implicate the defendant Schirach in the sense of his having known, approved, and supported all the conditions and atrocities in concentration camps. In 1942 he saw nothing in Mauthausen which might have indicated such crimes. There were no gas chambers and the like in 1942. At that time mass executions did not take place at Mauthausen. The statements of the Defendant Von Schirach concerning his impression of this camp appear quite plausible, because the testimony of numerous witnesses who have been heard during the course of this Trial has confirmed again and again that on the occasion of such official visits, which had been announced previously, everything was carefully prepared in order to show to the visitors only that which need not fear the light of day. Maltreatment and torture were concealed during such official visits in the same manner as arbitrary executions or cruel experiments. This was the case at Mauthausen in 1942 and certainly also at Dachau in 1935, where Schirach and the other visitors were shown only orderly conditions, which at a superficial glance appeared to be better than in some ordinary prisons.

As a result, Schirach only knew that since 1933 there were several concentration camps in Germany where, as far as he knew, incorrigible

habitual criminals and political prisoners were confined. However, even today Schirach is unable to believe that the mere knowledge of the existence of concentration camps is in itself a punishable crime, since he at no time did anything whatsoever to promote concentration camps, never expressed his approval of this institution, never sent anybody to a concentration camp, and would in any case never have been able to make any changes in this institution or to prevent the existence of concentration camps. Schirach's influence was always too small for that. As Reich Youth Leader, of course, he had nothing to do with concentration camps in the first place, and it was lucky for Schirach that in his entire Vienna Gau district there was not a single concentration camp. His relations with concentration camps were therefore limited to repeated attempts to have people released from them, and it is after all significant that his sole visit to the Concentration Camp Mauthausen resulted in his exerting his influence to obtain the ultimate release of inhabitants of Vienna who were imprisoned there.

May it please the Tribunal, I do not want to go again into many details which have played a larger or smaller part in the presentation of evidence for the case of Schirach. In the interest of saving time I shall not deal more specifically with his alleged connection with Rosenberg or Streicher, nor with his alleged collaboration in the slave labor program, in which connection not even the slightest participation of the Defendant Schirach could be proved, nor with a telephone conversation which has been used by the Prosecution and which allegedly took place between one of the Viennese officials and an SS Standartenführer regarding the compulsory labor of the Jews, about which Von Schirach knew nothing at all.

But I should like to insert a short remark about one subject which arose particularly in connection with the case of Rosenberg, that is, a brief explanation concerning the Hay Action by which thousands of children in the Eastern combat zone were collected and brought partly to Poland and partly to Germany. The apparent aim of this operation, as far as Schirach could see from the documents presented here, was to collect children who were in the zone of operations, that is, immediately behind the front and wandering around without their parents, with a view to giving them professional training and work so that they should be saved from physical and moral neglect.

The Defendant Von Schirach doubts whether this can be looked upon as a crime against humanity, or as a war crime; but one thing is certain, that the Defendant Von Schirach did not know anything of that affair at the time. He was not the competent authority. That entire affair was handled by Army Group Center in collaboration with the Ministry for the Eastern Occupied

Territories, and, of course, it is quite plausible that neither the Eastern Ministry nor the Army Group Center saw fit to approach the Gauleiter of Vienna in order to get his approval of that action, or even to notify him about it.

The only thing which, a considerable time later, came to the attention of the Defendant Von Schirach and may have some bearing on that, the Hay Action, was an incidental report by Reich Youth Leader Axmann that so and so many thousand youths had been brought to the Junkers works at Dessau as apprentices.

The Defendant Von Schirach was anxious to clear up this matter in view of his former office as Reich Youth Leader, and he wishes to make it quite clear that even after leaving that office he would of course never have undertaken anything against the interests of youth.

May I add another remark here concerning the letter which the Defendant Von Schirach sent to Reichsleiter Bormann after the murder of Heydrich, in which he suggested reprisal measures to Bormann in the form of a terror attack upon an English center of culture? That letter was actually sent by the defendant to Bormann. He acknowledges it. I have to point out at the very beginning that fortunately the suggestion remained a suggestion, and it was never carried out. The defendant, however, has told us that at that time he was very upset by the assassination of Heydrich, and it was clear to him that a revolt of the population in Bohemia would necessarily lead to a catastrophe for the German armies in Russia, and in his capacity as Gauleiter of Vienna he had considered it his duty to undertake something to protect the rear of the German army fighting in Russia. And that explains that teletype to Bormann in 1942 (Document 3877) which, as I have already pointed out, fortunately was not acted upon.

May it please the Tribunal, I shall proceed with my statement, the middle of Page 26.

I shall not deal in detail with the Adolf Hitler Schools which were founded by Schirach, nor with the Fifth Column which was somehow, quite wrongly, connected with the Hitler Youth, although nothing definite could be charged to the defendant. I shall not go into either the repeated efforts on behalf of peace undertaken by the Defendant Schirach and his friend Dr. Colin Ross, nor shall I discuss the merits of the defendant with reference to the evacuation of children to the rural areas, which took millions of children from bomb-endangered districts during the war into more quiet zones and thus saved their lives and health.

The Defendant Von Schirach has already talked about all these affairs in detail himself, and I should therefore like to refer to his own statements,

which you will consider in your judgment.

As counsel for the Defendant Von Schirach, I shall discuss only one more problem here, namely Schirach's opinion and attitude concerning the Jewish question. Schirach has admitted here on the witness stand that he has been a convinced National Socialist, and thus also an anti-Semite from his earliest youth. He has also made clear to us what he understood by anti-Semitism during those years. He thought of the exclusion of the Jews from civil service and of the limitation of Jewish influence in cultural life and perhaps also in economic life, to a certain extent. But that was all which in his opinion should be undertaken against the Jews, and this was in accordance with the suggestion which he had already made as leader of the students' organization for the introduction of a quota system for students. The defendant's decree concerning the treatment of Jewish youth is, for example, also important in establishing his attitude (Schirach Document Number 136). This is a decree in which he expressly orders that Jewish youth organizations should have the right and the opportunity to practice freely within the limitations imposed upon them. It says that they were not to be disturbed in their own life.

> "In its youth the Jewish community shall already today take up that secluded but internally unrestrained special position which at some future time the entire Jewish community will be given in the German State and in German economy."

Those are the very words of that decree. Obviously Schirach was not at all thinking about pogroms, bloody persecutions of the Jews, and the like; rather did he believe at that time that the anti-Semitic movement had already achieved its aim by the anti-Jewish legislative measures of the years 1933-34, thereby eliminating Jewish influence as far as it seemed unhealthy to him. He was therefore surprised and very alarmed when the Nuremberg Laws were promulgated in 1935, which formulated a policy of complete exclusion of the Jewish population and carried it out with barbaric severity. Schirach in no way took part in the planning of these laws; he has nothing whatsoever to do with their content and their formulation. That has been proved here.

When on 10 November 1938 he heard about the pogrom against the Jews and about the brutal excesses which were staged by Goebbels and his fanatic clique his indignation became known throughout the entire youth movement. The evidence proved this also. We have heard from the witness Lauterbacher how Schirach reacted to the report of these excesses: He immediately called his assistants together and gave them the strictest orders

that the Hitler Youth must be kept out of such actions under all circumstances. He at once had the leaders of the Hitler Youth in all German cities notified by telephone to the same effect and warned every subordinate that he would hold him personally responsible if any excesses should occur in the Hitler Youth.

But even after November 1938 Schirach never considered the possibility that Hitler was contemplating the extermination of the Jews. On the contrary, he only heard it mentioned that the Jews were to be evacuated from Germany into other states, that they should be transported to Poland and settled there, at worst in ghettos, but more probably in a closed settlement area. When Schirach in July 1940 received Hitler's order to take over the Gau of Vienna, Hitler himself also talked to him along the same lines, namely, that he, Hitler, would have the Jews brought from Vienna into the Government General; and even today Schirach has no doubt that Hitler himself was not thinking about the so-called "final solution" of the Jewish question at that time, 1940, in terms of the extermination of the Jews. We learn from the Hossbach minutes and other evidence of this Trial that Hitler was planning the evacuation of Poland already in 1937, but that he decided on the extermination of the Jewish people only in 1941 or 1942.

Schirach had nothing at all to do with the evacuation of the Jews from Vienna, as is alleged by the Prosecution; the execution of this measure was exclusively in the hands of the Reich Security Main Office and the Vienna branch of that office, and it is known that SS Gruppenführer Brunner of Vienna has in the meantime been sentenced to death for that very reason. The only order which Schirach received and carried out concerning the Viennese Jews was to report to Hitler in 1940 how many Jews there were still left in Vienna, and he made this report in a letter of December 1940 where he gave the figure of the Viennese Jews for 1940 as 60,000. It will be remembered that Minister Lammers answered this letter from the Defendant Schirach by a letter dated 3 December 1940 (1950-PS), which shows with all clarity that it was not Schirach who ordered the evacuation of the Viennese Jews to the Government General but Hitler himself, and that again it was not Schirach who carried out this measure but the Reichsführer SS Himmler, who delegated this task to his Vienna office. It must therefore be stated here categorically that Schirach is in no way responsible for the deportation of the Jews from Vienna; he did not carry out this program and he did not initiate it; when he came to Vienna in the summer of 1940 as Gauleiter, the majority of the Viennese Jews had already voluntarily emigrated or had been forcibly evacuated from Vienna, a fact which was confirmed by the Defendant Seyss-Inquart. The remaining 60,000 Jews who

were still there at the beginning of Schirach's time in Vienna were deported from there by the SS without his participation and without his responsibility.

Schirach did make the well-known speech in Vienna in September 1942, where he stated that every Jew working in Europe was a danger to European culture. Schirach furthermore said in this speech that if it was desired to reproach him with the fact that he had deported tens of thousands of Jews into the Eastern ghetto from this city, which had once been the metropolis of Judaism, he would but answer that he considered this an active contribution to European culture. That is how this passage reads. Schirach has openly and courageously admitted that he actually expressed himself in this manner at that time, and expressed his regret by stating:

> "I cannot take back this wicked statement; I must take the responsibility for it. I spoke these words, which I sincerely regret."

Should the Tribunal see in these words a legally punishable crime against humanity, Schirach will have to make atonement for this single anti-Semitic remark which can be attributed to him, though it was merely a spoken word and did not have any harmful result. Schirach's attitude in this respect does not exempt the Tribunal from its duty to verify carefully what Schirach actually did; furthermore, under what circumstances he made this isolated remark, and finally whether Schirach also made any other spiteful remarks against the Jews or committed any malicious acts against the Jewish race as a whole.

The foremost question is: What did Schirach really do? The reply to this, emerging from the revelations of this Trial, can only be: Apart from the fact that he made this isolated anti-Semitic remark in his speech in Vienna in September 1942, he has not committed any crime against the Jews. He had no competence in the question of the deportation of the Vienna Jews, he did not participate in it at all, and having too little power he could not have prevented it in any case. It is just as the Prosecution incidentally stated: He boastfully attributed to himself an action which in reality he had never committed and, in view of his entire attitude, he never could have committed.

What, however prompted Schirach to make this remark in his Vienna speech? How did he come to attribute to himself a deed and charge himself with an action which he had obviously never committed? Here too the answer is given by the results of the evidence in the Trial: It demonstrates what a very difficult position Schirach had in Vienna. Without giving any reason, Hitler dismissed him as Reich Youth Leader, presumably because he no longer trusted him. From year to year Hitler's fear was growing lest the

young people might stand behind Schirach and become alienated from him, Hitler, to the same degree that the black wall of his SS was isolating him from the people. Hitler possibly saw in his Youth Leader the personification of the coming generation which thought in world-wide terms, whose feelings were human and who felt themselves more and more bound to those precepts of true morality which Hitler had long ago jettisoned for himself and his national leadership, because they had long since ceased to be concepts of true morality for him but mere slogans of a meaningless propaganda. This feeling of Hitler's may have been the deeper reason why he dismissed Schirach as Youth Leader suddenly in the summer of 1940, without word of explanation, and put him in the especially difficult position of Gauleiter in Vienna, the city which he, Hitler, hated from the bottom of his heart, even while he spoke of his "Austrian fatherland."

In Vienna Schirach's position was extremely complicated. Wherever he went he was shadowed and spied upon, his administrative activity there was sharply criticized, he was reproached for neglecting the interests of the Party in Vienna, for almost never being seen at Party meetings, and for not making any political speeches. I refer in this connection to the affidavit of Maria Hoepken, Schirach Document Book Number 3. The Berlin Party Chancellery accepted any complaints the Vienna Party members made about their new Gauleiter with satisfaction, and this fact alone can explain the unfortunate speech Schirach made in September 1942, which was diametrically opposed to the attitude he had always maintained concerning the Jewish question. After the interrogation of the witness Gustav Hoepken here in this courtroom there can be no doubt as to how the Vienna speech came about, for it reveals that Schirach had expressly charged his press officer Günther Kaufmann to emphasize this particular point when telephoning his report of the Vienna speech to the German News Agency in Berlin, because he, Schirach—I quote—"had to make a concession to Bormann in this respect." Schirach himself stressed this point in the course of his interrogation with the statement that out of false loyalty he had morally identified himself with these acts of Hitler and Himmler. This ugly speech which Schirach made in September 1942 is, however, in another sense a very valuable point in favor of Schirach: He speaks of a "transfer of the Jews to the ghettos of the East." Had Schirach known at that time that the Viennese Jews were to be sent away in order to be murdered in an extermination camp, he would in view of the purpose of this speech doubtless not have spoken of an Eastern ghetto to which the Jews had been sent, and would have reported the extermination of the Viennese Jews; but even at this time, in the autumn of 1942, he never had the slightest suspicion

that Hitler proposed to murder the Jews. That he would never have approved and never accepted; his anti-Semitism at no time went so far.

Schirach also frankly stated here that at that time he approved of Hitler's plan to settle the Jews in Poland, not because he was inspired by anti-Semitism or hatred of the Jews, but by the reasonable consideration that in view of existing conditions it was in the Jews' own interest to leave Vienna and be taken to Poland, because the Jews would not in the long run have been able to stay in Vienna under the Hitler regime without being exposed to increasingly serious persecution. As Schirach declared on 24 May 1946, considering Goebbels' temperament it always seemed possible that incidents like those of November 1938 might be repeated from one day to the other, and under such conditions of legal insecurity he could not visualize the existence of the Jewish population in Germany. He thought that the Jews would be safer in a restricted settlement area of the Government General than in Germany and Austria, where they were exposed to the whims of the Propaganda Minister who, indeed, had been the main supporter of radical anti-Semitism in Germany. Schirach was well aware of this fact. He could not shut his eyes to the realization that the drive against the Jews in Germany obviously became more drastic, more fanatic, and more violent every day. This conception of the Vienna speech of September 1942 and the true cause of its genesis coincide with the statements of the Defendant Schirach at the meeting of the city councillors of Vienna on 6 June 1942 (Document Number 3886-PS), to the effect that in the late summer and autumn of that year all Jews would be expelled from the city, and likewise with the file note of Reichsleiter Bormann of 2 October 1940 (USSR-142), according to which, at a social meeting at Hitler's home, Schirach had remarked that he still had more than 50,000 Jews left in Vienna which the Governor General of Poland must take over from him. This remark was caused by Schirach's embarrassing situation at that time. Hitler, on the one hand, kept insisting on the expulsion of the Jews from Vienna, while on the other hand Governor General Frank was reluctant to receive them in the Government General. This disagreement was evidently the reason for Schirach's discussing this fact at the above-mentioned meeting on 2 October 1940, in order to avoid renewed reproaches by Hitler. Personally he was in no way interested in the removal of the Viennese Jews, as was proved by the testimony of the witness Gustav Hoepken regarding the conference between Schirach and Himmler in November 1943.

I should like to add a word here concerning that discussion. During that conference with Himmler, Schirach presented the point of view that the Jews might be left in Vienna, especially since they were wearing the Star of David

anyway. That has been testified to by the witness Hoepken as being a statement made by Schirach during the conversation. However, Hitler demanded the expulsion of the Jews from Vienna and Himmler insisted on having it carried out.

The Prosecution thought it possible to charge Schirach with having made another malicious anti-Semitic remark in connection with a speech which he supposedly made in late December 1938, certainly before the spring of 1939, at a students' meeting at Heidelberg. Across the Neckar River he pointed to the old university town of Heidelberg where several burned-out synagogues were the silent witnesses to the anti-Semitic activities of the students of Heidelberg. I refer to the affidavit of Ziemer, in which "the stout little Reich Student Leader"—as it is stated literally—is said to have approved and commended the pogroms of 9 November 1938 as a heroic act. This charge, as already mentioned, is supported by the declaration under oath of a certain Gregor Ziemer. However, there can be no doubt that this statement of Ziemer's is false. Ziemer never belonged to the German student movement or the Hitler Youth, and obviously was not personally present at the student assembly in question. The affidavit does not state from what source he is supposed to have obtained his knowledge. However, that his claim is false is already proved by his description of physical appearance when he speaks of a "stout little student leader"; for this does not at all resemble Schirach. Perhaps it would to some extent apply to his successor, who was Reich Student Leader at the end of 1938, but it certainly was not Schirach. As is known, he had already in 1934 given the office of Reich Student Leader back into the hands of the Führer's deputy, after he himself had in the meantime been appointed Reich Youth Leader. Schirach did not make a speech at the end of 1938 or at any other time before Heidelberg students, and by the affidavit of the witness Maria Hoepken (Schirach Document Book Number 3) it has been clearly proved that at the time stated Schirach was not in Heidelberg at all. Schirach has also confirmed this under oath and his own statement can lay claim to credibility because he has not whitewashed anything for which he was responsible, and he has not falsely denied anything, but on the contrary has accounted for all his actions with courage and truthfulness during his entire examination.

Still another fact decisively confirms the claim that the Ziemer affidavit is untrue, at any rate in regard to the person of Schirach. In the presentation of evidence it happened to be stated by chance how Schirach reacted to the November pogroms of the year 1938. The witness Lauterbacher has informed us here, as already mentioned at another point, that Schirach on 10

November 1938 condemned most vehemently the events of 9 November 1938 in the presence of his co-workers, and declared that he felt ashamed for the others and for the whole Party. The 9th of November 1938, Schirach said, would go down in Germany history as a unique disgrace of German culture of which we would never be able to cleanse ourselves. Such a thing might have happened among an uncivilized people, but it should never have occurred among us Germans who consider ourselves to be a highly civilized people. The youth leaders, Schirach explained at that time, had to prevent such excesses under all circumstances. He did not wish to hear anything like this about his own organization, either now or in the future. The Hitler Youth must be kept outside such things under all circumstances. These are sworn statements by the witness Hoepken. By a telephone message from Berlin, Schirach had all the offices of the Hitler Youth informed in the same terms. If Schirach in November 1938 condemned and criticized in such an extremely sharp manner the events of 9 November 1938, it is impossible for him to have praised at about the same time the bloody acts which had been committed and thus to have incited the Heidelberg students, and the question therefore arises as to why not a single participant at that student meeting in Heidelberg was brought here as a witness instead of one who could only testify from hearsay. Incidentally, the Prosecution did not revert to this alleged Heidelberg speech during cross-examination, thereby acknowledging Schirach's own presentation of the facts to be correct.

It is also a very significant fact that the Hitler Youth did not participate in the excesses of 9 November 1938, nor did they commit any excesses of this sort either before or afterward. The Hitler Youth at that time was the strongest Party organization. It comprised some seven or eight million members, and in spite of that not one single case has been proved where the Hitler Youth participated in such crimes against humanity, although its members were mainly of an age which, according to experience, is only too easily tempted to participate in excesses and acts of brutality. The only exception which has been claimed so far concerns the testimony of the French woman Ida Vasseau, who is said to be the manager of an Old People's Home in Lemberg and is supposed to have claimed, according to the report of the Commission, Document Number USSR-6, that the Hitler Youth had been given children from the ghetto in Lemberg whom they used as living targets for their shooting practice. This single exception, however, which so far has been claimed but not proved, could not be cleared up in any way, particularly not in respect of whether members of the Hitler Youth had really been involved. But even if there had been such a single case among the eight million members during 10 or 15 long years, this could not in any

way prove that Baldur von Schirach had exercised an inciting influence, and that, if I may add this here, at a time when he was no longer Reich Youth Leader.

THE PRESIDENT: We will adjourn now.

[*A recess was taken.*]

DR. SAUTER: If the Tribunal please, I shall proceed from Page 36 of my statement. Let us just examine all the speeches and articles which Von Schirach wrote as Reich Youth Leader, and which are in the possession of the Tribunal in the Schirach document book. They extend over a long period of years, yet they do not contain a single word inciting to race hatred, preaching hatred of Jews, exhorting youth to commit acts of violence, or defending such acts. If it has been possible to keep the members of the Hitler Youth, who numbered millions, clear of such excesses, this fact also goes to prove that the leaders endeavored to imbue the younger generation with a spirit of tolerance, love of one's neighbors, and respect of human dignity.

Just what Von Schirach thought about the treatment of the Jewish question is clearly evident from the scene with occurred in the spring of 1943 at Obersalzberg, which is also described in the affidavit of the witness Maria Hoepken (Document Book Schirach Number 3). In this case I refer to the scene where Schirach had an eyewitness describe to Hitler at his home at Obersalzberg how he had witnessed with his own eyes at night from a hotel window in Amsterdam the manner in which the Gestapo deported hundreds of Dutch Jewesses. Schirach himself could not dare at the time to bring such matters to Hitler's attention; a decree by Bormann had expressly prohibited the Gauleiter from doing this. Schirach therefore tried through the mediation of a third person, who had been a witness himself, to gain Hitler's approval of a mitigation in the treatment of the Jewish question. No success was achieved; Hitler dismissed it all bluntly with the remark that this was all sentimentality. Because of this intervention on behalf of the Dutch Jews the situation of the Defendant Von Schirach had become so critical that he preferred to leave Obersalzberg immediately, early in the morning of the following day, and from that time on, Hitler was in principle no longer accessible to Schirach.

This intervention of Schirach for a milder treatment of the Jewish question perhaps also contributed to the fact that Hitler, a few months later, in the summer of 1943, seriously considered having Schirach arrested and brought before the Peoples' Court, for the sole reason that Schirach had

dared, in a letter to Reichsleiter Bormann, to describe the war as a national disaster for Germany.

In any case all this shows that Schirach, as much as he was able, advocated moderation in the Jewish question in a manner which endangered his own position and existence. In spite of the fact that he was an anti-Semite—and just because of this it deserves attention—he withstood all pressure from Berlin and refused to have an anti-Semitic special edition published in the official journal of the Hitler Youth, while he had published his own special editions for an understanding with England and France and for a more humane treatment of the Eastern nations. It is no less worthy of consideration that Schirach, in conjunction with his friend Dr. Colin Ross, endeavored to attain the emigration of the Jews into neutral foreign countries in order to save them from being deported to a Polish ghetto.

The Prosecution has endeavored to substantiate its allegation that the Defendant Von Schirach bears a certain share of the responsibility for the pogroms against Jews which occurred in Poland and Russia, by trying to use against him the so-called "Reports on Experiences and Situation," which were regularly sent by the SS to the Commissioner for Defense of the Reich in the Military Administrative District XVII. In fact it must be said that if—and I emphasize, if—Schirach had at that time had cognizance of these regular "Reports on Experiences and Situation by the Operational Groups (Einsatzgruppen) of the Security Police and the Security Service in the East," then this fact would indeed constitute for him a grave moral and political charge. Then he could not be spared the accusation that he must have been aware of the fact that, apart from the military operations in the East, extremely horrible mass murders of Communists and Jews had also taken place. The picture of Von Schirach's character which we have so far, who was described even by the Prosecution as a "cultured man," would be tainted very materially if Von Schirach had actually seen and read these reports. For then he would have known that in Latvia and Lithuania, in White Ruthenia and in Kiev, mass murders had taken place, quite obviously without any legal proceedings of any kind and without sentence having been passed.

What has, however, actually been proved by the evidence? The reports referred to were sent, among dozens of other offices, also to that of the "Reich Commissioner for Defense in Military Administrative District XVII" and, moreover, with the specific address "attention of Government Councillor Dr. Hoffmann" or "attention of Government Councillor Dr. Fischer." From this style of address and from the way in which these reports were initialed at the office of the "Commissioner for Defense of the Reich,"

it can be established beyond question that Schirach did not have an opportunity of seeing these reports and that he obtained no knowledge of them in any other way either.

Schirach, it will be remembered, held three extensive offices in Vienna: as Reich Governor (Reichsstatthalter) and Reich Defense Commissioner he was the chief of the whole State administration; as Lord Mayor he was the head of the municipal administration; and as Gauleiter of Vienna he was the head of the local Party machinery. It is only natural that Schirach could not fulfill all these three tasks by himself, especially since in 1940 he had come from a completely different set of tasks, and first had to make himself acquainted with the scope of work in State administration and in municipal administration. He therefore had a permanent deputy for each of his three tasks, and for the affairs of the State administration, which interests us here, this was the Regierungspräsident of Vienna. This official, Dr. Delbrügge, was to handle the current affairs of the State administration completely on his own initiative. Schirach occupied himself only with such matters of State administration as were forwarded to him by his permanent deputy, the Regierungspräsident, in written form, or about which his deputy reported to him orally.

Now, if this had been the case with regard to the afore-mentioned "Experience and Situation Reports," then this would have somehow been noted on the documents in question. However, on the "Experience and Situation Reports of the SS" submitted here there is not a single note which indicates that these reports were shown to the Defendant Von Schirach or that he was informed about them. This will readily be understood without further explanation because, after all, the experiences which the Police and the SD had accumulated in the partisan struggles in Poland and Russia were completely inconsequential for the Vienna administration; therefore there was not the least cause to inform the Defendant Baldur von Schirach of these reports in any way, since he was very much overburdened anyhow with administrative matters of all kinds.

This conclusion, Gentlemen, rests primarily not only on the testimony under oath of the defendant here in Court, but also on that of the two witnesses Hoepken and Wieshofer, who, one as chief of the Central Office and the other as adjutant of the defendant, were able to give the most exact information about conditions in Vienna. It is certain that these "Experience and Situation Reports" never came into the distribution center of the Central Office in Vienna, but only into the distribution center of the Regierungspräsident, and that Hoepken, as chief of the Central Office, as well as Wieshofer, as adjutant of the defendant, likewise had no previous

knowledge of these reports but saw them for the first time here in the courtroom during their questioning. And I would like to insert here that the two officials of the Defendant Von Schirach who were mentioned by name, Dr. Fischer and the other one, were entirely unaware of them. In any case the result, as has been proved by the file notes which are on the documents, is that Schirach did not have any knowledge whatsoever of these reports, and that he is not coresponsible for the atrocities described therein, and therefore cannot be criminally charged on the basis of these activity reports.

May it please the Tribunal, in judging the personality of Schirach, his behavior during the last weeks in Vienna is also not without importance. For Schirach it was a matter of course not to carry out the various insane orders which came from Berlin at that time. He absolutely condemned the lynching of enemy aviators which was ordered by Bormann, and likewise the order to hang defeatists without mercy, regardless of whether they were men or women. His summary court was never even in session, and did not pronounce a single death sentence. No blood is on his hands. On the other hand, for example, he did everything in order to protect from the excited mob enemy aviators who had made an emergency landing and again, as we have heard from the witness Wieshofer, he immediately sent out his own car in order to bring to safety American aviators who had parachuted. Thereby he again placed himself in deliberate opposition to an order of Bormann that such aviators were not to be protected against lynching by the civilian population. Nor did he pay any attention to the order that Vienna was to be defended to the last man, or that in Vienna bridges and churches and residential sections were to be destroyed, and he emphatically refused compliance with the order to form partisan units in civilian clothing or to continue the hopeless struggle in a criminal manner with the aid of the Werewolf organization. He turned down such demands out of his sense of duty, all the more since this would have caused him to violate international law.

The characterization of the Defendant Von Schirach would be incomplete if we were not also to recall at this moment the declaration which he deposed here on the morning of 24 May 1946. I am speaking of that declaration in which he described Hitler as an unmitigated murderer, here before the whole German people and before the entire world public. Already last year Schirach made declarations which show his feeling of responsibility and his preparedness to answer fully for his actions and those of his subordinates. This was the case on 5 June 1945, for example, when he was hiding in the Tyrol and heard over the radio that all Party leaders were to be brought before an Allied court. Schirach thereupon gave himself up

immediately, and in his letter to the American local commander stated he was doing so in order to protect other people, who had only executed his orders, from being called to account for his actions. He surrendered voluntarily, although the British radio had already announced the news of his death, and although Schirach could have hoped to remain undiscovered in his hiding place. This behavior deserves consideration in judging the personality of a defendant.

The same feeling of responsibility was then shown by Schirach in the autumn of 1945 when he was heard by the Prosecution. He believed at that time that his successor Axmann had been killed, as he had been reported to be dead. In spite of this, Schirach did not attempt to put the responsibility on his successor; on the contrary, he expressly stated that he was assuming full responsibility also for the time his successor was in office, as well as for what had been done under his successor in the Reich Youth Leadership. The keystone in this line of conduct is furnished by the statement which Schirach made here on 24 May 1946, which went out from this courtroom to the whole world, to all the German lands, down to the last farm, down to the last workman's hut.

May it please the Tribunal: Any man may err, he may even make mistakes that he later may not understand himself. Schirach also has erred; he brought up the younger generation for a man whom he for many years held to be unimpeachable and whom he must now brand as a diabolical criminal. In his idealism and out of loyalty he remained faithful and true to his oath to a man who deceived and cheated him and the youth of Germany and who, as we learned here from Speer, up to his last breath placed his own interests higher than the existence and the happiness of 80 million people.

Schirach is perhaps the one defendant who not only clearly realized his mistakes, however they may be regarded, but who confessed to them most honestly and who through his plain speaking prevented the creation of a Hitler legend in the future. Such a defendant must be given consideration for trying to repair as far as he can the damage which he caused in good faith.

Schirach had tried to do that; he took pains to open the eyes of our people about the "Führer" in whom, together with millions of Germans, he saw for many years the deliverer of the fatherland and the guarantor of its future. He publicly rendered an account which the German people are entitled to ask of every subleader since Hitler committed suicide. He did this so that foreign countries could see how the conditions of the last six years had come about in Germany and just who was responsible for them.

But above all, the former Youth Leader, in making his statement on 24 May 1946, desired to tell the youth of Germany openly that so far, quite

unknowingly and with the best of intentions, he had led them astray and that now they must take another path if the German people and German culture are not to perish. In doing so Schirach did not think of himself nor of his life's work which had been destroyed; he was thinking of the youth of today, which not only faces the ruins of our cities and dwellings, but also wanders about among the wreckage of its former ideals; he was thinking of German youth, which is in dire need of new guidance and which must base its future existence on another foundation.

Schirach hopes that the entire youth of Germany has heard his words. What was particularly valuable in his confession of 24 May 1946 was his assurance that he alone takes the guilt for youth, just as he formerly assumed command. If this point of view is acknowledged as being right, and if the necessary conclusions are drawn therefrom, this would be a valuable result of this Trial for our German youth.

May it please the Tribunal, I am now coming to the end of my survey of the case of Von Schirach. In the treatment of this case I desisted from making general statements, and especially those of a political nature. Rather, I confined myself to the appreciation of the personality of the defendant, his actions and his motives.

In this connection I should like to add, to complete the picture, that these considerations and this appreciation by the Defense have shown that the Defendant Von Schirach is not guilty in the sense of the Indictment and cannot be punished, for he did not commit a punishable act, since you as judges will not judge political guilt but rather criminal guilt in the sense of the penal code.

At the end of my remarks in the case of Von Schirach I should like to have the privilege of making a few general statements, not immediately connected with the personality of Schirach, but suggesting themselves to a German defense counsel at the end of this Trial.

May it please the Tribunal, you are the highest tribunal of our times; the power of the whole world stands behind you; you represent the four mightiest nations on earth; hundreds of millions of men, not only in the defeated countries, but also in the victorious nations listen to your opinions and anxiously await your judgment, ready to be taught by you and to follow your advice.

This high authority affords you, Gentlemen, an opportunity of doing much good through your verdict and particularly through the statement of the basis for the judgment, in order that out of today's disaster the way to a better future may be found for the benefit of your own people and for the good of the German people.

Today, Gentlemen of the Tribunal, Germany lies beaten to the ground, a poor people, the poorest of all. The German cities are destroyed; German industry is smashed to pieces; on the shoulders of the German people rests a national debt representing many times the entire national wealth and spelling want and poverty, hunger and slavery, for many generations for the German people if your peoples do not help us. The findings supporting your verdict will in many respects point the way and give the help needed to emerge from this desperate plight.

To be sure, for reasons of sentiment it may be hard for you to consider this point of view and to take it into account when you think of the misfortune which the past six years also brought to your own countries. It becomes doubly hard, because for months this Trial has revealed nothing but crimes, crimes committed for a great number of years by a German tyrant misusing Germans and the name of this same German people of whose future you as judges are now asked to think benevolently and whom you are now required to help.

May it please the Tribunal: Hitler is dead—with him his tools who in these years committed crimes without number tyrannizing Germany and nearly all of Europe and disgracing the German name for generations to come. The German people on the other hand live, and must be allowed to live if half a universe is not to fall into ruins.

With this Trial and during this epoch, the German people are undergoing a very serious operation. It must not bring death; it must bring recovery. Your verdict can and must make a contribution in that direction, so that in the future the world may not see in every German a criminal, but revert again to the concept of Professor Arnold Nash of the University of Chicago, who a few days ago, when questioned about the purpose of his present trip to Europe, replied: "Every scientist has two fatherlands, his own and Germany." These words ought to be a warning also for all of those irresponsible critics who even today see it as their task, with propaganda means of every sort, to stir up feeling against everything German and to tell the world that at least every other person in Germany is a criminal.

You, as impartial judges, will not wish to forget one thing: There always was and there still is today another Germany, a Germany that knows industriousness and economy; a Germany of Goethe and Beethoven, a Germany that knows loyalty and honesty and other good qualities which in past centuries were proverbial for the German character. Believe me, Gentlemen of the Tribunal, in this epoch, when Germany is regaining consciousness as after a severe illness, as she proceeds to rebuild a better future from the ruins of an evil past, a future for her youth which has no part

in the crimes committed, at this time some 70 or 80 million German people are looking to you and are awaiting from you a verdict which will open the way for the reconstruction of German economy, the German spirit, and true freedom.

You are, Gentlemen, truly sovereign judges, not bound by any written law, not bound to any paragraph, pledged to serve your conscience only, and called by destiny to give to the world simultaneously a legal order which will preserve for future generations that peace which the past was unable to preserve for them. A well-known democrat of the old Germany, the former Minister Dr. Diltz, said in a recent article on the Nuremberg Trial: In a monarchist state justice would be administered in the name of the king; in republics courts would pronounce their rulings in the name of the people; but you, the Nuremberg Tribunal, should administer justice in the name of humanity.

It is, indeed, a wonderful thought for the Court, an ideal aim, if it could believe that its verdict could in fact make real the precepts of humanity, and that it could prevent Crimes against Humanity for all time. But in certain respects this would still remain an unsteady foundation for a verdict of such magnitude as confronts you, because ideas on what humanity demands or prohibits in individual cases may vary, depending upon the epoch, the people, the party concepts according to which one judges.

I believe you may find a reliable foundation for your verdict when you revert to a maxim which has endured throughout the centuries and which certainly will remain valid in ages to come: *Justitia est fundamentum regnorum*.

Thus the German people, and with them the entire world, await from you a judgment which will not just be hailed today by the victor nations as the final victory over Germany, but which history will recognize as proper; a verdict in the name of justice.

THE PRESIDENT: I call on Dr. Servatius for the Defendant Sauckel.

DR. SERVATIUS: Mr. President, may it please the Tribunal:

The Defense of the Defendant Sauckel has, in the first place, to deal with the charge of "slave labor." What is slave labor?

One cannot accept this as an established term comprising all the occurrences which, in bewildering abundance, are charged against the Defendant Sauckel under the heading "slave labor." Particularly, those actions ought first to be examined from a legal point of view. The legal basis for this examination is the Charter. However, this Charter does not say what is to be understood by "slave labor" or by "deportation." Therefore, these

concepts must be clarified by interpretation. Article 6 of the Charter deals in two passages and from two different points of view with deportation and slave labor. Deportation is designated both a war crime and a crime against humanity, and forced labor appears as "slave labor" under the heading of War Crimes, and as "enslavement" under the heading of Crimes against Humanity.

The question of under what heading the mobilization of labor by the Defendant Sauckel should fall is of decisive importance; if it is a war crime, then it should be judged exclusively under martial law. If it is a crime against humanity, then the latter presupposes the commission of a war crime or of a crime against peace.

It follows therefrom that the deportation mentioned in Article 6(b) cannot be the same thing as deportation according to Article 6(c), nor can forced labor according to Article 6(b) be identical with forced labor under Article 6(c). The difference between the two kinds must be found in ...

THE PRESIDENT [*Interposing*]: That paragraph of your speech which is in English on Page 2, the second paragraph:

"It follows therefrom that deportation mentioned in Article 6(b) cannot be the same as deportation according to Article 6(c) ..." is not altogether clear to the Tribunal. Could you make it clearer?

DR. SERVATIUS: In Article 6(c) we deal with Crimes against Humanity, whereas in Article 6(b) we deal with War Crimes. In both articles the expressions deportation and forced labor are used, but there must be some differentiation, and my examination is directed at establishing this difference more exactly. I believe, Mr. President, that my further statements will make this clearer than it has heretofore been.

I turn now to the terminology used in the Charter. I was talking of the difference between the two kinds of slave labor and deportation. The difference between the two kinds is to be found in the fact that something has to be added to the war crimes which violates the rules of humanity.

The correctness of this interpretation may also be recognized in the terminology of the Charter, however fluctuating it may be. For instance, the Russian text for deportation as a war crime chooses the word *uvod*, which means only removal from a place, whereas, on the other hand, it uses for crimes against humanity of the same nature the technical expression *ssylka*, by which penal deportation under the rule of the czars is understood as denoting deportation in the sense of penal deportation.

THE PRESIDENT: The French is not coming through. Will you just wait a minute, there is some difficulty with the French translation, Dr.

Servatius. The Tribunal must adjourn.

MARSHAL: The Court will remain adjourned until a quarter to two.

[*The Tribunal recessed until 1345 hours*.]

DR. SERVATIUS: I was speaking of the terminology of "deportation" in the Russian text. I pointed out the distinction between the word *uvod* meaning only transportation, and *ssylka* meaning a deportation as a form of punishment. From that one may conclude that deportation from the occupied territories for the purpose of work can only be regarded as a war crime, while it becomes a crime against humanity when assuming the penal character of a transportation of prisoners.

However, the question arises whether, beyond this, according to the Charter any removal of the population is punishable as a war crime, regardless of whether it occurs for allocation of labor or for other reasons. According to the text of the Charter, the latter seems at first sight to be the case, since it renders punishable "removal for slave labor, or for any other purposes." Upon closer examination, however, it becomes evident that this rule cannot be meant in such a sense, as there are cases in which a removal is not only consistent with international law but even becomes imperative.

Accordingly, the Charter could only be understood to mean that the punishable act does not consist of plain "removal" but comprises the composite concept "removal for slave labor" and "removal for any other purpose." The clause, "or for any other purpose," should be understood so as to mean only that an illegal purpose equivalent to slave labor exists. If removal of any kind was to have been made punishable, then the qualifying addition "for slave labor or for any other purpose" would be contradictory to common sense. This definition is important for the Defendant Sauckel, as otherwise proof of deportation classified as a war crime would be evident from the acts admitted by him.

Just as for the various kinds of deportation, the difference between the kinds of slave labor, according to the Charter, must be clarified. Here, too, a clue to the interpretation is provided by the terminology of the different languages, though not because of their clarity and consistency but by the very opposite:

The English version speaks of "slave labor" as a war crime and of "enslavement" as a crime against humanity; the French version states *travaux forcés* and *réduction en esclavage*, the Russian version accordingly *rabstvo* (slavery) and *poraboshtshenie* (enslavement). It is not discernible how the terms chosen differentiate *in re*. Basing upon the fact that labor inconsistent with laws of humanity must be carried out under more severe conditions than other labor and assuming "slave labor" to be the severest

forms of labor, it will be seen that no definition can be derived from this terminology of the Charter and that more of an ethical discrimination and stigmatization is intended.

Accordingly an objective division of the kinds of labor should be carried out independent of the terminology by considering exclusively the degree of severity of labor conditions. If one tries to analyze the terminology used, one finds the designation "enslavement," *esclavage*, and *poraboshtshenie* for the inhuman form of labor, whereas the labor not inconsistent with laws of humanity is called "forced labor," *travaux forcés*, and *prinudidjenaja rabota*. Slave labor ("slave labor," *travaux forcés*, and *rabstvo*) consequently is the general term comprising both kinds.

What does this definition mean for the defense of the Defendant Sauckel? He admits having negotiated "compulsory labor" in the form of obligatory labor which, as stated before, has been termed "slave labor" in general. He denies, however, having demanded "slave labor," which might be looked upon as inhuman labor, in other words, enslavement. A different standard applies, just as for deportation, to these two categories; "obligatory labor" is only a war crime and must be judged according to the rules of war; crimes against humanity, as I already stated above in connection with deportation as a crime against humanity, bear the additional characteristics of being connected with war crimes or crimes against peace. If it can be proven that the mobilization of manpower as ordered by the Defendant Sauckel was permitted by the rules of war, then the same act cannot be held to be a crime against humanity.

The Indictment, too, has made a difference as to the kinds of labor. It has treated, under Paragraph 3, Section VIII (H), as a separate war crime under the title of "Conscription of Civilian Labor," the mobilization of manpower as directed by the Defendant Sauckel, which I shall call "regulated labor mobilization," and mentions only "forced labor." The French version speaks here of *travaux forcés* and uses terms such as *les obligèrent à travailler* and *mis en obligation*; the Russian version follows this and also speaks only of "compulsory labor" as *prinuditjelnaja rabota* but does not refer to this as being slave labor.

The Defendant Sauckel does not deny the facts taken here as a basis, but I shall submit the legal reasons which justify this mobilization of labor, and I shall prove that it does not involve any war crime that would break international law.

The rules of international law are authoritative in determining the question whether "regulated labor mobilization" is a war crime. The Charter cannot prohibit what international law permits in wartime. Such precepts of

international law are laid down in the agreements on the rules of war and in the general legal principles and usages as applied by all states.

The Prosecution bases its opinion that labor mobilization is a war crime on the definitions of the Hague Convention on Land Warfare, as well as on the agreements and rules of war and the criminal codes of the countries concerned. If it is shown that labor mobilization is permitted by international law, then a judicial inquiry into the penal regulations is, of course, not necessary.

The Hague Convention on Land Warfare can be considered as a basis for the laws of warfare with which we are concerned here. Whether it was recognized by all the states involved here is, from a practical point of view, of little importance, for inasmuch as it was not recognized or cannot be directly applied, it is a case of a shortcoming in international law which is filled as a matter of course according to the principles of the belligerent's needs and his duty to respect the laws of humanity. The principles of international law as established in the Hague Convention on Land Warfare are in all cases an important guide.

The Prosecution quotes, in the first place, Article 46 of the Hague Convention on Land Warfare, which is designed to safeguard the fundamental rights of the population. It is typical for labor mobilization that it does restrict liberty, whereas this particular basic right is not protected by this article.

If the Hague Convention on Land Warfare is examined for a definite rule concerning deportation and forced labor, it will be realized that no such regulation exists. Just as in the sphere of air warfare and the use of new weapons, the Hague Convention on Land Warfare could not deal with questions which, at the time of its drafting, were far from the mind of the contracting parties. The first World War was still fought between two armies with already prepared material, and after it was used up the fight would be ended. The idea of a long war consuming huge amounts of material and requiring a continuous production with all available labor was for the Hague Convention on Land Warfare not yet a problem ripe for discussion.

Article 52 of the Hague Convention on Land Warfare, which deals with the right to requisition, touches on the matter; but it can be seen that the rules deal only with purely local requirements of an army which appears fully equipped and has only supplementary local requirements. It is characteristic for the purely local meaning that the requisitioning authority is entrusted to the local commanders, in contrast to Article 51 of the Hague Convention on Land Warfare which permits only an independent commanding general to impose compulsory contributions. The literature

about the right to requisition in international law accordingly quotes only examples of local significance.

Although Article 52 of the Hague Convention on Land Warfare can accordingly not be directly applied, its basic principles are nevertheless binding on the belligerents. The basic idea is that an army can demand practically everything necessary for the satisfaction of its requirements. There are only two limitations: It may not take more than it needs and not more than is compatible with the resources of the country.

The idea of a local obligation to furnish services will have to be adapted to modern warfare. The Hague Convention on Land Warfare envisaged the employment of smiths and wheelwrights necessary for the maintenance of the equipment of the army; work within the home country of the occupying power was, in view of undeveloped transportation conditions, impracticable and remained unconsidered.

Today the necessary work will no longer be done in the vicinity of the front-lines but must be carried out in the belligerents' own countries, so that it must be possible to demand that labor should be available at the only place where it can be done and where it is necessary. It must also be possible to demand such labor for modern war requirements of mass production for current replacements. What is necessary at any given time can be asked for, the amount depending on prevailing conditions. If in earlier times, according to the principle "the war feeds the war," an army far removed from its homeland was even to a large extent equipped in occupied territory, it must surely be possible today to supply the army by moving the workers to the factories in the belligerent's own country. The evolution of the laws of warfare is influenced by the requirements which these laws have to serve.

With the basic idea of the obligation to furnish services the basic idea on limitations will have to be accepted, too. These limitations must also be interpreted to apply to the changed conditions. While the obligation to furnish services is justified, no more work may be demanded than the occupying power requires of its own people at home. The intensity of the war as total war must be taken into consideration. The obligation to work may thereby assume considerable proportions.

The meaning and the purpose of the Hague Convention on Land Warfare is certainly not to place the nationals of a defeated state in a better position than those of the victorious state which occupied the country. This, however, would be the result if the Hague Convention on Land Warfare were interpreted according to its original wording. If this is maintained, then France, which had surrendered unconditionally together with all the other occupied countries, would have been able to look on in security while

Germany, strangled by the blockade, was exhausting herself in an indefatigable struggle by sacrifices of life and property. Can one really demand that the prisoner in a besieged fortress should live more comfortably than the defender of the fortress? If Germany today could live according to the romantic concepts of the Hague Convention on Land Warfare, this would certainly be preferable to the burden of the peace treaty to be expected.

Actually, the Hague Convention on Land Warfare has not been adhered to even in its original interpretation, if it is true that already before the conclusion of the armistice the Soviet Union as occupying power transferred the population on a large scale from the eastern parts of Germany for the purpose of performing labor outside Germany. The Tribunal could obtain official information about this through an inquiry with the Control Council. I also have information that German civilian internees are used for work in France today. Here too the Tribunal could obtain official information.

The second limitation of the obligation to work is embodied in the rule that no participation in war operations against the home country of the worker may be demanded. Any work done for the occupying power indirectly benefits its war effort; the prohibition is therefore restricted to direct participation in operations of the fighting force. The literature on international law contrasts the participation in military operations with the permissible participation in preparations. Participation in war operations in this sense was not asked of any worker; on the contrary, the purpose was to employ workers away from these operations and without disturbance by the war.

Consequently only such activity as is directed against the workers' own country is forbidden, thus taking the feelings of the individual into consideration. No protection of the enemy state is thereby intended. Wherever, therefore, the individual renounces his country and in a struggle of ideologies opposes the government of his country, such a restriction no longer applies. In connection with this I wish to point to the vast number of foreigners who adopted such an attitude and who, in part, still live in Germany today.

The same applies when the state to which the worker belongs has ceased fighting. This question is of special importance with regard to the obligation to work in the armament industry. The rules of the Geneva Convention with regard to the work to be done by prisoners of war are known. The basic notion, that no one may be forced to make weapons against his own brothers, must apply to civilian workers also.

The fact, however, that one's country is no longer in a legal state of war is one of the reasons that nullify this restriction. The need for protection also

ceases to exist when a country, though legally still participating in war, to all intents and purposes no longer possesses any fighting forces and has thus ceased to exist as a military object of attack. The fact, that this country may have allies who fight for it cannot arbitrarily extend this limitation beyond the terms of the Geneva Convention; nor is it the duty of a subject of a given state to protect allies fighting for it and to participate in the policies of his government.

Puppet governments cannot change reality. Recognition cannot be granted to them unless they reappear as independent combatants under a command of their own and are recognized as such. This applies to all states defeated by Germany.

At the time of the mobilization of labor only Britain, the United States, and the Soviet Union were active combatants against Germany. British and American subjects were not affected by this mobilization, although citizens of the Soviet Union were in part used in armament production.

The legal position of citizens of the Soviet Union is however fundamentally different. Under Document Number EC-338, USSR-356, the Prosecution has submitted a decree by the People's Commissars dated 1 July 1941. This decree deals with the utilization of prisoners of war for labor purposes; but it also, however, refers to the employment of interned civilians. According to the wording, armament production is not forbidden for either category of workers; and only two limitations are specified in the decree, namely, work in the combat zone and services required of an orderly.

Thus, from the point of view of reciprocity, no objection can be raised against the employment of Soviet citizens in armament production. In his examination before the Tribunal the witness General Paulus stated that prisoners of war were employed in factories of the Soviet Union, which means that in a state with a directed economy they were employed during the war in the armament industry. According to the decree it must be assumed then that these workers were also employed in the production of weapons.

The significance of such a violation of the principle that armament production shall be forbidden lies in the serious consequence that no formation of a generally recognized rule of international law in this new field of utilization of manpower can thereby be proven. Under these circumstances therefore Germany was likewise free to employ workers of the Soviet Union and workers of all other states in armament production.

The Hague Convention on Land Warfare thus does not forbid the regulated utilization of manpower, but there are also further international aspects permitting such a utilization of manpower. The assent of the

government of the occupied state is of primary consideration. This assent was given by France. The objection that Marshal Pétain's Government was not a constitutional government is invalid, for it was the legitimate successor to the provisional armistice Government. That it represented the French State with foreign governments is of decisive consideration in international relations. This authority of representation was confirmed by the United States by its keeping an ambassador in Vichy even after its own entry into the war. Great Britain also negotiated the terms of an armistice with a general of the Vichy Government in Syria in 1941.

This Government once recognized could not be deprived of its legality by the simple declaration of an oppositional government, even though the latter might have been recognized by the Allies. A government loses its international position only if it is forced to transfer its actual power to the oppositional government. Up to that moment it retains authority within its sphere of influence.

The other objection that the Government of Marshal Pétain was not free to act as it wished and that consequently agreements with Germany in the field of utilization of manpower were reached by coercive measures and are therefore invalid, is not justified from the point of view of international law. Armistice and peace treaties are always concluded under great pressure. That this does not curtail the validity of such treaties is an obvious point of international law. This has constantly been emphasized when refusing German demands for a revision of the Treaty of Versailles.

Agreements which are reached in periods between the armistice and the peace treaty are subject to the same conditions. This also applies to the agreement with France with respect to the utilization of manpower. Thus, if —contrary to the statement of the Defendant Sauckel—negotiations about the utilization of manpower were conducted in the form of an ultimatum, there could from the point of view of international law still be no reason for an objection. Besides, Sauckel's influence surely cannot have been so great that he could have exerted an excessive amount of pressure.

The validity of such agreements is open to doubt only under very special conditions, such as would mean that excessive obligations were to be assumed which obviously violate principles of humanity; for instance, if the agreements contain a clause stating that work must be performed under slave-like conditions.

The motive for these agreements was, however, to offer, especially to the French workers, favorable working conditions and salaries for their obligatory labor in Germany, thus to attract the workers.

Military reasons too can command the evacuation of an occupied territory by part of the population and thereby cause a displacement of manpower. This may happen when the population participates in partisan warfare or is active in resistance groups and thus endangers security instead of behaving obediently and peacefully. It even suffices for the population in the so-called partisan territories to be drawn upon even against its will for the support of the partisans. That such conditions were organized by Germany's enemies as combat measures in an increasing degree, first in the East and later in the West, is today looked upon as a patriotic achievement. In view of this one must not forget that the resulting displacement of workers was precisely the consequence of their activities and that such action was permitted by international law. Evacuation had to be carried out in the interest of security, and assignment of labor elsewhere was necessary if only to maintain order. It is the privilege of the occupying power to utilize this labor within a regulated state economy in the manner deemed most appropriate under the prevailing conditions. Similar measures might also be imposed in areas of retreat after it had been ascertained that the male population illegally took part in hostilities during the retreat, as it had been called upon to do by the enemy, sometimes even being supplied with weapons.

Evacuation measures for the security of combat troops are equally permissible under international law. To engage persons evacuated from the combat zone in new work is not only legal but is actually the duty of the occupation administration. The state which calls upon its subjects to fight and thereby intensifies combat, bears the guilt for such evacuation. The necessary retaliatory measures therefore must be legal.

Whenever such evacuations become necessary, they must be carried out without undue suffering for the population. For this preparatory measures, which alone can avoid unnecessary hardships, are necessary. That is the duty of administration as laid down in Article 43 of the Hague Convention on Land Warfare. Thereto appertain the proposals made by Sauckel for the evacuation of territories of retreat in France in the event of invasion (Document 1289-PS). These proposals did not materialize and cannot therefore incriminate the Defendant Sauckel.

This administrative duty may also call for a displacement of labor in order to avoid unemployment and famine. This, for example, occurred when the industrial areas of the Soviet Union were occupied, where there were no more working possibilities after the population became unemployed following the scorched earth policy adopted by the Soviet Union, and supplies failed to arrive because of transport difficulties.

These military and administrative points of view of international law can invalidate a number of reproaches; but they do not answer the basic question, namely, whether the enlistment of workers is also permitted outside the Hague Convention on Land Warfare for the very purpose of intensified labor to enable the state to carry on the war through increase of production and to allow it to release its own workers for service at the front.

A purely military emergency would provide no excuse for disregarding international law. Victory jeopardized must not be sought by breaking the law when in distress, because the laws of warfare are intended to govern that very combat, which is of necessity connected with distress. International law inclines differently where it is a case of a measure to be taken to safeguard the existence of the state. That is a law of self-preservation which every state is entitled to because higher institutions are lacking which could protect it from destruction.

It has repeatedly been stressed by all concerned that in this war our existence was at stake. This became evident for Germany after the fatal battles on the Eastern Front in the winter 1941-42. Whereas up to that time no wholesale employment of foreign labor had been necessary, new equipment now had to be produced immediately. The German labor reserves, were depleted due to the drafting of 2 million workers for service at the front. The employment of unskilled women and young people could not immediately relieve the situation. During the later stages of the war, especially through aerial warfare, armament demands increased to such an extent that, in spite of the increased employment of women and young people, the level could no longer be maintained. The means were exhausted.

The official figures which the Defendant Sauckel made public in his speech in Posen in February 1943 (see Document 1739-PS) proved that already in 1939, at the beginning of the second World War, more than twice as many women were being employed than at the end of the first World War and that their number at the end of the second World War had increased by another 2 million to a total of over 10 million. This figure exceeds the entire number of male and female workers in the armament industry at the end of the first World War. Yet in spite of that there was a shortage of labor. This has been confirmed by the witness Rohland for Codefendant Speer in Document Speer-56, according to which Speer also declared that foreign labor was needed under all circumstances.

The crux of the matter did not concern the problem of female labor, where by introducing additional home labor the limit was attained, but that of procuring specialists and men for heavy labor. Among the 10 million

German women who were at work, there were also the wives of front-line officers and others from similar classes of society.

The notion that in Britain the women were conscripted for work in a higher degree than in Germany is wrong. In Germany the women had to work up to 45 and later 50 years of age, and they actually worked in factories and did not have fake jobs of a social kind. Even schoolchildren beginning with the age of 10 were required to work, and from 16 years onward they were switched to regular labor or occupied in other services. Families were disrupted; schools and universities were closed; pupils and students worked in the armament industry, and even the wounded could not continue their studies. A grim fight was waged over every person capable of work. Speer's reserve of workers did not exist. What efforts were made in this sector is shown among others by Enclosure 2 of the Wartburg Document RF-810.

Another point of view illustrating the necessity of employing additional labor is the fact that the powers in possession of colonies brought labor from their colonies; France (see Document RF-22, Page 17), for instance, took in about 50,000 workers from North Africa and Indo-China, which were under the command and supervision of officers and noncommissioned officers. Since Germany, having been refused colonies and on account of the blockade, was unable to draw upon such reserves, she was entitled to some means, in her fight for existence, of procuring labor where it could be found inactive in occupied territories.

This is in outline the basis, with regard to international law, for judging the regulated mobilization of labor as a war crime. One may, with regard to certain points, differ in opinion; and it will generally be found that in international law a uniform interpretation will not be readily arrived at. The interests of individual members in the community of international law play an important part and are not always identical; legal principles are often not recognized because some state does not wish to place itself officially in contradiction with its former actions, or because it prefers to remain unbound for the future.

As counsel for the Defense, I am in a position to present my interpretation of law without such inhibitions. The significance of my statement for the Defense, apart from the objective side, lies in the fact that the Defendant Sauckel, subjectively, was for good reasons entitled to believe in the lawfulness of a regulated mobilization of labor and that to him his actions were not discernible as being in contradiction with international law. This was supported by the impression which the Defendant Sauckel could not but gain of the permissibility of a regulated mobilization of labor, as

shown by the attitude of other superior offices. When Sauckel entered upon his office, foreign workers had already been enlisted by individual action; and he could take it for granted that the State would equally proceed in a legal manner. None of the highest offices has ever raised legal objections before Sauckel. These offices, both the competent Foreign Office and the highest civil and military offices in the occupied territories, accepted his orders as a matter of course; and no questions of doubt on international law were raised.

For the opinion of the Defendant Sauckel the attitude of the foreign agencies concerned was necessarily of special importance, notably the consent of the French and the Belgians, who came to Berlin personally for discussions. From this resulted the good co-operation with the local authorities in the occupied territories, as was the case before enemy propaganda intervened.

Whether cognizance of breaking a law is indispensable when committing a crime against international law may be a moot point; but to establish guilt leading to a conviction, cognizance of the realization of all the criminal facts is essential. This includes cognizance of the fact that the action performed was contrary to international law. The subjective aspect of the facts, involving criminal guilt of the Defendant Sauckel, cannot be proved in respect to application of the regulated mobilization of labor. It would be impossible to commit the Defendant Sauckel for yet another legal reason, even if the regulated mobilization of manpower really were a violation of international law. According to the Hague Convention on Land Warfare, no individual responsibility exists. The Hague Convention on Land Warfare differentiates between two kinds of war crimes; those which can be committed by an individual, such as murder and ill-treatment, and those which can be committed only by parties in a war. The regulated utilization of manpower is a proceeding which can only be initiated by the state. While the individual action is punished according to the penal code of the different states, a special regulation was laid down for offenses committed by parties in a war in Article 3 of the introductory agreement to the Hague Convention on Land Warfare. This specifies only a liability for damages on the part of the state. This passage of the Hague Convention on Land Warfare still applies today, since it cannot be rescinded by agreement among the Allies alone. The Charter, which specifies the immediate criminal responsibility of the state organs or its executors, is void insofar as it is contradictory to the Hague Convention on Land Warfare.

I do not have to refer to the fact that Germany, as one of the parties to the agreement, would have had to agree to the suspension of Article 3; there

are other reasons which speak for a continuation of this stipulation. A modification of the Hague Convention on Land Warfare in the sense of the Charter might have resulted from the law of usage or general custom due to changing legal conceptions. The presupposition for this assumption would be, however, that the contracting powers relinquish their sovereignty, since only then would the punishment of the state organs be possible. However, such a renunciation of the rights of sovereignty has not, as far as I am aware, taken place to such an extent as would generally render such punishment permissible. With regard to this point, I refer to the general statements made by Professor Jahrreiss before the Tribunal.

I shall now deal with the utilization of manpower as a crime against humanity. If a regulated utilization of manpower appears permissible according to international law, there remains the problem of the method of its execution, namely, the question of up to what point this utilization of manpower can still be regarded as in order and when it will exceed the permissible limit.

The Charter fails to define the concept of humanity. As far as international law is concerned, the term can only be transposed from the practice of the nations. In endeavoring to establish the limit for actions permissible under international law, we must, for the sake of comparison, mention the bombing of large cities and the use of the atomic bomb, as well as deportations and evacuations as still in progress today. These are all incidents which have occurred before the eyes of the world and were regarded as permissible by the executing countries.

Once again we are confronted with the conception of necessity and find that it is being interpreted in a very flexible manner. This should be kept in mind when examining the mobilization of labor as to any violation of the principle of humanity involved. Its aim is not the sudden killing of hundreds of thousands; however, it naturally entails hardships and is certainly also subject to mistakes which arise unintentionally or are due to the shortcoming of individuals. An answer will be required to the question of whether deliberate killing does not always weigh heavier than the temporary infliction of other sufferings. Also, the Charter does not prescribe punishment for every violation of the principles of humanity but only when inhuman treatment occurred in the execution of, or in connection with, a crime for which the Tribunal is competent. However, the Tribunal is competent only for Crimes against Peace and for War Crimes. As for Crimes against Peace, inhuman treatment may be admissible in self-defense, while it is punishable when committed by an aggressor; or alternatively, it must be a case of a war crime.

This does not apply when compatriots are ill-treated, for they are not protected by the laws of warfare. Prosecution for an act against humanity committed toward them can only take place if a crime against peace is involved at the same time.

From an objective point of view labor commitment furthered the waging of the war which has been designated by the Prosecution as a war of aggression or as a war violating treaties. If this is established and if it is proved moreover that the mobilization of labor was carried out in an inhuman way, then the requirements of the Charter will have been met and a crime against humanity committed, regardless of whether the mobilization of labor was allowed or not allowed by the rules of war, since it was committed in connection with a crime against peace. But punishment can be inflicted only if the culprit himself knows that an unlawful war is being waged and that he is furthering it by his action. Since the Defendant Sauckel denies any such knowledge, it must be proved.

The other possibility of meeting the factual requirement occurs when the inhuman act serves to carry out a war crime or is connected with it. Of the examples given by the Charter for violation of the rules of war, the following in the main can be taken to apply to the mobilization of labor: murder, ill-treatment, and deportation of the civilian population. As shown by this enumeration, these war crimes are not, however serious they may be, in themselves crimes against humanity. Some aggravating circumstance making the act inhuman must be added. As shown by the examples of inhuman "extermination" and "enslavement," the acts in question must be objectively of particular scope or cruelty. Subjectively, however, an inhuman disposition of the culprit and the knowledge of the inhuman character of the act, that is to say, knowledge of the scope of the measure or of the cruelty of its execution, is additionally required. How far these conditions apply to the Defendant Sauckel must be investigated later on. A "regulated mobilization of labor," as allowed by international law can never in itself be a crime against humanity; but its execution may be carried out in such a way that it involves killings and ill-treatment, which for their part might be war crimes.

Such ill-treatment could result from regulations issued by the highest authority involved, who thereby would bear the responsibility. It may, however, also be committed by subordinate agencies acting on their own authority without the knowledge or intention of their superior authorities. In that case the head of the agency acting on its own accord bears the responsibility. Lastly, it may be a case of a purely individual act committed against the regulations in force. For such an act the individual is solely responsible.

It follows that the Defendant Sauckel is responsible, to begin with, only for such general orders and instructions which he has given, not however for independent acts by superior authorities in the occupied territories or by supreme Reich authorities, such as the Chief of SS and Police, which were not under his jurisdiction. The orders and directives of the Defendant Sauckel have been submitted, and they must show whether the mobilization of labor as ordered by him was in fact a regulated one or was tantamount to an "ill-treatment" of the population. Apart from the call for volunteers, mobilization of labor took place on the basis of a compulsory service decree, signed as a legal measure in accordance with Hitler's instructions by the territorial commanders. The authority to issue such laws exceeded the powers of the Defendant Sauckel, nor could he ask that any such laws be issued. He did however approve of them and made them the basis for his work. The contents of these laws were consistent with the fundamental ideas of the German laws concerning compulsory labor service. These laws were coercive. The use of coercive measures is not called for as long as the legal authority of the occupying power is acknowledged by the population; they become necessary only when such authority fails.

In this connection the Defendant Sauckel has repeatedly asked for the maintenance of executive authority by operations in partisan-infested territories for overpowering the resistance movement (Document R-124). No legal objections can be raised against the fact that to this end he demanded the use of means provided by the State. He is wrongly incriminated only by the words "SS and Police," which have been connected by the Prosecution with the conception of crime. Such an incrimination would only be justified if the criminal character of the Police had been proven and if the Defendant Sauckel at that time had had cognizance of such criminal activity.

That force may be used in case of resistance against orders of the occupation force cannot be disputed. The question is, where are the limits of force and whether or not there are legal and illegal, admissible and inadmissible, human and inhuman, measures of force.

If fundamental laws are no longer deemed to be valid when a state of siege is declared within a state, surely this will apply all the more to a power occupying another country in wartime. Anyone who refuses to carry out the orders of the occupying power knowingly participates in the fight to which he is not entitled and has to accept the consequences. Obedience is the primary duty toward the occupying power; and where patriotism and obedience are conflicting issues, the law decides against patriotism. The punishment meted out is, as such, not subject to any limitation; and the

threats of punishment by an occupation power are, for purposes of intimidation, usually extremely severe. The question is whether there exists a limit, from the standpoint of humanity, which prohibits punishment in excess of the legitimate purpose which may be considered unwarranted. Orders like the burning of houses, which were issued independently by subordinate offices in connection with the recruitment of labor, must be examined from this point of view.

This question is not easy to answer, if one bears in mind the special underlying circumstances and realizes that it was a case here of an open struggle between the occupying power and the population, with official support from the enemy. In case of uprisings and organized general resistance one cannot disclaim the applicability of the military laws as practiced by the combat troops. Necessity alone must be the decisive factor in this case. International law has put only one limit to coercive measures in forbidding, in Article 50 of the Hague Convention on Land Warfare, collective punishment of an entire population for the deeds of individuals for which the population cannot be held partially responsible. It is essential that such partial responsibility shall have been established by actual events and not construed through orders. It is not specified wherein collective punishment may consist. The limitations of humanity, as I already pointed out, must be respected, but in war this is a vague conception; necessity and practical value must always have preference.

Next to the manner of recruiting labor, the conditions of work may represent an ill-treatment which can be looked upon as a war crime. On principle, there can be no question of ill-treatment whenever the foreign workers are generally treated in the same way as the workers of the home country. Different treatment is only permissible when special circumstances justify it. Whereas generally foreign workers work on the same level as the Germans, the so-called, Eastern Workers were discriminated against. The most striking difference here was the limitation of freedom. If this had been arbitrary, that would be sufficient reason for declaring this to be ill-treatment. But the reasons for this limitation of freedom were not arbitrary; they were conditioned by the State's need for security. During wartime the presence of an enemy alien in the country always represents a danger, and it is for that very reason that originally the bringing in of foreign workers had been dispensed with. Only when necessity demanded the utilization of foreign workers did the need of security have to be taken into account simultaneously. The measures to be taken will depend upon the danger, which will vary according to the attitude of the alien. Whereas police

measures with regard to the French were almost imperceptible, the Eastern Workers were in the beginning kept under supervision in camps.

The natural interest of the state lies in attaining security by winning the aliens over inwardly because their collaboration is desired. This will never be achieved by depriving them of their freedom. As long as the attitude of the alien cannot be clearly assessed, especially if he be like the citizens of the Soviet Union, propagandistically trained, more stringent control may be necessary. However, it must not develop into permanent captivity, and should at most constitute a sort of quarantine. To deprive people without guilt of their liberty for an extended period is not admissible, because that would correspond to a forbidden collective punishment. The mere assumption of danger is not sufficient to justify such limitations; there must be certain acts which show that such foreign workers appear dangerous even under normal working conditions. The custody of Eastern Workers behind barbed wire and without permission to go out, as ordered by Himmler, must be regarded as ill-treatment if it is a permanent practice.

The Defendant Sauckel, guided by a feeling that in this matter the limits of the permissible had been overstepped, immediately took steps against this and in a tough fight against Himmler demanded and obtained the withdrawal of barbed wire and the prohibition to go out, as can be seen from the ensuing decrees, Document Number Sauckel-10, Exhibit USA-206.

Where in spite of later arrangements the old methods were still applied by the police, Sauckel always intervened whenever he heard of such occurrences. This has been confirmed repeatedly by witnesses. I refer particularly to Exhibit Sauckel-10, the statement by the witness Goetz.

Another controversial point was the identification by a badge "Ost," which was maintained until 1944 and then replaced by a national insignia. This identification of the Eastern Workers, who were free to move among the population, was necessary for security reasons. This cannot be considered ill-treatment. The distaste for this sign shown by the Eastern Workers was chiefly due to the defamation of this badge by propaganda, and the Defendant Sauckel always tried to change this insignia and to replace it by a national insignia such as the other workers wore voluntarily. He finally prevailed here also against Himmler (Document RF-810, Page 12).

Equality must also exist between a nation's own workers and foreign workers with regard to the rules concerning maintenance of discipline. With all belligerent states the war has raised the same problem as to how to deal with those workers who do not properly fulfill their work duties; that is to say, slackers, shirkers, and saboteurs. The practice of discharge, common in peacetime, is ineffective during war; on the other hand, deserters from work

cannot be tolerated today by any belligerent. In cases amounting to sabotage, police and penal measures were called for, the principal one being a short term in a labor training camp; in certain extreme cases, imprisonment in a concentration camp was inflicted. Document 1063-PS, RF-345, shows the similarity in the execution of the regulations as applied to Germans and foreigners.

Such police measures, which are caused by disloyal conduct of the worker, are justified. The Wartburg Document RF-810 shows in the report of the expert Dr. Sturm that such measures were carried out on a very moderate scale and that only 0.1 to 0.2 per thousand were thus punished.

Hence it follows that the issue of regulations concerning the maintenance of discipline is not yet in itself an ill-treatment which might form the basis for a crime against humanity. Such ill-treatment, however, can consist of excesses such as did occur outside the competence of the Defendant Sauckel. He can only be held responsible for those if he himself was subjectively to blame in that he knew of such excesses and approved of them although he might have prevented them.

In summing up one can say that the "regulated mobilization of labor" is permissible in international law and that restrictions imposed on workers within the limits of necessities must be permitted for reasons of state security. On the other hand, excesses in carrying out the regulations must be looked upon as ill-treatment and may amount to crimes against humanity. Responsibility for those rests with whoever has instigated them or who, within the sphere of his competence, failed to prevent them in the performance of his duty. When measuring the grave charges brought against the Defendant Sauckel by the standards of the aforesaid legal considerations, it will be necessary first of all to single out those fields in which the evidence reveals him to be absolutely clear of any responsibility.

In the first place, it is not proved that the Defendant Sauckel can be connected with the biological extermination of the population. His whole interest, as has been shown, pointed toward the opposite direction, since his purpose was to obtain people as laborers. He had nothing to do with migration measures and any methods used in that respect.

Work in concentration camps was just as far removed from the Defendant Sauckel's responsibility. Himmler's speech in Posen in October 1943 (Document 1919-PS, Page 21) reveals that the SS had erected gigantic armament plants of their own. We know that Himmler covered his extensive labor requirements by despotic arbitrary arrests of persons in occupied territories. Inside Germany he had workers engaged in regular employment arrested on insignificant pretexts and brought to concentration camps,

fraudulently using the regular labor offices. This is clearly shown in Document 1063-PS, containing a letter dated 17 December 1942 as well as a letter dated 25 June 1943, in which a requirement of 35,000 prisoners is signified. Moreover, no correspondence with reference to concentration camp labor ever passed through Sauckel's offices. As an example, I refer to Document 1584-PS containing some correspondence with Himmler's department. The Defendant Sauckel's name is never mentioned with reference to a conscription of prisoners, and the witnesses have unanimously stated that the Defendant Sauckel had no connection with these matters. This is also confirmed by the statement of the Director of the armament ministry's Labor Office, Schmelter, who received the prisoners required direct from Himmler.

Another field which must be eliminated is the conscription of Jews for labor. This formed a part of labor conscription of concentration camp prisoners; it was Himmler's own personal secret sphere. This is revealed for instance by Document R-91, in which Himmler's service orders the arrest of 45,000 Jews as concentration camp prisoners.

By the production of Document L-61 the Prosecution has attempted to convict Sauckel of a share of guilt in this field. This document is a letter, dated 26 November 1942, from Sauckel's office to the presidents of the provincial labor offices, stating that by agreement with the Chief of the Security Police and SD, Jewish workers remaining in the plants must be withdrawn and evacuated to Poland. As a matter of fact, this letter actually confirms that Sauckel had nothing to do with Jewish labor in the concentration camps, since Jewish workers were withdrawn from his department under the very pretext of evacuation. The measure is indeed solely concerned with the purely technical matter of excluding the Jewish laborers and replacing them by Poles, an operation which could not have been carried out without the participation of Sauckel's office.

This letter is in continuation of a correspondence which can be traced back to the period prior to Sauckel's assumption of office, and Document L-156 subsequently deals with the same technical operation. The unimportant character of the matter is attested by the fact that these letters were not sent from the Defendant Sauckel's head office in the Thüringerhaus, but from an auxiliary office in the Saarlandstrasse. The Defendant Sauckel disclaims knowledge of this correspondence and points out that the letters do not bear his original signature but were, according to the routine of his service, made out in his name just because they were of minor importance. The fact that the letters begin with the routine business term of "by agreement with," instead of "by consent of," the Chief of Police and SD does not mean that

they refer to an agreement reached, but simply points to the agency in charge of the matter.

Next, reference has been made to "extermination by labor." However, Documents 682-PS and 654-PS, dated September 1942, unmistakably show that this is a case of a secret maneuver of Himmler and Goebbels in co-operation with the Reich Minister of Justice, Thierack. The Defendant Sauckel is not involved.

Neither was the conscription of workers for the Organization Todt under Sauckel's responsibility. The accusations proceeding from Document UK-56 in this respect, bearing upon labor conscription methods in the Channel Islands, do not therefore concern him. The documents do not show that the Defendant Sauckel was aware of these proceedings or that he could have prevented them. This separation between the Defendant Sauckel's labor jurisdiction and the Organization Todt is confirmed in Document L-191, the report of the International Labor Office in Montreal.

The enlistment of labor by civil and military departments is another chapter. This was to a certain extent carried out as "pirate" mobilization and kept secret from the Defendant Sauckel, because he opposed these practices and endeavored to prevent them by all means. Occasionally he was by-passed by higher orders. In this category there is labor enlistment by the SS, the Reichsbahn, Air Force construction battalions, Speer's transport and traffic units, fortification and engineering staffs, and other services.

The exclusion of these aspects from the scope of the Indictment should exonerate Sauckel all the more since in these cases his directives did not apply.

Document 204-PS illustrates in this respect the circumstances in which transport auxiliaries were produced in White Russia. Document 334-PS shows the same with regard to the execution of an independent drive for Air Force auxiliaries, which cannot be held against Sauckel. The commitment of adolescents, known as the Hay Action, according to Document 031-PS of 14 June 1944, remained outside Sauckel's jurisdiction and activities, as becomes clear from the document itself. The 9th Army together with the Eastern Ministry were the originators.

A letter from the Codefendant Rosenberg to Reich Minister Lammers of 20 July 1944 (Document 345-PS) falsely refers to the "agreement" of the Plenipotentiary General for the Allocation of Labor; on the other hand it states that the Defendant Sauckel was not connected with an SS helper action and that he refused co-operation in this affair. According to this, as stated by Document 1137-PS of 19 October 1944, a special office in the Rosenberg Ministry with its own personnel attended to the seizure of

juveniles. The Defendant Sauckel's agency was by-passed and labor furnished directly to the armament industry.

In circumvention of the Defendant Sauckel's agency certain measures also took place which Hitler caused by direct orders to the local offices of the Armed Forces and of the civil administration; this for instance applied to the labor commitment ordered in the occupied territories for the fortification of the Crimea (Document UK-68).

The enlistment of labor in Holland, which was carried out by the Armed Forces against the protest of the labor service offices, is another of these cases; this is shown in Document 3003-PS and is confirmed by the Defendant Seyss-Inquart.

An important sector, which is beyond the Defendant Sauckel's responsibility, embraces all the actions undertaken as punitive measures against partisans and resistance groups. These are independent police measures; I already spoke about their judicial evaluation. Whether they were admissible and could be approved depends on the circumstances. For example, measures against the resistance movement in France, as described in Document UK-78 (French Government Report), cannot be included under the direct responsibility of Defendant Sauckel. Thus the most incriminating occurrences enumerated in Count 3, Paragraph VIII of the Indictment under "Deportation," which ended in concentration camps, are not within the responsibility of the Defendant Sauckel.

The deportations for political and racial reasons, which are also mentioned under VIII (B) of the Indictment, such as the deportation of French citizens to concentration camps, do not come within the responsibility of the Defendant Sauckel either. The resettlement of Slovenes and Yugoslavs described under (B) 2, must also be excluded.

According to the Indictment (under VIII, (H) 2) only part of the approximately 5 million Soviet citizens mentioned are stated to have been seized for labor commitment, the remainder being removed in other ways to which the regulations of the Defendant Sauckel did not apply. This is important not so much on account of the number of people involved, but because the alleged bad conditions might have applied in that very sector, since there the danger of improper treatment was unquestionably greater.

THE PRESIDENT: Would that be a convenient time to break off?

[*A recess was taken*.]

DR. SERVATIUS: The prisoners of war are also exempted from the field of responsibility of the Defendant Sauckel. Such labor did not have to

be enlisted but was only directed. This was done by means of special labor offices, which operated independently in connection with the prisoner-of-war camps and collaborated exclusively with the Armed Forces. Their task consisted only of employing prisoners of war where they were needed. The Defendant Sauckel could only request a transfer of prisoners of war. This is referred to in the Prosecution Document 1296-PS, of 27 July 1943, which mentions under Heading III the increase in the employment of prisoners of war in collaboration with the Army High Command.

The assignment of prisoners of war to plants took place under the supervision of the Armed Forces, who at the same time enforced observance of the Geneva Convention. Sauckel is in no way connected with the death of hundreds of thousands of prisoners of war of the Soviet Union in 1941 of whom Himmler speaks in his Posen speech (Document 1919-PS) and for whose replacement workers had to be brought in.

By Document USSR-415, the official Soviet report about the Lamsdorf Camp, the Defendant Sauckel is connected with the alleged ill-treatment of prisoners; but this is done merely because the number of personnel in the camp was reported to him as a purely routine matter. The charge cannot be maintained. The document, moreover, is not chronologically substantiated after the year 1941.

The Defendant Sauckel, although personally not competent, intervened in excess of his official duties for the care of the prisoners of war, because he had an interest in their work morale. He issued general decrees; this Document Sauckel-36 shows that he demanded an adequate standard food supply, and Document Sauckel-39 shows that he demanded the same working hours as for German workers; he also stressed the fact that no disciplinary punishment could be inflicted by the plants.

Further discrimination among the accusations raised must be made according to the time of the incidents. The Defendant Sauckel did not take over his office until 21 March 1942. His measures, therefore, could only have had effect some time later. What conditions prevailed previous to that can be seen from some documents dating from 1941. In Document 1206-PS leading authorities advocated feeding the workers on horse and cat meat, and in Document USSR-177 the production of bread of very inferior quality is suggested. Just a short time before the Defendant Sauckel took office Himmler in a sharp decree ordered the confinement of the workers behind barbed wire. It is fair to say that an extremely low level in the treatment of the foreign workers at that time in the Reich had been reached. The conception which prevailed with regard to the powers of resistance and the working capacity of the Russians is tragic.

With the advent of the Defendant Sauckel a fundamental change took place, which led to a constantly increasing improvement of the situation. The credit for having effected a change here is, according to some documents I will cite, solely due to the Defendant Sauckel. This is shown in particular by Document EC-318, which is a record, dated 15 April 1942, of the first meeting between the Defendant Sauckel and Reich Minister Seldte and his specialist staff when taking office. It is recorded there that it was the Defendant Sauckel who made his assumption of office dependent on the condition that food supplies for foreigners must equal those for Germans, and that the granting of this request was guaranteed by Hitler, Göring, the Minister for Food, Darré, and his state secretary, Backe. It is also established there that the Defendant Sauckel demanded the removal of the barbed wire, and actually succeeded in this; and finally, that he immediately took steps against the low wages of the Eastern Workers. The execution of his fundamental demands was then also immediately followed through with tenacity by the Defendant Sauckel against the resistance of all authorities.

The program of the mobilization of labor of 20 April 1942, Document 016-PS, accordingly proceeds to inveigh against all acts of cruelty and chicanery and demands that foreign workers be correctly and humanely treated; a hope is even expressed that a propaganda effect in Germany's favor ought to be achieved by the way in which labor allocation was carried out. This thought was frequently reiterated later. An economical allocation of workers was urged in order to counteract the waste indulged in by influential agencies.

A year later, on 20 April 1943, the Defendant Sauckel again addressed a declaration of the procedure to be followed to all persons concerned with labor commitment. This is the repeatedly mentioned "Manifesto of Labor Allocation," Document Number Sauckel-81, which was issued as a warning and a call to battle addressed to all agencies preparing to challenge the serious responsibility of the Defendant Sauckel. Goebbels opposed it by claiming that the title was too assuming, while the propaganda aspect went beyond the bounds of the matter. Other agencies simply disregarded the copies sent to them and did not forward them, whereupon Sauckel sent copies directly to the industries concerned. How this circular was dealt with by the various recalcitrant agencies is shown by its description as a "notorious manifesto," as it was referred to unchallenged in a session of the Central Planning Board on 1 March 1944; Document R-124, Page 1779.

The Defendant Sauckel was reproached for having been over-zealous. I refer to a remark made by General Milch (who was interrogated before the Tribunal), in which he mentions the Central Planning Board, criticizing the

allegedly too lenient treatment of loafers, and declaring that if anything was undertaken against them, agencies would immediately become interested in Germany which would protect the "poor fellow" and intercede for the human rights of others. This is Document R-124, Page 1913.

The attitude of Defendant Sauckel was generally known and has been confirmed by various documents. Thus all the agencies addressed themselves to him in case of complaints and deficiencies, not in order to make the Defendant Sauckel responsible for them, but to solicit his help, because everybody knew how eagerly he advocated improvements.

Thus Document 084-PS, which is a report by Dr. Gutkelch of the Central Agency for Eastern Nations of the Rosenberg Ministry, dated 30 September 1942, emphasized in various places the influence of the Defendant Sauckel and recommends getting into closer touch with him. His Codefendant Rosenberg also points to Sauckel's strenuous efforts in Document 194-PS, Page 6, a letter of 14 December 1942 to Koch, Reich Commissioner for the Ukraine. The Codefendant Frank likewise on 21 November 1943 applied to the Defendant Sauckel—Document 908-PS—for a basic change in the legal position of Poles inside the Reich.

To what extent do real events correspond with that which has been stated? The first point to be dealt with is the mobilization, which is practically identical with the point of deportation. Then follows the examination of the treatment of workers as designated by the term "slave labor."

The evidence has refuted the erroneous assumption that the Defendant Sauckel carried out the enlistment and mobilization of foreign workers on his own responsibility and through his own organization. It has been established that the supreme authorities in the occupied territories executed the laws regarding compulsory work as they had received them on Hitler's orders. All these agencies had their own administrative system and guarded their departments against the intrusion of others.

A communication of the Rosenberg Ministry of the East to Koch, the Reich Commissioner for the Ukraine, dated 14 December 1942, Document 194-PS, Page 7, in which the Codefendant Rosenberg particularly refers to the right of sovereignty existing in questions of labor allocation, proves that this administrative system had not been infringed upon. These supreme authorities had their own labor offices which were organized in detail from each ministry down to the least important office. In reference I wish to cite Document 3012-PS, an ordinance of 6 February 1943, by the Supreme Command of the Army, dealing with compulsory work in the Eastern operational sector, and Document RF-15, an ordinance of 6 October 1942.

The Defendant Sauckel could merely place requests with these agencies for the number of workers he was ordered to bring to Germany, and give them the necessary instructions. These were his limitations, which he never exceeded. He respected the right of execution as opposed to the right of issuing instructions. For these tasks deputies were appointed for each territory who, in accordance with the ordinance of 30 September 1942, Exhibit USA-510, were directly subordinate to the Defendant Sauckel; they did not however belong to his agency, but to the territorial authorities. It was expressly confirmed by the witness Bail, called by the Codefendant Rosenberg, that this applied to the chief deputy in the East, State Counsellor Peuckert who belonged to the staff of the Eastern Ministry.

This State Counsellor Peuckert was at the same time consultant for the Economic Staff East for the rear army area which bordered on the territory under civil administration; here too he acted only in an accessory capacity as deputy of the Defendant Sauckel. This is proved by Document 3012-PS, which is a memorandum dealing with a conversation of 10 March 1943 concerning labor allocation, in which the position of Peuckert is noted on the attendance list. Through this arrangement with regard to Peuckert's functions, created in the interest of the territorial authorities, all personal interference by the Defendant Sauckel was made impossible. In Document 018-PS, that is, in the letter to the Defendant Sauckel dated 21 December 1942, the Codefendant Rosenberg complains about the methods of labor mobilization in the East; but this must be considered as the complaint of a minister who is unable to assert himself against his subordinates and turns toward the presumable sources of the difficulties he is encountering.

It is true that these difficulties could have been removed immediately if the Defendant Sauckel had refrained from insisting on the fulfillment of his mission. But this fulfillment was the very task, specified in the decree of appointment as having to be effected under all circumstances.

The Defendant Sauckel had to fight against all obstacles due to weakness or departmental egotism, and had to see to it that local agencies did not out of a desire to let things ride fail to supply the required manpower, while other offices held it back out of selfish interests. "With all means" and "ruthlessly" are recurring expressions employed in combating these symptoms.

General Falkenhausen, the military commander in Belgium and northern France, during his hearing erroneously declared in Document RF-15 that the Defendant Sauckel forced him to mobilize labor and had carried this out by the aid of a special "organization" of his own. However, he had to admit that this was incorrect when the order signed by himself about the

introduction of compulsory labor was put before him. This is also confirmed by the statements of the witnesses Timm and Stothfang.

In France workers were mobilized by the French administration. The superior German office was not the office of the Defendant Sauckel, but of the military commander in France, where Sauckel had only a deputy. The negotiations which the Defendant Sauckel conducted in Paris and which were the subject of the evidence lie outside of this activity; they are negotiations of a diplomatic nature between the German and French Governments in which Sauckel participated. They were held in the German Embassy.

Conditions and circumstances in the other territories were analogous. The recruiting commissions, which corresponded to the labor mobilization staffs in the rear army areas and the operational zones, were also by no means offices of the Defendant Sauckel, as the Codefendant Rosenberg assumes. These recruiting commissions were vaguely connected with the Defendant Sauckel only insofar as they were composed of experts who emanated from the German labor offices belonging to Sauckel's department. They received directives only through their superior office, in order to guarantee uniform handling of all recruiting regulations. Regulation Number 4 in Document Number Sauckel-15 is very clear on this point. This advance appointment of the deputies as of 30 September 1942, which was already issued on 7 May 1942, provides for the sole responsibility of the military and civil authorities of the occupied territories. The deputies mentioned there as having been assigned the same functions, are the deputies with the German missions in friendly foreign countries.

This was misunderstood by the Prosecution, so that wrong conclusions were arrived at, to the disadvantage of the Defendant Sauckel, about the responsibility for recruiting and transport. The interpretation of the provision that all technical and administrative procedures of labor allocation were exclusively within the competence and responsibility of the Defendant Sauckel is also incorrect as far as occupied territory is concerned. This stipulation refers solely to the functions in the Reich and establishes the competence of the Plenipotentiary General for the Allocation of Labor, of the district labor offices, and the labor offices; this can be seen from Document 016-PS, last paragraph.

The Defendant Sauckel, therefore, is not directly responsible for the conscription of manpower. Indirectly, however, responsibility can be charged to him in that although he was aware of these unsatisfactory conditions and knew that they could not be stopped, he nevertheless demanded more workers.

It must be added that in the Defendant Rosenberg's letter of 21 December 1942, Document 018-PS, the Defendant Sauckel learned for the first time of the recruiting methods which were described as mass deportation. At the meeting which followed in the beginning of January 1943, the Defendant Rosenberg declared that he was opposed to this and that he would not tolerate such procedures. This is also confirmed by his previous letter of 14 December 1942 addressed to Koch, Reich Commissioner for the Ukraine, Document 194-PS, in which he clearly calls the latter's attention to his obligations to proceed legally.

Koch's memorandum of 16 March 1943, Document Rosenberg-13, of which the Defendant Sauckel learned only here at the Trial, explains that these incidents are exaggerated individual cases, their justification being based on the necessity of carrying out measures for the restoration of the prestige of the occupation authority. It is expressly declared in this that the recruitment of workers was undertaken by legal means and that steps were being taken in the event of arbitrary measures, Document Number Rosenberg-13, Pages 11 and 12.

It was not altogether impossible that it might have been a matter of tricky propaganda exaggerations, as Koch specifically points out. In wartime such a possibility exists, and the propaganda tendency of the Molotov reports (Document USSR-151) goes to emphasize this.

The Defendant Sauckel was also supported in this idea by the result of an investigation into the details of a "manhunt" which was reported to him at Minsk by Field Marshal Kluge; it turned out to be a round-up of workers employed by a private firm at the time of the retreat.

The Katyn case shows how difficult it is to determine the truth of such events when they are made use of as effective weapons of propaganda. As the witnesses from the Defendant Sauckel's office have confirmed, no other incidents involving such abuses have become known. The cases reported are to a certain extent obviously repetitions of the same happenings as communicated from various sources.

None of these reports, however, displays any desire to approve of such things; they are a sort of house alarm for the purpose of remedying and improving conditions.

Now, can one believe the Defendant Sauckel when he declares that he did not know about the conditions alleged by the Prosecution? What reached him through official channels is insufficient as proof of cognizance, and the witnesses confirm that the so-called "methods" were unknown. On the other hand we find here documents of the authorities of the occupied countries from which it appears that the Reich Commissioner in the Ukraine ordered

the burning down of houses in retaliation for resisting the administration, and there are decrees providing for such measures. Reports made to the Eastern Ministry regarding such events do not lead to penal prosecution but to suspension of the proceedings, such as the Raab case (Document 254-PS) and the Müller case (Document 290-PS).

Any doubt must be countered with the following: The measures employed were not approved by the highest instances, and were only surreptitiously applied by the lower offices who therefore had every reason not to let them become known. From the files on the preliminary proceedings of the cases of Raab and Müller it definitely appears that the existing regulations were unknown at the ministry.

The Defendant Sauckel did travel through the Ukraine, but it is unlikely that his attention should have been called to matters which might have got the local offices into trouble. The views of the Defendant Sauckel were well known, while on the other hand there existed a violent quarrel between the offices of Reich Commissioner Koch and Reich Minister Rosenberg. When the documents from both offices such as have been submitted are read carefully, it can be seen from the file notes that in this struggle both sides were collecting arguments and that neither wished to commit itself. Since the Defendant Sauckel himself had no direct authority, it is understandable that actual conditions should have remained unknown to him. Still another point of view must be considered: various documents mention that a certain pressure would have to be applied in the procurement of workers, since the workers were to be obtained "under all circumstances." Does this sanction all methods? It remains to be seen what was actually done in pursuance of these statements.

The OKH in one case thereupon ordered the increased mobilization of workers and permitted collective conscription, while prohibiting collective punishment. In this connection see Document 3012-PS, containing a telephone message from the Economy Staff East to General Stapf of 11 March 1943.

The best illustration can be found in that same Document 3012-PS by a file note concerning a discussion of 10 March 1943. Here General Nagel requests clear guiding principles and State Counsellor Peuckert asks for "reasonable" recruitment methods to be established by the OKH as the authorized agency. Document 2280-PS is also relevant here, which is the only personal statement made in Riga on 3 May 1943 on this question by the Defendant Sauckel. There he states that only "all permissible means" are allowed.

Document 3010-PS, Economy Inspection South, may also be quoted, in which on 17 August 1943 the use of "all suitable means" is permitted.

Orders are issued which contain severe measures in case of noncompliance with the duty to work: deprivation of ration and clothing cards. Imprisonment of relatives is threatened, as well as the taking of hostages.

What is the position as to the admissibility of such measures?

The deprivation of food cards has today become a generally applied means of coercion based on the rationing system, which derives from present-day conditions. It is easily carried out and does not require any special executive force, while being extremely effective. Concerning the imprisonment of relatives, severe violations of personal custody can be recorded even today. The Hague Convention on Land Warfare offers protection only against collective punishment of the population, but it does not protect the members of the family who may be considered as sharing the responsibility in the case of a refusal to work. The French law of 11 June 1943, which was presented as Document RF-80, also provides for such imprisonment only in the case of deliberate co-operation.

There finally remains the shooting of a prefect, which the Defendant Sauckel demanded. Apart from the fact that this statement as such is irrelevant from the point of view of criminal law, because it was not actually carried out, its legal import is merely a request to apply the existing French law. This law has been submitted by the Prosecution as Document RF-25, a decree of 31 January 1943 by the military commander in France, Article 2 of which provides for the death penalty.

Equally misunderstood by the Prosecution is a statement uttered by the Defendant Sauckel according to which one should handcuff the workers in a polite way (Document RF-86, Page 10, negotiation by Sauckel in Paris on 27 August 1943). But as appears from the context, the point in question is merely a comparison between the clumsy manner of the Police and the obliging manner of the French; handcuffing was not thereby especially advocated as a method of mobilization: Clean, correct, and Prussian on the one hand while at the same time obliging and polite on the other; that is how the work was to have been done.

I also refer to the proposal for "shanghaiing" as described in Document R-124, Page 1770, which is known to the Tribunal from the proceedings. The statement which the Defendant Sauckel has made gives an understandable explanation; according to it, this was legally a preliminary recruitment intended to induce the workers to agree to the real enlistment later on in the official recruitment offices.

These various incidents—shooting of a prefect, handcuffing, and shanghaiing—may be explained in various ways, but one can reach a complete understanding of the subjective side only if one considers why these statements were made, and under what conditions. The underlying reason for all these statements is the struggle against resistance and sabotage which in France assumed ever greater proportions. Therefore it is not a question of brutality and cynicism; rather were these statements intended to counteract the indecision displayed by the authorities.

Another consideration which must be appended here is whether the Defendant Sauckel had not exhausted the manpower of the country by his measures to such an extent that more workers could only be obtained by inhuman methods and that the Defendant Sauckel must have known this. The important point here is the figure for the "quotas." It has been established that they were high, but it has also been established that they were not fixed arbitrarily, but only after a careful study by the statistical department. Only a small percentage of the population was actually apprehended, and the decisive issue was not so much their inability to perform the work required as their will to offer resistance. In the occupied territories of the East were large reserves of manpower, especially among older adolescents, which were not effectively utilized. The German troops, their ranks greatly thinned, saw the densely populated villages during their retreat, and then felt the impact of the enemy thus reinforced shortly afterward.

In France there were likewise many forces which placed themselves under the protection of the Maquis or the "blocked factories." This is confirmed not only by the French Government Report, Document Number RF-22, but is also apparent from a remark which Kehrl, a witness for the Codefendant Speer, made in the Central Planning Board on 1 March 1944, Document R-124, Page 66. This witness states there that labor was available on an abundant scale in France.

Another conclusive contribution here is Document 1764-PS, Page 6, which is the report by Minister Hemmen of 15 February 1944, which deals with the "Reconstruction Program" of Marshal Pétain, and points out that the population was unscathed by war and was increasing by 300,000 young men every year.

If the number of workers mobilized is deemed to be of importance in this connection, it must be compared with the total population figures, while on the other hand it should be taken into consideration that Germany did not demand anything which she did not ask of herself to an even higher degree. The Defendant Sauckel was forced to the conclusion that the people, instead

of being unable to work, did not want to do so. In order to influence the people the propaganda struggle intensified, and threats of punishment were proclaimed by both parties; this first engendered in the population of the occupied territories a conflict of feelings which was the undoing of many.

The Defendant Sauckel could with good reason refer to the results of the counterpropaganda and of the deteriorating war situation as necessitating coercion; he could not, however, on the basis of the information at his disposal become convinced that the exhaustion of the countries was so great that nothing more could be extracted from them without the use of inhuman methods. The Defendant Sauckel believed he could obtain his object by creating special working conditions rather than by using violence. As an example I refer to the promise which Sauckel himself gave on 3 May 1943 in Riga, Document 2228-PS.

Apart from all this there is one more field of labor procurement which must be put in a different category. That is the liberation of prisoners of war on condition that labor forces be made available for Germany by "relève" or "transformation."

The French Government Report RF-22 declares both methods of procuring labor forces to be inadmissible. It is pointed out in the report that the exchange on the basis of "relève" amounted to the enslavement of a roughly threefold number of French workers. Against this it must be stated that the replacement workers came only for 6 months for voluntary work and in succession. At the end of 18 months all workers were free, while the prisoner was liberated immediately.

Coercion for the execution of the "relève" did not exist. From a legal point of view it was not assailable. Captivity can be terminated at any time; release may be made subject to a condition. The French report unduly stresses its moral indignation in quoting a phrase of the president of a news agency of the United States; this phrase speaks of the "abominable choice of either to work for the hereditary enemy or to deprive a son of one's own country of a chance of release from captivity."

To refute this, I refer to the healthy sentiment according to which in the older Russian literature such a change was applauded as a patriotic and magnanimous deed during the Nordic War. Neither the King of Sweden nor Peter the Great seems to have considered exchange as equal to replacement by a substitute slave.

The "transformation" ("Erleichtertes Statut") is contained in Document Number Sauckel-101. This is the release of a Frenchman from captivity if he accepts other work, or under condition that an additional French worker should come to Germany according to the "relève" regulations. No prisoner

of war was forced in this manner to change his legal status, but whole camps volunteered for it. If a prisoner made use of the possibility offered, he forfeited thereby the special legal protection of the Geneva Convention with regard to work; but this was done in agreement with his government, and thus does not constitute a violation of international law.

The home furlough connected with the change-over was discontinued because the men granted these furloughs did not return, even in the case of the first convoys. The French Report, RF-22, itself states on Page 69 that of the 8,000 men forming one leave convoy, 2,000 did not return. The report states that the "unfortunate people" were placed before the alternative: "Either you return, or your brothers die." This consideration, however, did not impress them. Nor could their promise prevent them from immediately joining the Maquis.

The cancellation of these home furloughs does not therefore constitute an arbitrary act in slave labor. Perusal of the French report can only strengthen that impression.

It follows therefore that no conscription of workers, violating the laws of war or carried out in an inhuman manner, was effected by the Defendant Sauckel in this field either.

I now come to the question of the treatment of workers.

In order to facilitate proper judgment, a clear distinction must be made between the different bearers of responsibility. The works manager was responsible for general labor conditions in the works, while the general conditions of life outside the works were the competence of the German Labor Front.

These spheres of responsibility become clearly apparent through the fact that two exponents for them are mentioned in the Indictment, namely, Krupp and Dr. Ley. The Defendant Sauckel can be held responsible for what happened in these spheres only insofar as events were due to his decrees, or where, contrary to his duty, he failed to exercise direct supervision. The Defendant Sauckel was directly responsible for the wages. On assuming office he found a table of wages which he could not modify on his own responsibility; to do so he had to apply for permission to his superior office, which was the Four Year Plan, and for the consent of the competent Reich minister. The legal regulations compiled in the chapter on wages of my Document Book 2 show that the basic decrees were not issued by the Defendant Sauckel, but by the Ministerial Council for the Defense of the Reich (see Documents Sauckel-50, 17, and 58) and the Reich Minister of Economics (Document Sauckel-51) and the Reich Minister of Finance (Document Number Sauckel-52).

The Defendant Sauckel could schedule wages and fix wages for piece work only within the general outlines existing for him, and in so doing he had to consider the interests of the ministries in question. So far as it was at all possible for the Defendant Sauckel to do so, he worked for an amelioration; thus a series of his decrees show that he granted premiums such as bonuses, compensatory payments, and the like [see Document Numbers Sauckel-54 and 58(a)].

The Defendant Sauckel's activity, however, could on the whole only aim at increasing wages by influencing the competent agency. This is shown in Document 021-PS of 2 April 1943. There we find as appendix a treatise with statistical material bearing on a proposal for a basic improvement of wages for Eastern Workers. From a study of wage sheets dating from different periods it will also be seen that the average wages of Eastern Workers were raised several times during the Defendant Sauckel's term of office.

It was for the Defendant Sauckel to determine the working hours, but only within the framework of the superior competence of the Reich Minister of Labor Seldte. This is shown by Document Number Sauckel-67, where Seldte fixes the working hours for Eastern Workers in Paragraph 3 of the Decree of 25 January 1944. Generally speaking, the working hours were the same as for the German workers, depending upon the output in each factory. This is also admitted by the French Government Report, Document UK-783; the cases enumerated there, on Page 580, of excessive working hours are contrary to the orders of the Defendant Sauckel.

Since they do not specify any year, it cannot be ascertained if they deal only with temporary measures or with permanent conditions. The same lack of clarity obtains in the French Report RF-22, Page 101; there the minimum working time is given as 72 hours, which was liable to increase to 100 hours. This may refer to the work of concentration camp inmates. Working hours were then changed by Goebbels, who on the basis of his powers of plenipotentiary for the waging of total war introduced the 10-hour day for Germans and foreigners alike, although in practice this could not be applied generally. Unreasonably long working hours cannot be maintained and will lead to setbacks. I should like to add that Sauckel was responsible for the fact that these extra hours were paid for, or compensated, in the same manner as overtime work.

Special attention has been paid by the Prosecution to the regulation of the working hours of female domestic workers from the East, of whom, instead of the 400,000-500,000 girls originally demanded by Hitler; only 13,000 actually came to Germany. The Prosecution has presented the

instructions for the employment of these female domestic workers as Document USSR-383. There it says under Number 9 that they shall not be entitled to take time off. The purpose of this was to leave the settlement of their time off to each household according to convenience. Any other interpretation of the regulation is hardly imaginable, because after all it was intended permanently to receive these female domestic workers into the families, and to give them the chance to remain in Germany. They had been selected as girls who were considered particularly dependable, and had all reported voluntarily for domestic work. In the light of new experiences the order was later modified by a subsequent decree (Document Number Sauckel-26), by which all remaining limitations were also canceled.

Determination of working hours for children took place within the scope of the German labor protection legislation. This referred to children who, contrary to the decrees of the Defendant Sauckel, had come to Germany with their parents in an irregular manner. Their work can have concerned only rural occupations, since that applies equally to German children. In this context it may be pointed out that during the war schoolchildren in Germany as from 10 years of age could be employed for work in accordance with the decree of the Reich Youth Leader of 11 April 1942 [Document Number Sauckel-67(a)].

A general survey by Dr. Blumensaat in the complete Document Number Sauckel-89 provides full information about the entire complex of wages and working hours as finally established by laws.

This factor of immediate responsibility alone, however, cannot serve the Defendant Sauckel as an excuse, if he knew and tolerated those things which, according to the Prosecution's assertion, characterized the transports and life in the camps and factories. It was his duty to superintend even where he was not directly responsible.

The accommodation and feeding of the workers was the responsibility of the industries. With regard to the installations of the camps for foreigners, the same regulations as for the camps for German workers applied by virtue of decrees by the Reich Minister of Labor, Seldte (Documents Number Sauckel-42, 43 and 44). It is indisputable that the accommodation suffered as a result of difficulties, in particular from the effects of air warfare. The deficiencies, however, were remedied as far as at all possible. The situation of the foreign workers was not different from that of the German civilian population.

The food supply suffered from the blockade and transportation difficulties. The established rations, contrary to the notorious statements on the feeding of the Russians, amounted to 2,540 calories for the Soviet

prisoners of war, according to the table of 24 November 1941 in Document USSR-177. A further table has been submitted with the affidavit of the witness Hahn as Exhibit Number Sauckel-11. According to this rations in the Krupp works amounted to 2,156 calories for the ordinary Eastern Worker and 2,615 calories for those performing heavy work; supervision insured a proper distribution.

The Reich Ministry of Food was responsible for the supply of food. Grave accusations have been made by the Prosecution with regard to both points. These, however, can only apply where the existing regulations were not observed. It is quite likely that mistakes should have been made in this large sphere of activity in the course of years, but the general picture is not composed of mistakes, and judgment cannot be based thereon. The actual conditions have not been clarified in this procedure to the extent that one might contend that deficiencies were so general and obvious that the Defendant Sauckel must have known them, and did in fact know them.

In contrast to the vague statements of the witness Dr. Jäger we have the affidavit of the witness Hahn, which refutes the former to a large extent. The affidavits of the witnesses Scharmann and Dr. Voss (Exhibits Number Sauckel-17 and 18) confirm that no serious deficiencies existed in their spheres of activity.

In addition to the obligations on the part of the works managers, the German Labor Front had to look after the foreign workers (Document Number Sauckel-16). Its tasks included transports and the supervision of medical care, as well as general welfare activities. The extensive activity which this very large organization developed has not been described in these proceedings. The basic principles of the German Labor Front can be seen from Document Number Sauckel-27, which is the ordinance of the German Labor Front regarding the status of foreign workers at their working site. The aim is characterized as maintenance of morale by observing conditions of contracts, absolutely fair treatment, and comprehensive care and attention.

The German Labor Front was also responsible for transports, according to Regulation Number 4 (Document Number Sauckel-15), wherein Sauckel's instructions are contained. This task included transport as far as the working site. The witnesses Timm, Stothfang, and Hildebrandt have testified about this and did not report anything about bad conditions. The description in the Molotov Report (USSR-51) cannot refer to transports carried out under orderly direction, but only to so-called "pirate" convoys. The same applies to convoys which, according to the Indictment, were heading for the concentration camps. The special attention which the

Defendant Sauckel from the very beginning accorded to the transport problem, is shown particularly by Document 2241-PS, submitted by the Prosecution. It contains a decree where detailed directives to prevent the utilization of unsuitable trains are given.

However, mistakes did occur, especially the incident mentioned in Document 054-PS in connection with a return transport of workers. These had been brought into the Reich before Sauckel's time in a manner contrary to his basic principles. The matter was an isolated incident, and the necessary steps were immediately taken. The return of sick persons unfit for travel was prohibited, and Bad Frankenhausen was placed at their disposal, Document 084-PS, Page 22. This was followed by the order specifying the attendance at such transports of male and female Red Cross nurses (Document Number Sauckel-99).

The carefully and thoroughly organized system of medical care, which operated in collaboration with the Association of Panel Doctors did not break down in the face of the greatest difficulties; rather is it a fact that no epidemics or serious diseases broke out.

The cases presented by the Prosecution from some camps among the total of 60 run by Krupp's can only have arisen out of an unusual chain of circumstances. They cannot prove that bad conditions, of which these examples might have been typical, prevailed generally.

Another document, RF-91, has been presented, which contains the medical report of Dr. Février of the French Delegation of the German Labor Front, which was compiled after the beginning of the invasion on 15 June 1944. Besides deficiencies it is intended to correct, the report also points out favorable aspects. It speaks with particular acknowledgement of leaders of youth camps, of the systematic X-ray examinations, and of the support given by district administrations, and similar things. A genuine over-all picture of conditions could only be obtained by the study of the medical reports of the health offices of the German Labor Front existing everywhere.

For the defense of the Defendant Sauckel it may be said here that from his remote post he could not obtain a clear picture of unsatisfactory details. Any sanctioning of such bad conditions would have been in striking contrast to the actions and declarations of Sauckel. The Defendant Sauckel did not acquiesce when, for instance, one Gauleiter said: "If anybody is going to be cold, then first of all let it be the Russians." He intervened and publicly proclaimed his views in his official Handbook on the Allocation of Labor (Document Number Sauckel-19). The Defendant Sauckel also made efforts to improve the food, although this was outside his competence. That has been confirmed by several witnesses, among others the witness Goetz

(Exhibit Number Sauckel-10). It is also shown by the record of the Central Planning Board (Document R-124, Page 1783). The Defendant Sauckel did not let matters slide, but established a personal staff of his own, whose members traveled around the camps and corrected bad conditions on the spot. He also endeavored to obtain clothing, and put factories to work to a large extent for the purpose of supplying Eastern Workers. All the witnesses heard regarding this problem have again and again unanimously confirmed that the Defendant Sauckel basically took great interest in the welfare of workers.

I would also refer to the announcements and speeches of the Defendant Sauckel, which always advocate good treatment. I do not wish to enumerate the documents in detail, and shall only mention in particular the "manifesto" on the allocation of labor, Document Number Sauckel-84, in which he refers to his binding basic principles, and demands that these be constantly kept in mind. I also refer to the speeches to the presidents of the provincial labor offices of 24 August 1943 (Document Number Sauckel-86), and of 17 January 1944 (Document Number Sauckel-88). The Defendant Sauckel finally got even Himmler, Goebbels, and Bormann to acknowledge his ideas as correct. That is shown by Document 205-PS of 5 May 1943, which is a memorandum regarding the general basic principles for the treatment of foreign workers. There the basic principles of a regulated mobilization of labor are accepted.

How do the statements of the Prosecution on ill-treatment of workers as slaves correspond with this? It will be necessary to examine closely whether the cases referred to involve real abuses affecting workers in the process of normal mobilization, or abuses incidental to the deportation of prisoners and to their work. Next, one should investigate exaggerations and distortions such as may be due to human weakness and foibles. In my opinion no adequate clarification of this subject has so far been obtained, and press reports have already begun to appear which are bound to increase doubts as to the accepted standard applying to the life of foreign workers.

The plan submitted as Exhibit Number Sauckel-3 displays the numerous offices for checking and inspection relative to the question of laborers. They did not report any particular abuses to the offices of the Defendant Sauckel. Perhaps the fact that these offices were so numerous constitutes a weakness: It is quite possible that each government department kept silent about whatever mistakes originated under its own jurisdiction and failed to bring them to the attention of the Defendant Sauckel, because as a rule the controlling agencies were on a higher level than the Defendant Sauckel. This should be considered particularly with regard to relations

between the most important agency, the German Labor Front, under the leadership of Reichsleiter Dr. Ley, and Gauleiter Sauckel.

On closer examination of the document submitted as 1913-PS, an agreement on the creation of "central inspection offices for the care and welfare of foreign labor," it appears to have been carefully designed as an instrument of defense against the Defendant Sauckel. The document was devised by Dr. Ley and signed on 2 June 1943, then submitted for his signature to the Defendant Sauckel who did not approve or publish it until 20 September 1943. It is quite possible that Dr. Ley did not wish to invite criticism. On the other hand, there is little likelihood that the abuses were general and manifested themselves openly. Otherwise they would obviously have become known to the Defendant Sauckel through his own control agencies.

In addition to his own staff, the Defendant Sauckel on 6 April 1942 appointed the Gauleiter as "Commissioners for the Mobilization of Labor," impressing upon them as their foremost duty that of supervision with regard to the enforcement of his orders. This becomes apparent from Document Number Sauckel-9, Figure 5; the same applies to Document 633-PS of 14 March 1943. Several Gauleiter were examined by the Tribunal as witnesses, and they have confirmed the fact that the supervision was carried out as ordered and that Sauckel checked it through members of his staff. No abuses were reported.

After due consideration of the matter, whom should one believe? Are we concerned here with exaggerated complaints, or do findings to the contrary command credibility? There is no testimony by those Frenchmen who, according to Document UK-783, Draft III, were taken to the real slave centers; there is no testimony by those Russians, who, according to Document USSR-51, were sold at 10 or 15 Reichsmark.

In any case one fact clearly speaks in favor of the Defendant Sauckel, one which has always been confirmed by competent witnesses, namely, that the workers were willing and industrious and that when the collapse came no uprising occurred in which they would have given vent to their natural wrath against the slaveholders.

I have summarized actual happenings and appraised them juridically. All this, however, must appear to be juridical quibbling when a higher responsibility is involved. It has been stated here that it would not do to let the insignificant works managers take the blame, and that the moral responsibility must go to the highest Reich Government offices: On their own initiative they ought to have introduced corrections on a larger scale to cope with the difficulties inherent in the circumstances of that time. This

might have applied to offices which had the power and the means to bring about improvement. The Defendant Sauckel and his small personal staff had merely been incorporated in a ministry already in existence, and he had no such means at his disposal. His authority consisted of a narrowly defined power to give directives on the mobilization of labor, and he untiringly made use of this authority.

The works managers in the armament industry formed an independent administration and were secure from so-called bureaucrats. The duty of self-maintenance results from such a privilege of self-administration. Consequently, if something was to be done to improve the security of foreign workers, or their situation in armaments works, it was up to these establishments and to the armaments ministry, under whose supervision they operated, to deal with the matter. It was not the duty of the office of the Defendant Sauckel to intervene in these matters, since it was under the armaments ministry. That is clearly evident from Document 4006-PS, containing the decree of 22 June 1944, and is also borne out by the most intimate personal relations between the armaments minister and Hitler, which made him the most influential man in the economic sphere. If higher responsibility existed for mistakes made in the factories, such responsibility can be placed only at the door of those who had knowledge of such conditions and the power to correct them.

There is still another legal question to be considered with regard to the Indictment; namely, whether the position of the Plenipotentiary General for the Allocation of Labor is determined by Article 7 or Article 8, in other words, whether the Defendant Sauckel was an independent government official or whether he acted on orders. The requests for labor were placed from time to time on Hitler's special orders, in the form of a general program, and only the subsequent distribution was left to Sauckel. This is also confirmed by the fact that the Defendant Sauckel always refers to Hitler's "orders and instructions," as in the manifestos of the Plenipotentiary General for the Allocation of Labor (Document Number Sauckel-84, in circulars to the Gauleiter, Figure 7, Document Number Sauckel-83 and others). From this also derives the fact that the Defendant Sauckel in every case specifically reports execution of the orders, as well as the beginning and end of his official journeys (Document 556-PS of 10 January 1944 and 28 July 1943).

Another argument against his working independently is that according to the nomination decree the Defendant Sauckel was immediately subordinate to the Four Year Plan and attached to the Reich Ministry for Labor, which had been preserved with its state secretaries; only two

departments were placed at his disposal. If the form of responsibility is to be determined, it can thus only be within the limits of Article 8 of the Charter.

Herewith I conclude my exposition regarding the special field of labor allocation.

The Defendant Sauckel is accused on all Counts of the Indictment, in addition to labor mobilization; specific acts however are not charged against him. A closer characterization of the accusation has been effected in the course of the proceedings only with regard to the concentration camps. In this connection, however, it has been proved by a sworn statement by the witness Falkenhorst (Exhibit Number 23) and an affidavit by the witness Dieter Sauckel (Exhibit Number 9) that no order for the evacuation of the Buchenwald Camp upon the approach of American troops was given. Knowledge and approval of conditions at the camp cannot be deduced from two visits of the camp before 1939, because the excesses submitted by the Prosecution had not yet occurred. Nor did the geographical proximity of the camp to the Gauleitung of the Defendant Sauckel bring about any close connection with the SS staff, as they had their seat in Kassel and Magdeburg. Finally it must be remembered that the human convictions of the Defendant Sauckel, which were based on his earlier career, were irreconcilable with Himmler's point of view.

What part can the Defendant Sauckel have played in the conspiracy? He was Gauleiter in Thuringia and did not rise above the rest of the Gauleiter. His activities and his aims can be deduced from his fighting speeches, which have been submitted as Document Number Sauckel-95. They consistently show the fight for "liberty and bread," and a desire for real peace.

During his activity, extending over many years in the Party, the Party program was authoritative for the Defendant Sauckel; the aims and plans contained therein required neither war nor the extermination of the Jews. The practical realization of the program alone could disclose the reality. For every convinced Party exponent, however, the official explanation of events was authoritative and met with no doubts. Up to his nomination as the Plenipotentiary General for Allocation of Labor in March 1942, the Defendant Sauckel did not belong to the narrow circle of those who had access to Hitler's plans. He had to rely upon the press and the broadcasts like everybody else. He had no contact with the leading men. This is demonstrated somewhat tragically by his action, so often ridiculed, of boarding a submarine as an ordinary seaman for some mission. That is no way to participate in conspiracies.

As a faithful follower of Hitler, the Defendant Sauckel remained isolated in the circle of the initiated. It is understandable that the extremists should have shunned him owing to his well-known opinions. He was not initiated into the secrets of people who aspired to be Hitler's friends and murderers at the same time, nor was he kept informed by the group of people who were Hitler's enemies, but who kept their knowledge secret with a novel kind of courage. A believer to the end, the Defendant Sauckel cannot to this day understand what has happened. Must he, like a heretic, recant his error in order to find mercy? He lacks the contact with reality, which would make understanding possible.

Does his sentence depend on his having unknowingly served a good or a bad cause? Nothing is either good or bad, but thinking makes it so. One thing, however, is always and under all circumstances good, and that is a good intention. This good intention was shown by the Defendant Sauckel. Therefore, I ask that he be acquitted.

THE PRESIDENT: I call on Dr. Exner for the Defendant Jodl.

PROFESSOR DR. FRANZ EXNER (Counsel for Defendant Jodl): May it please the Tribunal, in this unique Trial the discovery of the truth is faced with difficulties of an exceptional nature. At a time when the wounds of the war are still bleeding, when the excitement of the events of the last few years is still felt, at a time when the archives of one side are still closed, it is asked that a just verdict be given with dispassionate neutrality. Material for the Trial has been spread out before us covering a quarter of a century of world history and events from the four corners of the globe.

On the grounds of this tremendous amount of material we see 22 men being accused simultaneously. That makes it immensely difficult to gain a clear picture of the guilt and responsibility of each individual, for inhumanities of an almost unimaginable vastness have come to light here, and there exists a danger that the deep shadow which falls upon some of the defendants may also darken the others. Some of them, I fear, appear in a different light because of the company in which they now sit than they would if they were alone in the dock.

The Prosecution has promoted this danger by repeatedly making joint accusations, thereby mixing legal and moral reproaches. They have said that all the defendants had enriched themselves from the occupied territories, that there was not one who did not shout, "Perish, Judah!" and so forth. No attempt to prove this in the case of any single individual was made, but the statement in itself creates an atmosphere hostile toward all of them.

Another fact brought about by the Prosecution which renders elucidation of the question of individual guilt still more difficult is that the

Defendants Keitel and Jodl are treated as inseparable twins: One common plea against them by the British prosecutor, one common trial brief by the French Prosecution; the Russian Prosecution indeed spoke very little about the individual defendants but preferred to heap reproach after reproach upon all of them.

All of this is presumably intended to shorten the Trial, but it hardly serves to clear up the question of individual responsibility. Indeed, the Indictment goes still further. It reaches beyond these 22 defendants and affects the fate of millions through a prosecution of certain organizations, which, taken in conjunction with Law Number 10, leads to the result that one can be punished for the guilt of other persons.

Something that is more important at the moment is a further form of summary treatment of the defendants. The Prosecution is bringing in the conception of a "conspiracy" in order once more to obtain the result that persons may be made individually responsible for some wrong that others committed. I must deal with this point in greater detail, since it also concerns my client.

It is actually clear, I think, from the previous speakers' statements that a conspiracy to commit Crimes against Peace and the laws of war and humanity did not in fact exist. Therefore, I shall demonstrate only that, if such a conspiracy did actually exist, Jodl at least did not belong to it.

The Prosecution has admitted that Jodl's participation in the conspiracy before 1933 could not be proved. In fact, anyone whose attitude toward the whole National Socialist movement was so full of distrust and who spoke with such skepticism about its seizure of power did not conspire to help Hitler take over the reins of Government. But the Prosecution seems to think that Jodl joined the alleged conspiracy in the period before 1939. In truth, during this time, too, nothing essential changed as far as he was concerned. True, his attitude toward Hitler was now an entirely loyal one. But it was Jodl's respected Field Marshal Von Hindenburg who had called Hitler into the Government, and the German people had confirmed this decision with more than 90 percent of its votes. Added to this was the fact that in Jodl's eyes—and not only in his—Hitler's authority was bound to rise by leaps and bounds in view of his remarkable successes at home and abroad, which now followed one after another in quick succession; yet personally Jodl remained without any connection with Hitler. He did not participate in any of the big meetings at which Hitler developed his program. He had only read extracts of Hitler's book *Mein Kampf*, the bible of National Socialism. Jodl remained just an unpolitical man, quite in line with his personal inclinations, which were far removed from Party politics and in accordance with the traditions

of the old family of officers from which he sprang. Of liberal leanings, he had little sympathy for National Socialism; as an officer he was forbidden to belong to the Party, and he had no right to vote or be politically active.

If, as the Prosecution says, the Party held the conspiracy together and was the "instrument of cohesion" between the defendants, then one asks with wonder what cohesion actually existed between Jodl and, let us say, Sauckel, or between Jodl and Streicher. Of all the defendants, the only one he knew before the war, outside of the officers, was Frick, from one or two official conferences in the Ministry of the Interior. He kept clear of the NSDAP, and his attitude toward its organizations was even in a certain sense inimical. His greatest worry during these years, right up to the end, was the danger of Party influence in the Armed Forces.

Jodl did what lay in his power to prevent the SS from being puffed up into a subsidiary Wehrmacht, to prevent the transfer of the customs frontier guards to Himmler, and he notes triumphantly in his diary that after the withdrawal of General Von Fritsch, Hitler did not, as had been feared, make General Von Reichenau, who had Party ties, Commander-in-Chief of the Army, but the unpolitical General Von Brauchitsch, and so forth. If Jodl had conspired for National Socialism in any way, his attitude would have been the opposite on every one of these points.

Nor was Jodl present at any of the so-called meetings of the conspirators, as on 5 November 1937—Hitler's testament was unknown to him—at Obersalzberg in February 1938, and at the meetings on 23 May 1939 and 22 August 1939.

No wonder; for Jodl was after all at that time still much too insignificant to be permitted to participate in conferences and meetings which were of such decisive importance to the State. People do not conspire with lieutenant colonels or colonels of the General Staff. They simply tell them what to do, and that settles the matter.

However, the most incontrovertible proof of the fact that Jodl can have belonged to no conspiracy to wage aggressive war is his absence for 10 months just before the beginning of the war. Jodl had left the OKW in October 1938 and was sent to Vienna as artillery commander. At that time there was in his mind so little probability of war that before leaving Berlin he drafted, on his own initiative, a plan of deployment in all directions for security purposes. In this he disposed the bulk of the German forces in the center of the Reich because he could not see any definite opponent against whom a deployment plan might have to be prepared.

Exactly a year before the beginning of the attack, this alleged conspirator for aggressive wars drew up a purely defensive General Staff

plan, and, although he knew definitely that in case of war he would have to return to Berlin, this possibility seemed so remote that he moved to Vienna, taking along all his furniture.

Besides, since he wished to get away from office work again, he arranged to have the mountain division at Reichenhall promised him for 1 October 1939. Lastly, as late as July he obtained passage on a sea cruise planned to last several weeks, which was to have started in September—so sure was he of peaceful developments during these 10 months.

Up to the time he was called to Berlin shortly before the outbreak of the war, Jodl had no official or private connections with the OKW. The only letter he got from them at that time was the one which promised him his transfer to Reichenhall on 1 October.

Note that at the most critical time when the alleged conspirators were discussing and working out the Polish plan, Jodl was for 10 months out of all contact with the authoritative persons and knew no more of what was happening than one of his second lieutenants.

When the Führer came to Vienna during the summer, it did not even seem worth while to Keitel to introduce Jodl to him, although Jodl, as the Supreme Commander's strategic adviser, was called upon in the event of war to carry out the allegedly common aggressive plan.

One can imagine how astonished Jodl was to read in the Indictment that he had been a member of the conspiracy to launch the war.

Mr. President, I have reached the end of a paragraph, and this perhaps might be an opportune moment to recess.

THE PRESIDENT: Very well.

[*The Tribunal adjourned until 19 July 1946 at 1000 hours.*]

TRANSCRIBER NOTES

Punctuation and spelling have been maintained except where obvious printer errors have occurred such as missing periods or commas for periods. English and American spellings occur throughout the document; however, American spellings are the rule, hence, “Defense” versus “Defence”. Unlike Blue Series volumes I and II, this volume includes French, German, Polish and Russian names and terms with diacriticals: hence Führer, Göring, etc. throughout.

Although some sentences may appear to have incorrect spellings or verb tenses, the original text has been maintained as it represents what the tribunal read into the record and reflects the actual translations between the German, English, French, and Russian documents presented in the trial.

An attempt has been made to produce this eBook in a format as close as possible to the original document presentation and layout.

[The end of *Trial of the Major War Criminals Before the International Military Tribunal: Nuremberg 14 November 1945-1 October 1946 (Vol. 18)* by International Military Tribunal]