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Closing Statement for the United States of America

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M I L I T A R Y T R I B U N A L IV

Case No. 11

THE UNITED STATES OF AMERICA

v.

ERNST VON WEIZSAECKER, et al

CLOSING STATEMENT FOR THE UNITED STATES OF AMERICA

Nurnberg

9 November 1948

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INTRODUCTION

The close of this case brings to an end the long parade of evidence presented to the thirteen solemn Tribunals which have sat in judgment at Nurnberg. This awe-inspiring march of documents and witnesses began in November 1945 before the International Military Tribunal, only a few days short of three years ago. In the course of a little more than these three years, Allied investigators have filed for official registration in the central document room of the courthouse, more than 61,000 documents. The large majority of these documents are "contemporaneous documents" written by German leaders or the assistants of German leaders during the Nazi era itself. These contemporaneous records constitute the unerasable, self-written history book concerning those men who for so long clung together for better or worse, for richer or poorer, in Hitler's Third Reich until their ill-fated union began to crack in the last months of the Nazi era in the face of common defeat and the impending wreck of their booty-laden ship of state.

This growing source book of history has been the backbone of the Nurnberg story. What we say here, what the defendants and the defense counsel have said here or will say here, and what this Tribunal finally says here will be measured in terms of this now indestructible record of Hitler's Third Reich. It could not be otherwise, for time itself can afford few, if any, better gauges to a scientific inquiry into the role which individual men played in the history of these times than is already laid bare before us in this contemporaneous source book. And, in Germany itself, it is to this record that the true scholar, knowing that the Nazi limitations on the process of inquiry have been removed, looks for an understanding of the unfortunate history of Germany from 1933 to 1945. Our words can add little to the

condemnation which these contemporaneous records convey within their four corners, and we suggest that the explanations that the defendants and their witnesses have made are but a scant apology for such condemnation. One of the most distinguishing aspects of this particular trial is that far more of the contemporaneous documentation has passed before the scrutiny of this Tribunal than before any of the other twelve Tribunals convened in Nurnberg, not excluding the International Military Tribunal. In fact, when the International Military Tribunal ceased taking evidence in the summer of 1946, only a small fraction of this available evidence had been uncovered from the myriad of places where it laid buried in ruins or hidden away in the tons of paper work which reflected the business of these times. Indeed, if any substantial part of this newly discovered evidence had been available before the indictment was filed with the International Military Tribunal in October 1945, it is plain that more than a few of the defendants in this case would have accounted for his individual responsibility in that first great trial. Like the findings in the judgment of the International Military Tribunal, your findings upon the vast evidence in this record will be a significant factor among those factors which will finally reveal to all mankind that the leaders of nations, just as the common citizens of nations, may not, without a due accounting, commit evil upon mankind at will.

In summing up, the prosecution is anxious to observe the utmost economy of words and means. The burdens which this trial has imposed, on the Tribunal and on counsel for the prosecution and defense alike, have been heavy. On the part of the prosecution, we intend to embody our detailed analysis of the record, and our summation of the evidence as it relates to each individual defendant in the briefs which we will file.

In this oral summation, accordingly, we do not propose to deal

exhaustively with each charge of the indictment nor with each defendant. To undertake a full and detailed exposition of this sort would, we think, prolong this statement unnecessarily and needlessly duplicate much of what will appear in our briefs. Today we shall attempt principally to emphasize the law of the case and to suggest its application with respect to these defendants.

COUNTS I and II

CRIMES AGAINST PEACE

We shall discuss at this point, the legal questions presented in connection with Counts I and II, relating to Crimes against Peace. First, we shall indicate the difference between Counts I and II of the Indictment. Second, the question of whether planning, preparation and initiation of aggressive war is separate and distinct from the "waging" of aggressive war. Third, what is embraced in the concept of "waging" aggressive war, as distinguished from participation in the planning and preparation thereof. Fourth, in connection with the concept of waging of aggressive war, we shall discuss the relation of participation in plunder and spoliation and slave labor as they relate to Crimes against Peace. Fifth, we shall consider whether the invasion of Austria and Czechoslovakia come within the definition of Crimes against Peace, and what effect, if any, the absence of hostilities plays in that connection. Sixth, we shall consider the nature and effect of the defense raised, that these defendants were engaged in preparation for a defensive war. In that connection, we shall discuss the effect of Ordinance No. 7.

Seventh, we shall analyze and review briefly the decisions of the Nurnberg Tribunals, in the Krupp, Farben and High Command cases, as they relate to Crimes against Peace, and finally, we shall indicate what appears to us to be the principles to be applied in determining the guilt or innocence of the

defendants in this case under Counts I and II.

We have submitted a brief which discusses in some detail the legal questions indicated.

We propose in this oral argument to touch only the highlights of these questions. In view of the nature of the questions involved, we respectfully invite the Tribunal to interrupt the Speaker at any time to ask questions which the Tribunal may consider necessary to clarify any doubtful points.

The Difference between Count I and Count II

Count I charges the commission of Crimes against Peace, namely the participation in planning, preparation, initiation and waging of wars of aggression.

Count II charges participation as leaders, organizers, instigators and accomplices, in a conspiracy to commit the foregoing.

Although some of the Military Tribunals in Nurnberg have considered both of these Counts to be one and the same thing, analysis will disclose that they are not one and the same thing. We have discussed this point in detail in our brief. In this oral presentation, we desire to demonstrate the point by referring to one or two cases.

The IMT, likewise, had two counts, charging Crimes against Peace which were set up in the same way. The counts of that Indictment were in the reverse order to the counts in this case - that is, the IMT Count I was the "conspiracy" count, and Count II was the count charging "planning, preparation,

initiation and waging of War." In the Judgment of the IMT, dealing with these specific counts, some of the defendants were found guilty under the planning, preparation and waging war count, but were acquitted of the conspiracy count. Some were indicted only on the count charging planning, preparation and waging, and were not indicted on the conspiracy count. If the contention is correct that both counts are one and the same thing, then it would be meaningless to find a defendant guilty on one of the counts, and not guilty on the other count. On its face, that is. sufficient proof that the counts are independent and separate. The Judgment of the IMT, as we show in more detail in our brief, very plainly indicates that in its decision as to the individual defendants, they recognized and drew a distinction between the conspriacy count and the count charging participation in the planning, preparation and waging of aggressive war.

A careful analysis of the IMT Judgment discloses that in the application of the facts to the respective counts, they applied a different degree and quantum of proof to convict for a conspiracy than they did to convict on the count charging planning, preparation and waging of aggressive war. One reason for the court adopting such a narrow construction of the concept of conspiracy was probably the fact that this concept of conspiracy is foreign to Continental Law, and hence it was given a very limited construction. But, again, we emphasize the point that when the same defendant whom the IMT has acquitted of Count I, is

found by it to be guilty under Count II, then the conclusion must be inescapable that the counts are separate and distinct offenses in the legal sense.

Conspiracy, therefore, is to be considered separate and apart from the count charging planning, preparation, initiation and waging of wars of aggression.

The Difference between Waging Wars of Aggression and Participation in the Preparation, Planning and Initiation

Control Council Law No. 10 defines Crimes against Peace as:

> " * * * initiation of invasions of other countries, and wars of aggression in violation of international laws and treaties; including, but not limited to, planning, preparation, initiation or waging a war of aggression, or a war in violation of international treaties, agreements or assurances - or participation in a common plan or conspiracy for the accomplishment of any of the foregoing."

The London Charter in section 6 contains the same definition - in the alternative - planning, preparation or waging. Now, it is plain from the language of Control Council Law No. 10, and the London Charter that planning, preparation and initiation are separate and distinct offenses from waging, and that a conviction will lie for participating either in the planning, preparation and initiation, or in the waging. That distinction is made by the IMT with respect to the case of the defendant Doenitz, and the Tribunal specifically stated there that Doenitz did not participate in the planning, preparation or initiation, but

did participate in waging, and upon that ground found him guilty under Count II, as charged. Since the IMT decision, the General Tribunal in the French Zone of Occupation, consisting of French, Belgian and Dutch judges, rendered Judgment in the case of Hermann Roechling. This Tribunal was exercising jurisdiction under Control Council Law No. 10. In its Judgment it also drew the distinction between planning, preparation and initiation of wars of aggression, and the waging of such wars. In that case, Roechling was charged on specific counts with, 1) having participated in the preparation and planning of aggressive war, and 2) participating in the waging of aggressive war. The Judgment of the General Tribunal, which we discuss in detail in our brief, acquitted Roechling of the count charging him with participating in the planning and preparation, but found him guilty of the count charging participation in the waging. The Military Tribunal in the I. G. Farben case also made a similar distinction.

This, then, brings us to the problem of what is embraced in the concept of "waging" aggressive war.

The Concept of "Waging" Aggressive War.

As a general principle of criminal responsibility, it is necessary to establish that a defendant substantially participated in a criminal act, and that such participation was accompanied by criminal intent - or to state it another way, the state of mind of the defendant which accompanied his activity, must be such that it can be adduced that he had knowledge or is

chargeable with knowledge of the criminal character of his activity.

Since we maintain that waging is an offense separate and distinct from preparation, planning and initiation, it is incumbent upon us to define, at least for purposes of this case, the extent of the concept of waging.

If there is knowledge on the part of a defendant that the initiation of a particular war is illegal - that is, that it is aggressive - and he then participates in a substantial way in waging such war (and we stress the word "substantial"), then we say, that constitutes the waging of aggressive war. To illustrate our point: a person may have knowledge of the planning and preparation of wars of aggression, but he does not participate in a substantial enough manner in such planning and preparation which would be sufficient to hold him criminally responsible. Yet, when possessed of such knowledge whether acquired before or after a particular aggression, any substantial participation by him thereafter, constitutes waging of aggressive war within the meaning of control Council Law No. 10.

The Farben Tribunal undertook to discuss the concept of "waging" in relation to the activities of the defendants in that case. That Tribunal posed the problem as follows: (p. 61)

> "Is it an offense under international law, for a citizen of a state that has launched an aggressive attack on another country, to support and aid such war efforts of his country, or is liability to be limited to those who are responsible

for the formulation and execution of the policies that result in the carrying-on of such a war?"

The Tribunal in trying to prescribe the limits of the class of persons who are embraced within the concept of waging, stated: (p. 61)

> "to depart from the concept that only major war criminals - that is, those persons in the political, military, and industrial fields, for example, who are responsible for the formulation and execution of policies, may be held liable for waging wars of aggression, would lead far afield. * * * To say that the Government of Germany was guilty of waging aggressive war, but not the men who were in fact the Government and whose minds conceived the planning and perfected its execution, would be an absurdity."

The Tribunal then construed the IMT decision as having fixed the standard of participation: (p. 63)

> "* * * high among those who lead their country into the war."

The Tribunal concluded that the Farben defendants were:

> "*** not high public officials in the civil Government, nor high military officers. Their participation was that of followers, and not leaders."

What troubled the Tribunal in the Farben case, was the extent of the standard dealing with waging war, so as not to include within its scope the ordinary German. The Tribunal said: (p. 64)

> "We cannot say that a private citizen shall be placed in the position of being compelled to determine in the heat of war, whether his Government is right or wrong, or if it starts right - when it turns wrong. We would not require the citizen, at the risk of becoming a criminal under the rules of international justice, to decide that his country has become an aggressor, and that he must lay aside his patriotism, the loyalty

> to his homeland, and the defense of his own fireside, at the risk of being adjudged guilty of Crimes against Peace on the one hand, or of becoming a traitor to his country on the other if he makes an erroneous decision based upon facts of which he has but a vague knowledge."

In endeavoring to find the mark dividing the guilty from the innocent, insofar as responsibility for waging of aggressive war is concerned, the Farben Tribunal stated that the line of demarcation did not stop with the defendants who were tried before the IMT. The standard of the IMT was construed by the Farben Tribunal as having been set: (p. 64)

> "* * * below the planners and leaders such as Goering, Hess, von Ribbentrop, Rosenberg, Keitel, Frick, Funk, Doenitz, Raeder, Jodl, Seyss-Inquart and von Neurath. * * * "

who were found guilty of the waging of aggressive war, and,

> "* * * above those whose participation was less, and whose activity took the form of neither planning nor guiding their nation in its aggressive ambition."

As we have indicated, the Farben case dealt with private citizens, not high governmental officials.

The test which we suggest be applied to the defendants in this case, in connection with "waging", eliminates the fears indicated by the Farben Tribunal. The defendants here charged were all high officials of the Government possessed with unique knowledge unavailable to private citizens. Hence, the area of responsibility in this case is limited to high officials of the Government who had knowledge of the planning and preparation for some or all of the aggressions, and whose participation after the initiation thereof, was substantial.

Plunder, Spoliation and Slave Labor - as "Waging War"

In connection with the concept of "waging", we desire to call attention to another factor which is embraced in this concept. The plunder of property in occupied countries is charged separately as a War Crime, and a Crime against Humanity. The initiation and utilization of slave labor is separately charged as a War Crime and a Crime against Humanity - But there are other aspects of plunder and spoliation, and slave labor, which play a part in Crimes against Peace relating to the waging of aggressive war.

When a defendant has knowledge that an aggressive war has been initiated, and that the plan for waging of such war includes the utilization of the economy and industry of occupied countries, and the utilization of the manpower of such occupied countries, then his substantial participation in the execution of these features of the program, constitutes, participation in waging wars of aggression. Now, the distinction between performing activities in these fields, which are War Crimes and Crimes against Humanity, and participation in these activities which constitute waging of wars of aggression, lies in the fact of Knowledge that these programs are intended as part of the plans for waging wars of aggression. To illustrate - plunder and spoliation of property, per se, constitutes a War Crime and Crime against Humanity. When, in addition to participating in the act of plunder itself, there is evidence that this participation was accompanied by knowledge that the property was to be plundered and spoliated pursuant to a plan or program to more effectively wage the aggressive wars,

then as to such defendant, the crime of "waging" is made out.

Another factual illustration will perhaps make this point clearer. In connection with the spoliation charges against Russia, the Defense have taken the position that as a matter of law, it is not a violation of the Hague Regulations to plunder Russian property, since such property is of a special character, and not of the kind dealt with in the Hague Conventions. The Prosecution vigorously contests this contention. But if such contention is sustained, then, of course, there would be no War Crimes or Crimes against Humanity of plunder and spoliation as to Russia. Now, assuming, for argument's sake only, that with respect to War Crimes and Crimes against Humanity there is no criminal responsibility for the spoliation acts in Russia, it is clear from the evidence, that the spoliation activities in Russia were integral parts of the plans for waging aggressive war, both against Russia and the other Allied countries, and any defendant who had knowledge of and substantially contributed to the planned aggression against Russia, and who had knowledge of and substantially contributed to the plans to plunder and spoliate Russian industry for purposes of enabling the German war machine to wage aggressive war, is guilty of the crime of participation in the waging of aggressive war.

There is another aspect of "waging" that we should like to discuss. The evidence as to some defendants shows substantial participation in the planning to use Russian industry and manpower as an instrument for the strengthening of the German military machine for

the continued waging of war. Assuming, however, arguendo, there were no participation in the Russian spoliation as distinguished from the planning, yet participation in such planning would constitute participation in waging aggressive war against England, France, Holland, Belgium, etc. - for the planning to use the resources and manpower of Russia was directly connected with the plans for further waging of war against England and the others mentioned.

We have referred to the Judgment of the General Tribunal in the French Zone in the Roechling case, and have pointed out that the Tribunal, consisting of French, Belgian and Dutch judges, found the defendant guilty of "waging", but acquitted him of participating in the planning, preparation and initiation of aggressive war. We have discussed in our brief in some detail the facts upon which the French Tribunal based its decision which found the defendant guilty of "waging", and for present purposes it would be sufficient to note that Roechling's activities for which he was convicted for "waging", is related to the take-over and utilization of industry and property of occupied countries for the purpose of waging wars of aggression. Roechlings positions and activities were considerably less significant than that of these defendants.

Austria and Czechoslovakia

In connection with Crimes against Peace, consideration of the legal effect of the activities of Germany, and of these defendants, in relation to

Austria and Czechoslovakia, is necessary. From the legal aspect, we see the problem to be this: Were the invasions of Austria and Czechoslovakia, where no hostilities actually occurred, Crimes against Peace? Does the fact that there was no physical resistance by Austria or Czechoslovakia in the form of sending an army into the field to resist the German invasion, make this invasion permissible under international law?

The position of the Prosecution is that if the invasion is unlawful, it does not become lawful because the military force of the invading power was so superior that the occupied power felt it useless, in the military sense, to resist.

The moral problem and the legal problem, here involved, relates to the use of force as an instrument of national policy. It is the exercise of such force on another Government, compelling the latter Government to yield to the superior force, which constitutes the crime. We cannot see, as a matter of principle, that it can make any difference whether the Government yields after a battle, or before a battle, when from the military point of view, it is known that actual resistance can serve no useful purpose.

The IMT considered that point, and stated: (p.194)

> "It was contended before the Tribunal that the annexation of Austria was justified by the strong desire expressed in many quarters for the union of Austria and Germany; * * * and that in the result, the objective was achieved without bloodshed. These matters, even if true, are really immaterial, for the facts plainly

> prove that the methods employed to achieve the objective, were those of an aggressor. The ultimate factor was the armed might of Germany ready to be used if any resistance was encountered."

The IMT, in discussing the guilt of von Schirach, stated:

> "von Schirach * * * is charged * * * only with the commission of Crimes against Humanity. As has already been seen, Austria was occupied pursuant to a common plan of aggression. Its occupation is, therefore, a 'crime within the jurisdiction of the Tribunal' as that term is used in Article C of the Charter."

The Tribunal then held that persecution on political, racial or religious grounds in connection with the occupation of Austria, constituted a Crime against Humanity under the Charter. This holding is significant when we recall that the Tribunal held that: (p. 254)

> "To constitute Crimes against Humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. * * * The Tribunal, therefore, cannot make a general declaration that the acts before 1939 were Crimes against Humanity within the meaning of the Charter."

We emphasize the words "general declaration." These holdings of the IMT plainly indicate that it is not a requisite for actual hostilities to take place in order to support a finding that an aggressive act or an invasion in violation of international treaties has occurred. If the IMT had thought that the occupation of Austria was lawful, then it would have been bound to hold that Crimes against Humanity could not, in the legal sense, have been committed in Austria.

Its holding was directly to the contrary.

It should be pointed out in this connection, that the Indictment lodged before the IMT did not charge the invasion of Austria was an aggressive war (Count II of the IMT, Vol. I, Trial of the Major War Criminals, at p. 42). The IMT made special reference to that point when it discussed the guilt of of Kaltenbrunner, and stated:

> "The Anschluss, although it was an aggressive act, is not charged as an aggressive war."

In this Indictment, we have specifically charged that the invasion against Austria was an invasion and act of aggression in violation of international laws and treaties. We have then in this case a charge which was not made against any of the defendants before the IMT. The findings of the IMT that the invasion of Austria was an aggressive act, is binding on this Tribunal. In view of the specific charge in the Indictment that this particular activity is an invasion and a war of aggression in violation of international treaties, a specific finding is required as to each of the defendants who are here charged with responsibility for participation in the planning and preparation for the invasion of Austria.

Czechoslovakia presents a slightly different problem. There are two factual phases dealing with the situation in Czechoslovakia: 1) the Sudetenland which was occupied under the Munich Agreement, and 2) Bohemia and Moravia, which was occupied on 15 March 1939 in violation of the Munich Agreement, and in violation of international law generally.

As to the occupation of Bohemia and Moravia, the findings of the IMT are that: (p. 334)

> "Bohemia and Moravia were occupied by military force. Hacha's consent obtained as it was by duress, could not be considered as justifying the occupation. * * * The occupation of Bohemia and Moravia must, therefore, be considered as a military occupation covered by the rules of warfare."

Again, this indicates that if the invasion is aggressive or in violation of international treaties or assurances, it is a Crime against Peace within the meaning of the Control Council Law, regardless of whether hostilities actually occurred. A contrary holding would substitute force as the standard of justice, rather than the sanctity of international obligations, and a small or weak nation which lacks the military force to resist the powerful aggressor, would have no protection under international law. International law cannot rest on any such immoral foundation.

As to the Sudetenland, the argument is made that the occupation of that part of Czechoslovakia was lawful, since it was pursuant to the Munich Pact. The IMT, after reciting the facts in connection with the planning of aggression against Czechoslovakia, stated: (p. 196)

> "These facts demonstrate that the occupation of Czechoslovakia had been planned in detail long before the Munich conferences. * * * The plan was modified in some respects after the Munich conferences, but the fact that the plan existed in such exact detail and was couched in such war-like language, indicates a calculated design to resort to force."

The Munich Agreement insofar as Germany was concerned was a "diplomatic" operation, carried out in execution of the plan to take all of Czechoslovakia by force. We do not, we submit, have to consider any theoretical question under international law as to whether occupation of a country under a formal license of another power, or with the formal consent of another power, is legal under international law. We need go no further than a consideration of the facts of the Munich Agreement. In view of the findings of the IMT that it was concluded as an alternative to the immediate execution of the aggressive plans of Germany to occupy Czechoslovakia, it does not carry with it the same legal effect as an agreement carries which is freely negotiated, without force or coercion. In our brief dealing with the legal principles applicable to plunder and spoliation and War Crimes and Crimes against Humanity we discuss the legal problems of Czechoslovakia in some detail, and for a further consideration of the question, we respectfully refer the Tribunal to that brief.

We have mentioned the findings of the IMT to the effect that Austria and Czechoslovakia were aggressive acts, and to the findings that certain wars were aggressive wars. We believe this an appropriate point to consider the effect of those findings. Ordinance No. 7 provides that:

> "The determinations of the IMT that invasions and aggressive acts, aggressive wars, crimes, atrocities or inhuman acts were planned or occurred, shall be binding on the Tribunals established hereunder and shall not be questioned except insofar as participation therein or knowledge thereof

> of any particular person may be concerned. Statements of the International Military Tribunal in the Judgment in Case No. 1 shall constitute proof of the facts stated, in the absence of substantial new evidence to the contrary."

A number of the defendants have attempted to show that some of the acts found aggressive by the IMT were not aggressive in fact. Of course, under Ordinance No. 7 this avenue is not open to them. The ordinance provides that "determinations of the IMT that invasions and aggressive acts, aggressive wars" took place are binding. But the defendants may argue that they had no knowledge that the invasion, for example of the USSR, was aggressive, and that on the contrary they thought Germany's attack was in fact a defensive war. This is a fashionable line of argument nowadays, but it is not new. The same argument and was made before the IMT. Concerning that argument the evidence there submitted, the IMT said:

> "It was contended for the defendants that the attack upon the USSR was justified because the Soviet Union was contemplating an attack upon Germany, and making preparations to that end. It is impossible to believe that this view was ever honestly entertained."

The evidence submitted in this case is to a similar effect and has not stood up under cross examination. The testimony of General von Halder, Chief of Staff, called as a defense witness on this point, is a striking example of the shallowness of this proof. We submit that, quite as in the IMT case "it is impossible to believe that this view was ever honestly entertained" by any of these defendants.

Distinguishing the Krupp, Farben, and High Command Cases.

We come, now, to a consideration of the cases which have, heretofore, been decided by the Military Tribunals at Nurnberg, which deal with the legal questions involving the interpretation and application of the Control Council Law No. 10 definition of Crimes against Peace.

In the case-by-case application of the principles announced by the IMT, and those underlying Control Council Law No. 10, relating to Crimes against Peace, the Military Tribunals at Nurnberg have excluded certain types of officials and persons and certain activities from the area of responsibility for this crime. Thus, in the Krupp case, the Tribunal held that private citizens who were engaged in producing munitions for war, could not be charged with responsibility for participating in the planning, preparation, initiation or waging of aggressive war, when there was no showing that such private persons had any substantial connection with, or close relationship to, the officials of the Government who were engaged in such planning, preparation, initiation or waging. Thus, Judge Anderson, in his Special Concurring Opinion in that case, stated:

> "The twelve defendants were non-combatants engaged as private citizens in the conduct of a private enterprise producing, among other things, armaments for profit.*** If the manufacture and sale of armaments for profit can be regarded as preparation for war in a criminal sense, it can only be so if done in complicity with the plans of some agency capable of planning, initiating and waging war."

Likewise, in the case involving the defendants of I. G. Farben, the Tribunal held that they, too, were private citizens who were not shown to have the degree of connection with high Government officials of a character to warrant a finding that their participation in rearmament was with the knowledge of its criminal purpose. Thus, the Tribunal in the Farben case, stated:

> "In this case, we are faced with the problem determining the guilt or the innocence with respect to the waging of aggressive war on the part of men of industry who were not makers of policy, but who supported their Government during the period of rearmament, and who continued to serve that Government in the waging of war. *** The defendants now before us, are not high Government officials in the Civil Government, nor high military officials. Their participation was that of followers, and not leaders."

We think it apparent that in the factual situations involving Krupp and Farben, the decisive fact was that the defendants were private citizens not occupying high Government or military office. This fact, is the substantial difference between those cases and the case at bar.

The Military Tribunal in the case known as the "High Command Case", decided 28 October 1948, again applied the IMT principles and the statutory definition of Crimes against Peace to the particular facts of that case, which involved Commanders and Staff Officers, below the policy level. The particular military officials involved, were held by the Tribunal to be Commanders and Staff Officers "below the policy level", and the Tribunal was of the opinion that such officers: (p.38)

> "*** in planning campaigns, preparing means for carrying them out, moving against a country on orders, and fighting a war after it has been instituted * * *."

were not participating in the planning, preparation, initiation or waging of war. The decision of the Military Tribunal in the High Command case was nothing more than the application of legal principles to a given factual situation, namely the authority and activities of a particular group of Military Commanders and Staff Officers. This is apparent from the following reference in the Tribunal's Judgment: (p.36)

> "The individual soldier or officer below the policy level, is then the policy makers' instrument, finding himself as he does, under the rigid discipline which is necessary, and is peculiar to military organization."

In the cases discussed, there will necessarily appear dicta both pro and con. This is familiar judicial technique in rationalizing a particular judgment. The point we make is that the three cases referred to, namely, Krupp, Farben and the High Command, constitute factual situations of a special nature, and as to those factual situations, the Tribunal found that the persons and activities there involved did not come within the scope of criminal responsibility for Crimes against Peace.

The Law still is left at the stage where it must be developed by a case-to-case process of inclusion and exclusion before it can be sufficiently crystallized into a more definite pattern which identifies with greater certainty the positions and activities coming within its prohibition.

The point we make, is that the three factual situations which the Military Tribunals at Nurnberg had before them for consideration with respect to Crimes against Peace, are substantially different from the factual situations which are present in this case. The defendants here, however, both by virtue of their high governmental position and their functional activities, are parallel to the defendants found guilty by the IMT.

What, then, shall we use as a guide in applying to the facts in this case the principle that aggressive war is criminal?

The IMT has stated that the supreme international crime is the commission of Crimes against Peace. The Krupp case recognized that basic moral concept underlying this crime, and stated:

> " * * * Aggressive war is the supreme crime, and no penalty is too severe for those who are responsible for it."

We further have the observation of the IMT, that:

> "Hitler could not make aggressive war by himself. He had to have the cooperation of statesmen, military leaders, diplomats and businessmen."

What we are faced with here, is recognition in international law of a moral principle, coupled with repeated assurances that the maintenance of this moral principle is necessary for the preservation of civilization. If in application this principle is too narrowly applied, it becomes a pious hope, and not an instrument of Justice for which the responsible persons must answer.

It is not true that the only persons responsible for the aggressive wars of Germany, are Hitler and the thirteen defendants who were found guilty by the IMT. It runs contrary to experience and to all reason to say that the tremendous military organization which Germany built to prepare for aggressive war and to wage it, is the handiwork of only Hitler and those thirteen persons. It is unrealistic, and contrary to everyday experience, to say that thirteen persons can mobilize a population of 80 million, and organize an industrial economy for war over a period of years, and integrate the economy of conquered countries to wage aggressive war. Mr. Justice Jackson expressed the same thought before the IMT:

(p. 104, Vol. II, IMT)

> "This war did not just happen - it was planned and prepared for over a long period of time and with no small skill and cunning. The world has perhaps never seen such a concentration and stimulation of the energies of any people as that which enabled Germany 20 years after it was defeated, disarmed, and dismembered, to come so near carrying out its plan to dominate Europe. Whatever else we may say of those who were the authors of this war, they did achieve a stupenduous work in organization, and our first task is to examine the means by which these defendants and their fellow-conspirators prepared and incited Germany to go to war."

Common knowledge of modern Government should be enough to demonstrate that Ribbentrop was not the whole Foreign Office. Goering was not the entire Four Year Plan. Goebbels was not the entire propaganda machine. Himmler was not the entire SS. And Hitler was not the whole government in action. The defendants in this case are the high governmental officials who were partners of and indispensable supplements to Ribbentrop, Goering, Goebbels, Himmler and Hitler, so that the tremendous military machine which they were building in preparation for the

aggressive wars, and the waging of such wars, could be accomplished.

If, as Former Secretary of War, Henry L. Stimson, (25 Foreign Affairs 179 (January 1947)) states:

> "The central moral problem is war - and not its methods,"

we do not come to grips with the heart of the problem by giving the words of Control Council Law No.10 a restrictive interpretation, that is not justified by the language nor by the spirit and intent of the law. Such restrictive interpretation disregards the factual situation which the legislators had in mind at the time.

We call attention again to paragraph 2 of article II of Control Council Law No.10, which provides that a person is deemed to have committed a Crime against Peace if:

> " * * * he was (a) a principle or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission or (e) was a member of any organization or group connected with the commission of any such crime or (f) with reference to paragraph 1 (a), if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country."

Now, we respectfully suggest, that this Tribunal, being a creature of, and owing its existence to. the authority of the Control Council Law, is. required to give to that statute an interpretation consistent with its legislative intent. That is to say, the standards laid down in paragraph 2 of article II, are statutory provisions, and the court is bound to apply

the provisions of that statute, according to its plain lanuage. A Tribunal cannot, under the guise of interpretation of a particular statute, set up its own standards of criminal responsibility. The provisions state that a person holding high position in the civil, military or industrial life in Germany is, if he takes a consenting part, guilty of the commission of Crimes against Peace.

It appears to us that this statutory standard has not always been applied in accordance with its unmistakable language.

There is a tendency to judge these defendants according to the standards of public life in the executive branch of the Governments of the United States, England, and other Democratic countries. The system of government instituted by the Third Reich was based on political and legal considerations of a different nature. The division of legislative, judicial and executive power, which we know, was done away with and lodged in one department of the Government and rationalized under the concept of the Fuehrer principle. All of these defendants willingly joined that political system and that Government, knowing that a different principle of responsibility for government action was the standard of their system. They voluntarily joined the Government of Hitler, and exercised the legislative, executive and judicial power so concentrated in the Government offices in which they became associated. Did they not then, in plain and simple language, sanction, approve and participate in the force and terror upon

which that system was based and maintained?

Can they now say that they, cabinet members, ministerial secretaries or government officials on the same level, are not to be held responsible because the final overall decision was at the Fuehrer level?

KOERNER's defense is a good example of this point. He joined up with Goering early in 1926 and when Goering was first elected to the Reichstag in 1928, KOERNER severed his private business connections to devote his full time to Goering. From the beginning of the Nazi seizure of power, he became his closest associate. He was to Goering what Hess was to Hitler. He was at Goering's side through the successive stages of terror whereby the power seized, was extended and maintained. He was his chief deputy in the Four Year Plan. He says now, that although he was at a high governmental level, he cannot be held responsible for the general policy of the Government which led to war, notwithstanding his participation in the execution of that policy. For he argues, that under the Fuehrer principle - (and he asks for a literal interpretation and application of that principle) only Goering can be held responsible for the tremendous job of the Four Year Plan which did enable Germany to wage the aggressive wars. Only Goering, he says, could make the basic decision - and hence only he should be held answerable.

It is not, we submit, a realistic approach to the factual situation relating to the Government of the Third Reich to undertake to define the precise areas of

authority between Goering and KOERNER. Nor is it a realistic approach to undertake to define the precise area of authority between Ribbentrop and Weizsaecker; between Goebbels and Dietrich, between Frick and Stuckart, between Himmler and Berger or Schellenberg. The internal jurisdictional divisions which the Hitler Government set-up to more effectively carry out the planning, preparation and waging of aggressive war, cannot, in a realistic sense, be broken down so as to apportion closely within these sectors and levels, the varying degrees of responsibility. We think it enough if the evidence shows that each defendant knowingly took a consenting part in and participated in a substantial way in the criminal activities charged. It is enough that each of these defendants operated at a high level in the same fields of activity that the principal defendants in the IMT case operated and substantially contributed to the success or failure of the program.

A functional comparison with the positions and activities of the defendants in the IMT and the defendants in this case, will disclose the parallel between the two cases. The simple test to be applied to these defendants is this: Was there substantial participation by these defendants in the preparation, planning, initiation or waging of aggressive war, and was such participation had with knowledge of the fact that the policy in which they were engaged in, had as its basis the use of force as an instrument of national policy?

An analogy of these defendants in connection with the Crime against Peace to the defendants convicted by the IMT will now follow.

1. WEIZSAECKER, WOERMANN, RITTER, and VEESENMAYER.

The culpability of the defendants Weizsaecker, Woermann, Ritter and Veesenmayer for crimes against the peace is a part of, or essential supplement to, the culpable conduct of certain defendants convicted on the aggressive war count before the IMT. We shall draw some parallels between parts of the evidence in this case and the findings of the IMT concerning the criminal conduct of von Ribbentrop, von Neurath, Seyss-Inquart and Frick, all defendants convicted by the IMT.

First let us take the activities of the defendants Weizsaecker and Woermann. We find these activities are comparable to or extensions of the conduct of Ribbentrop and Neurath. Ribbentrop and Neurath were found guilty under both the conspiracy and aggress war counts by the IMT. At the time of the aggressive act against Austria in March 1938, Neurath once again took charge of the Foreign Office for the duration of the action against Austria, even though Ribbentrop had been appointed Neurath's successor. During this interregnum Weizsaecker remained Chief of the Political Division. The IMT held that Neurath:

> "took charge of the Foreign Office at the time of the occupation of Austria, assured the British Ambassador that this had not been caused by a German ultimatum, and informed the Czechoslovakian Minister that Germany intended to abide by its arbitration convention with Czechoslovakia." (p.334).

Weizsaecker shares responsibility for the formulation of the assura which Neurath gave to the Czechs and in the preparation of the official communique containing the Nazi pretext "justifying" the Anschluss. This communique was made before German troops went into action against Austria.

Within a few days after the success of Germany's first aggressiv act, Weizsaecker was promoted from Chief of the Political Division to the position of State Secretary of Ribbentrop, the new Foreign Minis Ribbentrop needed and used the capacity and suavity of the experienc

Weizsaecker and of defendant Woermann, the experienced Under-Secretary, who succeeded Weizsaecker as Chief of the Political Division. Weizsaecker and Woermann were head over heels in the machinations connected with Germany's next aggressive act against Czechoslovakia - and, indeed, in the maneuvers of aggression from there on until the last aggression had been launched.

The IMT's findings as to von Ribbentrop's participation in the aggressive plans against Czechoslovakia (pp.285-286, IMT Vol.I) can be applied to the defendant Weizsaecker almost word for word with very little alteration. The IMT held that von Ribbentrop "participated in the aggressive plans against Czechoslovakia". So did Weizsaecker. The IMT held that von Ribbentrop "participated in a conference for the purpose of obtaining Hungarian support in the event of a war with Czechoslovakia". So did the defendant Weizsaecker. The IMT found that after the Munich Pact the defendant Ribbentrop "continued to bring diplomatic pressure with the object of occupying the remainder of Czechoslovakia". So did the defendant Weizsaecker. The IMT found that Ribbentrop was instrumental "in inducing the Slovaks to proclaim their independence". So was the defendant Weizsaecker. Both Ribbentrop and the defendant Weizsaecker were "present at the conferences of 14-15 March 1939, in which Hitler by threats of invasion counselled Hacha to consent to the German occupation of Czechoslovakia". When, finally, the defendant Ribbentrop was in Prague for the "celebration", the defendant Weizsaecker remained in Berlin in charge of the Foreign Office. There he informed foreign diplomats that the Czechoslovakian affair was a fait accompli and that Germany would not accept any protest.

We submit that there is a striking interrelation, and often almost identity, between the conduct and the guilt of Ribbentrop and the defendant Weizsaecker in the aggression against Czechoslovakia. It is no more striking, however, than the interrelation of their activities in the aggression against Poland. The IMT held that

Ribbentrop "played a particularly significant role in the diplomatic activities which led up to the attack on Poland". So did Weizsaecker. The IMT found the defendant Ribbentrop discussed "the German demands with respect to Danzig and the Polish Corridor with the British Ambassador during the period of 25 to 30 August 1939". Weizsaecker discussed the same question with Ambassador Henderson and Ambassador Coulondre for a still longer period of time. The IMT found that it was an official German policy to "attempt to induce the British to abandon their guarantee to the Poles". Concerning the discussions on these questions, both Ribbentrop and Weizsaecker "did not enter them in good faith in an attempt to reach settlement of the difficulties between Germany and Poland". Weizsaecker cabled the defendant Veesenmayer that discussions with the Poles should be continued in such a way so that the failure of a pacific settlement could be blamed upon the Poles (Exh.173, 175, 176). It is a little late in the day for Weizsaecker to declare that he did not identify his will with the aggression of Hitler's Third Reich.

The correlative nature of the conduct of Ribbentrop and Weizsaecker continued with respect to the aggressive acts against Norway, Denmark and the Low Countries. The IMT held that "Ribbentrop was advised in advance of the attack" and that Ribbentrop "prepared the official Foreign Office memoranda attempting to justify these aggressive actions". Weizsaecker, for his part, attempted to induce the Norwegian, Danish and Belgian governments to capitulate without resistance in numerous conferences with foreign officials of these countries. The documents show that the teamwork of Ribbentrop and Weizsaecker continued with respect to the aggressive acts against the Balkan countries and the Soviet Union.

The defendant Woermann participated substantially in all aggressive acts beginning with Czechoslovakia. He was Chief of

the Political Division, the very heart of the German Foreign Office. In this position he necessarily gave intimate and significant support to the acts of Ribbentrop and Weizsaecker. It is striking to compare his function in the Foreign Office with the IMT findings concerning the defendant Frick's work in crimes against peace. With respect to Frick the IMT stated:

> "Performing his allotted duties, Frick devised an administrative organization in accordance with wartime standards. According to his own statement this was actually put into operation after Germany decided to adopt a policy of war." (Vol.I, p.299).

According to an official German document spelling out the organizatio of the German Foreign Office, Woermann's Political Division held:

> "... the position of a central agency, which is to observe current events abroad and to determine foreign policy according to the Fuehrer's intention ..." (Pros. Exh.3658).

We have already noted that the IMT found that Ribbentrop was "instrumental in inducing the Slovaks to proclaim their independence". Woermann, in an official memoranda, expounded the rationale of securing an independent Czechoslovakia pursuant to Germany's plans for expansion to the east. Woermann wrote:

> "An independent Slovakia would be a weak political organism and hence would lend the best assistance to the German need for advance and settling space in the East. Point of least resistance in the East." (Pros.Exh. 98).

The IMT found that Ribbentrop used the Sudeten question as a means:

> "... which might serve as an excuse for the attack which Germany was planning against Czechoslovakia." (Vol.I, p.286)

We ask the Tribunal to note carefully what Woermann was thinking and counselling concerning the Sudeten maneuvering and how carefully he advised with respect to the skilful timing of events. Woermann developed the following plan in his memorandum of 19 September 1938 (Pros.Exh.C-385):

"As to the fate of the rest of Czechoslovakia, of the many possibilities ranging from simple annexation to full national independence with or without an international guarantee, the most far-reaching possibility, namely that of an annexation is out of the question for the time being, since otherwise there would be no sense in discussing the terms of the right to autonomy of the Sudeten Germans ... The request for German military sovereignty" (as suggested by the Sudeten German Party in a plan submitted to Hitler) "would naturally include the request that Czechoslovakia withdraw from any treaties directed against Germany. Even if such a far-reaching program is not desired, or cannot be realized at the present moment, the request for the annulment of such treaties should be made an independent request.

"Under no circumstances must the solution of the Sudeten German question be delayed by negotiations and discussions on the aforementioned problems. For these reasons we will have to see to it that in future discussions with the British the Sudeten-German problems on the one hand and the other problems on the other hand be treated differently with regard to the time. The Hungarians and Poles must be won for this idea."

The defendant Ritter, in the German Foreign Office, was Ambassador for Special Assignments. His principal function was to coordinate the aggressive policy between the Foreign Office and the High Command of the Wehrmacht. It is not surprising that his conduct ties in closely to criminal conduct found by the IMT in its discussions of the defendant Ribbentrop on the one hand, and the conduct of Keitel and Jodl of the High Command, on the other

hand. By way of example we shall quote one excerpt from the IMT judgment concerning Keitel and one from the IMT judgment concerning Ribbentrop. We shall then quote from a memorandum of the defendant Ritter which shows his coordinating role in the diplomatic and the military maneuvers involved in aggression.

In the case of Keitel, the IMT held:

> "Formal planning for attacking Greece and Yugoslavia had begun in November 1940. On 18 March 1941 Keitel heard Hitler tell Raeder complete occupation of Greece was a prerequisite to settlement, and also heard Hitler decree on 27 March that the destruction of Yugoslavia should take place with 'unmerciful harshness'." (P.289, Vol.I.)

In the case of Ribbentrop, the IMT judgment states:

> "Von Ribbentrop attended the conference on 20 January 1941, at which Hitler and Mussolini discussed the proposed attack on Greece, and the conference in January 1941, at which Hitler obtained from Antonescu permission for German troops to go through Roumania for this attack." (P.286, Vol.I.)

In January of 1941 Keitel informed Ritter of the aggressive war steps to be taken in the Balkans. Keitel told Ritter that the date for the attack against Greece was set for the beginning of April and that the German troops should enter Bulgaria at the latest possible moment. Based on this conversation, Ambassador Ritter proposed the policy which Ribbentrop and the Foreign Office should now follow in order to coordinate military and diplomatic acts in the scheduled aggressions. Ritter's own proposal for the policy synchronization reads:

> "During the next two or three weeks a number of actions in the field of foreign policy have to be timed and coordinated with the military situation and the military activities ..." (Pros. Exh.300, NG-3097).

In the same memorandum Ritter mapped out actions, which included the renovation of the Bulgarian-Turkish non-aggression pact, the entry of Bulgaria into the Tri-Partite Pact, and an open statement of German policy concerning Turkey.

When we come to the defendant Veesenmayer, his conduct has striking comparisons to some of the conduct which the IMT emphasized

in finding Seyss-Inquart guilty of crimes against Peace. Both were masters of Nazi intrigue in the territory of Germany's neighbors. With respect to the intrigue in Austria, Seyss-Inquart was the Austrian traitor and as such he has held the limelight concerning the whole affair. However, the contemporaneous documents in this case show that actually Seyss-Inquart was directly subordinate to the defendants Keppler and Veesenmayer in the whole Austrian action. As Hitler's personal representative in Austria in 1937 and early 1938, the defendants Keppler and Veesenmayer used Seyss-Inquart as the principal tool for turning and preparing the forcible Anschluss. Concerning Seyss-Inquart's role, the IMT stated:

> "Seyss-Inquart participated in the last stages of the Nazi intrigue which preceded the German occupation of Austria ..."

In connection with the intrigue which led to the separation of Slovakia from the sovereign Czechoslvak State, both the defendants Veesenmayer and Keppler were topmost representatives of the German Foreign Office in engineering this important aspect of the entire aggression against Czechoslovakia. Both Veesenmayer and Keppler played a substantial role by personal conversation in inducing Tiso to go to Berlin. Keppler accompanied Tiso to Berlin when Hitler, in the presence of the defendant Keppler, forced the hand of Tiso. When this aggression was completed, it was Veesenmayer alone who went to Danzig in order to foment a proper basis for engineering the next German aggression against Poland. It was also Veesenmayer who provided a principal justification for the aggression against Yugoslavia by precipitating the secession of Croatia at the eleventh hour. Veesenmayer moved from one spot to another as the maneuvers of aggression required. Our brief will demonstrate in full the significant role that Veesenmayer played in making and breaking governments and in providing requisites for a number of German aggressions.

We now come to the defendant Otto Meissner. Meissner participated in a number of outstanding international meetings which were part and parcel of Germany's political aggression. Meissner was present at the meeting with the Slovak President Tiso which prepared the separation of Slovakia from the sovereign Czechoslovak State. He was present at the conferences with President Hacha when Hacha was bullied into surrendering Czechoslovakia without resistance upon threat of devastation. Meissner was present at the conferences with Japanese Foreign Minister Matsuoka in which Japan was urged:

> "... to strike at the right moment and take the risk upon herself of a fight against America."

But upon a reconsideration of all of the evidence in the case, we are not convinced that the evidence proves beyond a reasonable doubt that the defendant Meissner took substantial initiative or played an important role in bringing about these conferences, in influencing what was said or done, or in following up on any decisions taken. After Hitler became both Fuehrer and Reich Chancellor of Germany, it appears that in the consolidation of executive functions under Hitler, the functions of the Chief of the Presidential Chancellery were narrowed. In the field of foreign policy, the Office of the Presidential Chancellery did perform certain functions of protocol and no doubt it was not entirely sterile in influencing or executing the foreign policy of the Third Reich. But on the basis of the entire record we are not convinced that we have established our burden of showing a substantial participation by Meissner in the preparation, initiation or waging of aggressive war. It does appear that the Office of the Presidential Chancellery played a highly significant part in certain policy matters, especially in respect to the treatment of certain prisoners turned over for "special treatment" or murder to the Gestapo. Such conduct, however, is properly a matter for consideration under Count V.

Therefore, upon consideration of all the evidence in the case, the prosecution feels that it has not established its burden of proof as against the defendant Meissner with respect to crimes against peace. The prosecution hereby formally withdraws its charges against the defendant Otto Meissner under Counts I and II of the indictment.

2. KROSIGK

There is an adequate basis for convicting von KROSIGK on Count I by analogizing his case to the cases of Funk and Schacht, defendants in the IMT case. In fact, his guilt is more clearly established than that of Funk, in some respects, because of the long period of time during which he gave his services to the Nazi regime. He encompasses much of the early period during which the IMT found Schacht played a dominant role, as well as the later period when Schacht retired and Funk was Plenipotentiary General for War Economy.

To elaborate this a little more: As to Schacht, the IMT summed up the issue in the following sentence (Vol. I, IMT, p. 310):

> "The case against Schacht therefore depends on the inference that Schacht did in fact know of the Nazi aggressive plans."

That inference, the IMT said,

> "has not been established beyond a reasonable doubt." (Ibid, p. 310)

The basis for that remaining reasonable doubt is explained in the earlier discussion of the case against Schacht, It was not that Schacht could not have known of the aggressive objective of the rearmament program; quite the contrary, the IMT specifically recognized that anyone with a knowledge of German finances was in a particularly good position to realize that the armament policy had aggression as its object. The IMT said:

> "On the other hand, Schacht, with his intimate knowledge of German finance, was in a peculiarly good

> position to understand the true significance of Hitler's frantic rearmament, and to realize that the economic policy adopted was consistent only with war as its object." (Ibid, p. 309).

The basis, then, was the lack of participation in the economic program after its aggressive purpose became evident. The IMT apparently accepted Schacht's own explanation of his conduct. Of it, the IMT said:

> "Schacht, as early as 1936, began to advocate a limitation of the rearmament program for financial reasons. Had the policies advocated by him been put into effect, Germany would not have been prepared for a general European war. Insistence on his policies led to his eventual dismissal from all positions of economic significance in Germany." (Ibid, p. 309).

In the light of this reasoning, there can be no question but that Schacht would have been guilty under Count II of the IMT case (Count I, this case) had he continued to cooperate in the economic program, rather than adopting a policy of opposition which eventually brought about his dismissal. If there were any doubt about it, the judgment as to Funk dispels it. The first sentence of the judgment finding Funk guilty states:

> "Funk became active in the economic field after the Nazi plans to wage aggressive war had been clearly defined." (Ibid, p. 304).

Then, after outlining his activity, the IMT concluded:

> "Funk was not one of the leading figures in originating the Nazi plans for aggressive war, His activity in the economic sphere was under the supervision of Goering as Plenipotentiary General of the 4-year plan. He did, however, participate in the economic preparation for certain of the aggressive wars, notably those

against Poland and the Soviet Union, but his guilt can be adequately dealt with under Count Two of the Indictment." (Ibid, p. 305).

Schacht escaped conviction because the IMT was at least partially convinced by his story that he began to put on financial brakes as soon as he was convinced of the aggressive designs of Hitler. However, when Schacht was trying to slow down rearmament, KROSIGK increasingly was sponsoring the measures which made Schacht's objective impossible. Schacht was not only in opposition to Geering in the economic field, but was also in opposition to von KROSIGK in the financial field. KROSIGK knew that if the MEFO bills were to be paid -- 12 billion of them -- that rearmament would slow down, because the money was not there for both repayment and continued rearmament. He chose, despite that fact, to allocate the money to further armament, rather than meet the MEFO obligation. At the very best, he cast his lot with the aggressors, rather than with Schacht. The facts are discussed at length in the KROSIGK brief of the Prosecution.

Relative to later rearmament the IMT said, in its decision on Funk:

"Funk became active in the economic field after the Nazi plans to wage aggressive war had been clearly defined." (Ibid, p. 304).

As to von KROSIGK, we need modify that sentence in only one respect, so that it would read: Von KROSIGK continued to be active in the economic field after the Nazi plans to wage aggressive war had been clearly defined. The IMT begins its recitals on Funk

with the Goering speech of 14 October 1938, at which a "gigantic increase in armaments" was announced. For von KROSIGK, we can go further back to pick up the threads, and show how, by the end of 1938, the Ministry of Finance was completely allied with and an integral part of the whole rearmament program.

It will be remembered that it was in 1936 that Schacht, according to the IMT began to advocate a limitation on armaments, and, as the IMT said, because of his intimate knowledge of German finance, was in a good position to realize that Hitler's "frantic rearmament" was "consistent only with war as its object" (Ibid, p. 309). The documents certainly fully bear out the intimate knowledge which von KROSIGK had of all matters of finance and economics in the preparation for war. They also show that von KROSIGK's attitude conformed thoroughly to the will of Hitler to rearm as quickly as possible, and that von KROSIGK participated in the top-level discussions at which the policy of more and more armament was revealed and insisted upon despite Schacht's objection.

It is worthwhile noting again the dissimilarity between von KROSIGK and Schacht. This was the time when Schacht began definitely to lose out. The IMT said:

> "Goering advocated a greatly expanded program for the production of synthetic raw materials which was opposed by Schacht on the ground that the resulting financial strain might involve inflation." (Ibid, pp.307-308).

As we have seen, Von KROSIGK, who was also on the council which had to do with raw materials and foreign exchange, went along with the program.

The IMT said:

> "The influence of Schacht suffered further when in October 16, 1936, Goering was appointed Plenipotentiary for the 4- year plan with the task of putting 'the entire economy in a state of readiness for war' within four years. Schacht had opposed the announcement of this plan and the appointment of Goering to head it, and it is clear that Hitler's action represented a decision that Schacht's economic policies were too conservative for the drastic rearmament policy which Hitler wanted to put into effect." (Ibid, p. 307).

There is no evidence that von KROSIGK opposed the plan, or Goering's appointment. He went along, fully. Schacht went on leave of absence from the Ministry of Economics in September, 1937, and resigned as Minister of Economics and as Plenipotentiary for War Economy in November, 1937 (IMT, p. 307). Von KROSIGK stayed on, cooperating at the highest policy level. Certainly when one was in a position so high — a cabinet minister — that he participated in all of these activities, the denial of knowledge and realization is patently absurd.

Like Funk, von KROSIGK knew what he was doing when he continued action in late 1938. That von KROSIGK knew of the plan to smash Czechoslovakia, and lent his willing aid to finance the necessary preparations is not contested. On 1 September 1938 von KROSIGK wrote to Hitler (Exh. 1165, EC-419, Bk. 70-B, p. 67). In it he explains the financial situation; the measures he has taken to meet the rearmament program, and the steps he has taken to meet the "basic change" in 1938 caused by the retaking of Austria, the Western fortifications and the "increased tempo of armament." He ends the letter with a statement that:

". . . the day will not be far off when the final death thrust can be dealt to the Czechs." (Exh. 1165, p. 70 supra).

Von KROSIGK may argue that the letter counsels caution, as it does, and that it makes von KROSIGK like Schacht. The difference is that von KROSIGK's worries are not, as Schacht's were found to be, about whether there would be an aggressive war, but one solely as to <u>when</u> the aggression should occur. He thought, and argued, that Germany's head start on the Western Democracies was not yet great enough. He said (p. 70, supra): "Most important is: 'time works in our favor'. . . We therefore can only gain by waiting." But beyond a doubt, as early as 1 September 1938 — before Goering's speech of 14 October 1938 — von KROSIGK was aware that the first object of all the frantic rearmament was "the final death thrust" to the Czechs.

We can put von KROSIGK side by side with Funk. The IMT said, in discussing Funk's Crimes against peace:

"On October 14, 1939, after the war had begun, he made a speech in which he stated that the economic and financial departments of Germany working under the 4-year plan had been engaged in the secret economic preparation for over a year." (Vol. I, IMT, p. 305).

This would put the beginning of Funk's and von KROSIGK's most secret war preparation back to about mid-1938, when the new armament plan was announced, the Reich's Defense Council was reorganized, and when the new financing plan was drawn up. In every aspect, von KROSIGK was in up to his neck.

When we come to the year 1939, we find von KROSIGK, and the Ministry of Finance, playing even more important part in the war preparations; the Reichsbank which until then had been an important, and an independent instrumentality of war financing, became in 1939 completely subservient to the Finance Minister. Von KROSIGK, subject only to Hitler, became the predominant financial power in the Reich.

One of the two meetings cited in the IMT Judgment against Funk is the meeting of May 30, 1939, (p. 304). The IMT said:

> "On May 30, 1939, the Under Secretary of the Ministry of Economics attended a meeting at which detailed plans were made for the financing of the war."

Similarly, the Under Secretary of the Ministry of Finance, Reinhardt, also attended the meeting. (3562-PS, Exh. 1011, Bk. 70-C, p. 73). The minutes state (p. 73): "To be shown to the Minister for his information". The text of the minutes makes it obvious why the IMT cited it as important. A partial translation of page 1 of the minutes states (p. 74):

> "Then a report was made of the contents of the 'Notes on the Question of Internal Financing of the War', of 9 May of this year, in which the figures given to me by the Reichs Minister of Finance are also discussed."

Von KROSIGK had been active already in making financial plans for the prosecution of the war. What kind of a war? The minutes give a definite answer (p. 75):

> "First, as concerns the scope of the total production, it is clear that the economic power of the protectorate and and of other territories, possibly to be acquired, must of course be completely exhausted for the purpose of the conduct of the war. It is, however, just as clear that these territories cannot obtain any compensation from the

economy of Greater Germany for the products which they will have to give us during the war, because this power must be used fully for the war and for supplying the civilian home population. It is therefore superfluous to add any amount for such compensation to the debt of the domestic German war financing. The question as to what labor forces, new products and other commodities in the Protectorate and in the territories to be acquired can be utilized for us . . . thus can be excluded from this investigation. Insofar as it should happen that, for political reasons, deliveries without any expectancy of compensation cannot be demanded of the 'occupied' territories, to that extent we will be able to pay with debt certificates of the Reich. . ."

"During the war the army can reckon, out of the economy of the Greater Germany, substantially only with deliveries to the extent of that portion of production which in peacetime is attributed to the public expenditures--minus the minimun requirements of the civilian governmental agencies. In order to cover additional requirements of the Army the economic power of the Protectorate and of the territories to be acquired during the campaign, must be used."

"The war" is now the topic. And we will search in vain for even a suggestion that it is a "defensive" war. Von KROSIGK is plainly participating, on the highest level, in the plan to acquire territory for Germany by force of arms. Czechoslovakia had been taken over; Poland was next. Hitler's decision had already been made, and announced at a meeting of 23 May 1939. (IMT. pp. 198-204). That von KROSIGK was a key figure in the planning is shown by the evidence and discussed in the briefs.

KROSIGK did a stupendous job. Without in the slightest degree minimizing the importance of the work of many other parts of the Hitler government, one can still assert that funds are the sinews of war preparation and war waging. Money had to be available, and it

was up to von KROSIGK, as the Minister of Finance, to supply that money, by taxes, long-term loans, short-term loans, proceeds of confiscation, and the like. The fact that the Finance Minister did not personally participate in all of the high-level strategy conferences where military timetables were worked out principally with military strategists is not surprising, and it does not detract from his responsibility any more than his presence at them would add to his responsibility. For KROSIGK's position was not the determination of a particular military timetable. His job was to prepare the stage for for those who would ultimately determine the exact time and the exact place of a particular offensive. Von KROSIGK was sufficiently acquainted with the secret plans concerning particular and specific aggressions, as the documents show, so that he could provide the necessary financial assistance and so that he could suggest any modifications demanded by the exigencies of the financial situation or the financial possibilities.

When funds were needed, they were there. We have no evidence to indicate that Hitler's preparations for aggressive war suffered in the slightest from the need of Reichmarks. In von KROSIGK's particular field, the internal financing of the war, the striking thing about the documents is that they reveal no particular worry of the war mongers at where the money would come from. Von KROSIGK could be depended upon to supply it.

How, then, can the Minister of Finance, who takes care of employing "all cash and reserves" for the

armament program and who curtails all other expenses in the interest of that program, deny that he played the leading role in financing the armament?

The evidence emphasizes the ability and the dedication with which von KROSIGK performed the task allotted to him in the preparation for war. It is further indicated that activities of von KROSIGK extended beyond the taxgatherer field. His financial tasks even carried him into dealings with the SS concerning the proceeds and the loot of their horrible activities. His participation in war planning and war waging covers the entire Nazi epoch. After the war broke out, von KROSIGK showed the same energy in garnering the required funds which he displayed in making available the funds which made the launching of war possible. KROSIGK mobilized all the forces for the financial victory, paying attention to the whole of Nazi economy as it enfolded with the occupation of most of Europe. KROSIGK never wavered in his enthusiasm and labors for the Nazi cause. That he has admitted this before this Tribunal and has not a ttempted to fabricate for himself a position in the resistance movement is noteworthy. But the attempt to draw parallels between his course and that of Schacht is utterly impossible. The analogy to Funk, however, is a reality, except that Funk put a heavy shoulder to the wheel much later in the day than did von KROSIGK.

3. LAMMERS and STUCKART

In analyzing the evidence, it will not be necessary to travel over unchartered seas. The verisimiltude between the evidence adduced against Frick in the IMT, which resulted in a finding of guilt and a sentence to death by hanging, with the evidence presented against LAMMERS and STUCKART is unusual. It depicts an almost identical pattern of crime, although, as we stated earlier, the evidence in this case is more abundant on these defendants than it was on Frick in the IMT case.

The defendants submit, however, that their positions were utterly insignificant; that their signatures under laws and decrees were purely formal, and the legislative enactments in which they participated were ineffectual from the very outset; that the reports which were being submitted to them were either obsolete when they reached them or not worthy of their interest; that the agencies of which they were members were stillborn children and their enactments abortive; and that their knowledge of happenings in the Third Reich was as scanty as that of an average woebegone German citizen. In a word, they were walking blindfolded through the horrors of the Third Reich. Authentic captured documents from German official sources were - as these defendants would have the Court believe - the archetypes of inexactitude and error.

The phraseology of the documents in evidence is so plain and self-explanatory that they hardly call for any further interpretation. They speak for themselves. In short, these defendants and their witnesses succeeded

in cluttering up the record with a mass of testimony which, insofar as one can tell, had no other purpose than to bewilder, confuse and evade the issues.

We, of course, disagree emphatically with LAMMERS' and STUCKART's technique of taking such a self-deprecating view of their positions, functions, guilt and responsibility. The evidence portrays them in their true perspective. It overwhelmingly shows that LAMMERS and STUCKART were architects who designed catastrophe.

In theory it may be true that in a Fuehrer state the supreme legislative and administrative powers were vested in the Fuehrer. In practice, however, his powers had meaning and effect through the agencies which were charged with transposing the political will of the Third Reich into the phraseology of laws and decrees and to see to it that they were also being enforced. In almost every phase of this procedure LAMMERS and STUCKART were instrumental factors. Reference is made to the great number of criminal laws and decrees with which we have dealt at length in the individual briefs of the defendants.

These defendants were not only leaders in the Third Reich but had reputations as being outstanding authorities in law, particularly in the fields of constitutional and administrative law. It is a generally recognized maxim that no man may plead ignorance of the law as an excuse. But when trained lawyers deliberately prepared and issued laws and decrees which they knew at the time violated every standard of justice and common decency and the defined principles of civilized criminal law as well as of international law, then the seriousness

of their crimes is magnified. There is a peculiar element of premeditation and deliberation in all the acts for which LAMMERS and STUCKART are being held responsible. It is impossible for a lawyer to sit down and draft and participate in the preparing of a more or less complicated legal document without considering the question of its legality. And, if the trained lawyer continued to turn out criminal legislation for years and years, so to say as a matter of routine, this becomes an especially aggravating factor. Such acts have been so adjudged in the "Justice" case before Tribunal No. 3.

In brief, LAMMERS and STUCKART were in possession of the heaviest imaginable responsibility. As lawyers, they were fully aware of this and thoroughly cognizant of the possible repercussions which their acts would cause.

The position of Keitel whom the IMT found "did not have command authority over the three Wehrmacht branches which enjoyed direct access to the Supreme Commander", (Vol. I, p. 288) is mutatis mutandis comparable to that of LAMMERS. Defense Counsel of LAMMERS pointed out in his opening statement the similarity of positions held by Keitel and LAMMERS. LAMMERS had to admit on cross-examination - with the usual reservations - that "for certain military matters his (Keitel's) position is comparable to mine insofar as military and civilian matters are comparable at all." (tr.p. 22304). In spite of the judgment of the IMT that Keitel as head of Hitler's military staff had no power to give orders, he was convicted on all 4 counts of the indictment before the IMT, including

"the planning, preparation, initiating or

the "conspiracy" and "waging wars" count.

In the Ministry of Interior, STUCKART, like Frick, was a dominating influence in the waging of war. His importance constantly increased. The IMT found Frick guilty of Count II of the Indictment. (IMT, p. 301). As pointed out before, Count II of the IMT is analogous to Count I of this case (aggressive war count). Frick was found guilty of waging aggressive war despite the fact that "the evidence does not show that he participated in any of the conferences at which Hitler outlined his aggressive intentions." (IMT, p. 299). Thusly, Frick was acquitted under Count I in the IMT (Conspiracy Count), but found guilty under Count II (aggressive war count).

We submit that the STUCKART case is parallel in every particular to the Frick Case. The LAMMERS case is also parallel to the Frick case and may further be compared to the Keitel case. The evidence which the prosecution has submitted in support of these charges is very extensive. For reasons of expediency we direct the Tribunal's attention to the individual responsibility briefs of the prosecution. The evidence which will be reviewed discloses that LAMMERS and STUCKART became involved in the Crimes against Peace, War Crimes and Crimes against Humanity to a greater extent than Frick and is sufficient to weave a second mantle of guilt.

4. DIETRICH

The tremendous importance of the role played by DIETRICH's press propaganda in carrying through the plans and objectives of the aggressive war machine - in promoting the concentration and stimulation of the energies of the German people as a result of such press propaganda, cannot easily be exaggerated.

The development of the press as a weapon was the most important single aspect of propaganda as a whole. The printed word has a magic of its own. Hitler saw this at an early point in his career and it was no accident that he selected DIETRICH to supervise and control the press policy in furtherance of his aims.

Mr. Quincy Wright, in "The Crime of War Mongering" (42 American Journal of International Law 128 - January 1948) says:

> ". . . Propaganda which instigates or encourages aggression or other crimes against international law had been considered a crime, not in itself, but because of its relationship to the international delinquency or crime which it incites . . . Where instigation of international delinquency or crime is concerned the question relates to the importance of the propaganda in producing the crime or delinquency." (p. 131).
>
> "Insofar as such propaganda provokes or encourages aggression or other international crime, it becomes a crime itself." (p. 132).

DIETRICH was successful in suppressing the editorial work of the German press to such an extent that the IMT said of it: (IMT, p. 182)

> "Through the effective control of the radio and the press, the German people, during the years which followed 1933, were subjected to the most intensive propaganda in furtherance of the régime. Hostile criticism of any kind was forbidden, and the severest penalties were imposed on those who indulged in it. Independant judgment, based on freedom of thought was rendered quite impossible."

In such an atmosphere the criminal responsibility of DIETRICH is immeasurably heightened. His control of the press became a lethal weapon in the conditioning of the people to accept aggressive wars. This weapon was as necessary for the realization of the Nazi program as the large-scale production of armaments and the drafting of military plans. Without DIETRICH's press, it would not have been possible for German Fascism to realize its aggressive intentions, to lay the groundwork for and then to perpetrate war crimes and crimes against humanity. The particulars in support of this position are extensively set forth for the Tribunal's consideration in the prosecution's final brief against DIETRICH.

The IMT clearly followed the theory expressed by Mr. Quincy Wright in the case of the defendant Streicher:

> "In his speeches and articles, week after week, month after month, he infected the German mind with the virus of anti-Semitism, and incited the German people to active persecution." (IMT, p. 302)

DIETRICH's case is more far-reaching than that of Streicher in that his guilt includes Crimes against Peace, as well as War Crimes and Crimes against Humanity. Streicher was the editor of a comparatively small weekly periodical, "The Stuermer", published

in Nurnberg. At the height of its ill fame, it boosted a circulation of 600,000, whereas DIETRICH had at his disposal, not only Streicher's paper, but more than 3,000 other publications with a circulation of better than 30,000,000. The evidence shows the character and intensity of the anti-Semitic directives released by the defendant DIETRICH during the period to which the IMT referred in passing judgment on Streicher. Streicher's publication, then, was only one of the manifold vehicles, which were ultimately subject to DIETRICH in furthering the provocation of international crimes.

Of course, Streicher was acquitted by the IMT for Crimes against Peace. Concerning him the IMT stated: "There is no evidence to show that he was ever within Hitler's inner cricle of advisers; nor during his career was he closely connected with the formulation of the policies which led to war" (p. 302, Vol. I, IMT). DIETRICH's relation to the inner circle of advisers was quite different. Not only was he Reich Press Chief of Party and State, an intimate of Hitler from 1928 on; not only was the defendant a member of that select hierachy of Reichsleiter which included such figures as Hess, Himmler, Ley, Darre, Goebbels, Frank, and Rosenberg, with all the accessibility to top secret information which such membership necessarily entails. DIETRICH was entrusted, in the field of press propaganda, with the daily responsibility for the acquisition, digest, selection, and transmission of information, of all types, on all levels, from every source, and for every purpose. He issued press instructions labeled "Daily Paroles of the Reich Press Chief", which directed the press to present to the

people certain themes, such as the leadership principle, the Jewish problem, the problem of living space, or other standard Nazi ideas which served as a condition precedent in tempering the masses of German people to each aggression.

The evidence before this Tribunal clearly establishes DIETRICH's guilt for Crimes against Peace, as well as War Crimes and Crimes against Humanity. The facts are discussed in the DIETRICH brief. The application of the principle of law set forth in the Streicher case by the IMT makes the conclusion inescapable.

5. BERGER and SCHELLENBERG

The defendants BERGER and SCHELLENBERG found full scope for their talents in areas where activities of the SS and of the Government proper were most closely fused and where the politics and the programs of the Third Reich, murderous in nature from the beginning, reached their natural fulfillment.

The record is replete with evidence of their fanatical contributions to the genocidal policy of the Third Reich. More reference to the briefs suffices. However, the part played by the SS in Crimes against Peace is directed to the Tribunal's attention. Of the SS, the IMT said:

> "SS units were active participants in the steps leading up to aggressive war." (IMT, p. 270).

BERGER and SCHELLENBERG were not minor figures in the SS, BERGER was chief of the SS Main Office and SCHELLENBERG was subordinated only to Heydrich and

later to Kaltenbrunner in the SD (a component part of the SS). The IMT specifically stated of SS activities:

> "The Verfuegungstruppe was used in the occupation of the Sudetenland, of Bohemia and Moravia, and of Memel. The Henlein Free Corps was under the jurisdiction of the Reichsfuehrer SS for operations in the Sudetenland in 1938, and the Volksdeutschemittelstelle financed fifth-column activities there." (IMT, p. 270).

The defendant BERGER issued the orders subordinating the Free Corps to the SS for the purpose of effecting the aggression with full knowledge of the purpose of the Free Corps. BERGER was the sole link between the SS and the Free Corps. The proof shows that he supplied the Free Corps with the arms necessary to fulfill its mission.

BERGER's activities did not stop there however, He was engaged in organizing so-called defense units of forces indigenous to the occupied eastern territories, three weeks after the invasion of Poland. He established contact with the Dutch Nazi leaders in Duesseldorf which led to the setting up in 1940 of the Dutch special duty regiment "West Land". Immediately after the invasion of Belgium, BERGER became president of DeValag, a pro-Nazi political party in Belgium under German sponsorship. He employed this party primarily to further aggressive warfare. And, he succeeded in bringing the German racial group in Yugoslavia under the SS six months before the invasion of that country.

It is next to impossible to single out any one portion of the SS which was not involved in these

criminal activities charged in the indictment, but it is safe to say that the evil of the RSHA (Gestapo and SD) is exceeded by none. Of it the IMT said:

> "The nature of their participation is shown by measures taken in the summer of 1938 in preparation for the attack on Czechoslovakia which was then in contemplation. Einsatzgruppen of the Gestapo and SD were organized to follow the army into Czechoslovakia to provide for the security and political life of the occupied territories. Plans were made for the infiltration of SD men into the area in advance, and for the building up of a system of files to indicate what inhabitants should be placed under surveillance, deprived of passports, or liquidated. These plans were considerably altered due to the cancellation of the attack on Czechoslovakia, but in the military operations which actually occurred, particularly in the war against U.S.S.R., Einsatzgruppen of the Security Police and SD went into operation, and combined brutal measures for the pacification of the civilian population with the wholesale slaughter of Jews. Heydrich gave orders to fabricate incidents on the Polish-German frontier in 1939 which would give Hitler sufficient provocation to attack Poland. Both Gestapo and SD personnel were involved in these operations." (IMT, p. 266).

The proof shows that SCHELLENBERG was the master mind of such projects. Particularly in the creation of the Einsatzgruppen to be used after the invasion of the U.S.S.R. In May 1941 he drafted the final agreement which established the Einsatzgruppen for use in the East with full knowledge that Russia was to be invaded. An integral part of this operation was the screening and interrogating of prisoners to determine their usefulness for the illegal purposes of the Third Reich. SCHELLENBERG headed an operation entitled "Zeppelin" which employed those selected for work on the eastern front behind Russian lines and to work with the Einsatzgruppen. The evidence in

the SCHELLENBERG case reveals that the staging of an incident for a pretext to invade Poland was only a fore-runner to further trickery by the Gestapo and SS under the direct command of SCHELLENBERG in creating a pretext to invade Holland. The Venlo incident was clearly an underhanded SS method to provide Hitler with sufficient provocation to march into Holland.

The record is complete. BERGER and SCHELLENBERG participated in the criminal plans of the SS in the steps leading up to aggressive wars as outlined by the IMT.

6. KOERNER, KEPPLER, PLEIGER, and DARRE.

The Tribunal's attention is drawn to the parallel activities of these defendants to the defendants Goering, Hess and Funk who were convicted by the IMT for Crimes against Peace. KEPPLER, PLEIGER, AND DARRE are charged with Crimes against Peace principally because of the significant role they played in organizing and maintaining the military economy of Germany with knowledge of the purpose to wage aggressive war. KEPPLER is further charged with activities in the diplomatic field as a State Secretary in the Foreign Office.

KOERNER

The case of KOERNER, stripped of all details, amounts to this: He was to Goering what Hess was to Hitler. With respect to Hess, the IMT found:

> "Until his flight to England, he was Hitler's closest personal confident. Their relationship was such that Hess must have been informed of Hitler's aggressive plans when they came into existence." (p.284)

The Tribunal said:

> "Between 1933 and 1937, Hess made speeches in which he expressed a desire for peace and advocated international economic cooperation. But nothing which that contained, can alter the fact that of all the defendants, none knew better than Hess, how determined Hitler was to realize his ambitions, how fanatical and violent he was, and how little likely he was to refrain from resort to force if this was the only way in which he could achieve his aims."

The Tribunal found Hess guilty of Crimes against Peace under Counts One and Two.

It is interesting to note that KOERNER's defense is along the line that Goering was a man of peace, that his violent speeches, plainly aggressive in character, were not to be taken seriously, and at least that KOERNER, because of his close relationship with Goering, knew and appreciated the peaceful character of the man.

The IMT, with respect to Goering, stated:

> "After his own admissions to this Tribunal, from positions which he held, the conferences which he attended, and the public words he uttered, there can remain no doubt that Goering was the moving force for aggressive war, second only to Hitler ..." (p.280).

And in concluding its appraisal of Goering's activities, the Tribunal stated:

> "His guilt is unique in its enormity. The record discloses no excuses for this man." (p.282)

KOERNER, the record shows, was Goering's closest personal and official associate. He first met him in 1926, and in 1928 when Goering was elected to the Reichstag, KOERNER severed his private business connections so that he could be closer to Goering. He stayed with Goering through the entire period of the Nazi seizure and consolidation of power. He participated with Goering in setting up the Gestapo as an instrument of force and terror. He was the administrative head of the special "spying agency" - the Forschungsamt - an organization which monitored conversations of Germans.

Goering was appointed Plenipotentiary General of the Four Year Plan in 1936, and designated KOERNER as his permanent deputy. KOERNER was also Goering's permanent deputy in the General Council of the Four Year Plan. The evidence fully establishes KOERNER's special knowledge of the military character of the Four Year Plan, that it was intended as, and developed into an instrument to make a military machine to further Germany's policy of aggression.

KOERNER, KEPPLER and VON KROSIGK were present at the secret conference when Goering informed them of the nature of Hitler's secret memorandum of August 1936 which discussed the true purposes of the Four Year Plan. In addition to being advised by Goering of Hitler's secret memorandum, KOERNER admitted that Goering gave him this memorandum to read and that he read it. KOERNER testified that he never spoke to anyone about this secret memorandum of Hitler,

except to Goering and the other persons present at the meeting. There were only three copies of this memorandum - one went to Goering, another was later given by Hitler to Speer and the third is not accounted for. The details of KOERNER's participation in the Four Year Plan after knowledge of the above, are outlined in detail in our brief. KOERNER also had special knowledge of the planning for the Russian aggression. He was Goering's deputy in the Economic Leadership Staff East, which engaged in the planning and exploitation of Russia. This activity constitutes as to Russia, participation in the "planning, preparation or initiation of aggressive war". As to the other Allied powers at war with Germany, it constitutes participation in the "waging of aggressive war". The evidence shows that the planning involved the utilization of the industrial potential of Russia for the further waging of aggressive war already in existence.

In 1942, KOERNER became a member of the Central Planning Board. This agency, among other things, determined the "requirements" and overall allocation of slave labor. There were originally three members of this board, namely, Speer, Milch and KOERNER. In 1943 Funk was added. For the participation in the activities of the Central Planning Board relating to the slave labor program, Speer, Milch and Funk have been found guilty. KOERNER is the remaining member of the Board. It is important to note that KOERNER had knowledge that the utilization of slave labor was part of the program for waging aggressive war, and that he participated in the execution of that program. Because of his knowledge of the program, and its use as an instrumentality for waging war, KOERNER is not only guilty of War Crimes and Crimes against Humanity in connection with his slave labor activities, but his participation in this program also establishes his guilt for Crimes against Peace.

KEPPLER

One year before Hitler seized power, KEPPLER became Hitler's Economic Advisor, and in March 1933 he was appointed Hitler's Deputy for Economic Questions. Shortly thereafter, he was given a special assignment by Hitler to build up the German raw material base, particularly in the field of strategic military materials. Thus he laid the foundation for Germany's main industrial capacity for synthetic rubber, synthetic fuel, synthetic fats and synthetic fibers. His overall participation is well described by KEPPLER. He testified:

> "Frequently Goering ordered me to report to him and on these occasions I had to give him a very lengthy and detailed report concerning the work that I had done up to that stage. In addition to that, Goering was absolutely satisfied in every respect with the work that I had done up to that time. ... Goering was really a personality if one had personal contact with him. He told me very frankly that after all he himself didn't know a single thing about economy, and he ordered me to carry on my work on a much larger scale." (Tr.p.19313,19314)

In connection with KEPPLER's appraisal of Goering, it is interesting to note that Goering frankly admitted that he (Goering) did not know a thing about economy. This is a significant statement in view of the defense which KOERNER interposed to the effect that Goering was the sole responsible person in connection with the operation of the Four Year Plan and that he, KOERNER, merely was his advisor without authority or responsibility.

KEPPLER was an expert in essential specialized fields, and the record shows that his participation in these fields was substantial and of great importance to further the economic mobilization for war. KEPPLER's Bureau for German Raw Materials and Synthetics was incorporated in October 1936 into Goering's Four Year Plan. KEPPLER was present at the conferences preceding the creation of the Four Year Plan. One significant conference, to which we call attention, is that of 26 May 1936 when Goering addressed his group of experts stating that he was opposed to any financial limitations on war

production and that all measures were to be considered from the standpoint of an assured waging of war.

KEPPLER, like KOERNER, had special knowledge of the military character of the Four Year Plan. He, too, was informed by Goering, prior to the public announcement by Hitler of the Four Year Plan, of the contents of Hitler's secret memorandum of August 1936. He was present at the meeting when Goering confidentially informed those present of the military nature of the Plan in connection with the preparations for war. KEPPLER's participation thereafter must be viewed from this very significant fact relating to knowledge. Within the Four Year Plan, KEPPLER was appointed to the Council of Ministers as the expert on synthetic and raw materials.

As to knowledge, a comparison with the Farben Case shows that it was KEPPLER who negotiated with I.G. Farben with respect to the construction of the synthetic rubber plants. It is apparent that KEPPLER cannot be believed when he stated that he participated in setting up the synthetic rubber program as a measure of peacetime economy, since he was informed by Goering of the contents of Hitler's secret memorandum regarding the Four Year Plan.

The record shows that prior to the time when Goering informed KEPPLER of Hitler's secret memorandum, KEPPLER discussed the synthetic rubber program directly with Hitler and that KEPPLER acted as Hitler's Deputy when discussing this program with the Army and the Finance Ministry. The record also shows that after September 1936 KEPPLER acted as liaison between the Four Year Plan, the Army and the I.G. Farben. Thus, an official report stated:

> "On 7 October, the Chief of the Military Economic Staff informed Mr. KEPPLER that in view of the new rubber program which came within the Four Year Plan he had no objection to the capacity of the three giant plants to be erected being increased ***." (Exh.2710,Doc.No. NI-4713,Doc.Book 140, E.p.12)

In 1937, KEPPLER attended the meeting with Goering where the discussion with respect to increasing production of iron took place.

As a result of this discussion, the Hermann Goering Works were set up to exploit low-grade iron ore. KEPPLER was appointed to the Aufsichtsrat of the Hermann Goering Works. All this occurred at a time when KEPPLER had special knowledge of the military objectives of this economic preparation.

In the beginning of 1938, KEPPLER also became engaged in other activities which gave him special knowledge of the aggressive character of the planning. He was appointed Secretary of State in the Foreign Office and was assigned special tasks in connection with the preparations for the accomplishment of the Austrian Anschluss. As the pillars of Austrian sovereignty shook, KEPPLER increased the tempo of Nazi demands. It was KEPPLER who backed up Hitler's threats by informing Miklas that 200,000 German soldiers were being assembled at the Austrian border, ready for invasion.

He himself has described in part the nature and extent of his participation in Austria before the Anschluss. In a letter to Seyss-Inquart, dated 30 June 1938, KEPPLER stated:

> "In addition, General Field Marshal Goering charged me with extensive work with the Hermann Goering Works and other industrial enterprises of the State. I also received my first big assignment by Ribbentrop. It was a very important, but difficult affair, which I have to settle under strictest confidence, which, therefore, is not suitable for a publication in the press. I just came back from the Foreign Office where I inspected my future offices. I will have to conduct my office activities in various buildings, because my office remains where it was." (Exh.2717, Doc.No.NID-14959, Doc.Book 140,E.p.73)

KEPPLER was Germany's chief agent in carrying out special research projects in the countries which were to be invaded. After the Munich Agreement, Goering made a speech on 14 October 1938. The report states:

> "The Sudetenland has to be exploited with all the means. General Field Marshal Goering counts upon the complete industrial assimilation of the Slovakias. Czech and Slovakia would become German dominions. Everything possible must be taken out. The Oder and Danube Canal has to be speeded up. Searches for ore and oil have to be conducted in Slovakia, notably by State Secretary KEPPLER." (Exh.971,Doc.No.1301-PS,Doc.Bk.118,E.p.265)

Can it be seriously urged that KEPPLER was not informed of the aggressive plans against Czechoslovakia?

There is a very significant fact in connection with KEPPLER's activities, and that is the "timing" of his various tasks. He appears in Austria just before the invasion. When that is an accomplished fact, he moves on to a special job in Czechoslovakia. When that country is taken over, he moves on to southeastern Europe. It is more than coincidence that he was in the vanguard even before a number of the aggressions were launched.

PLEIGER

PLEIGER operated in a specialized industrial field - coal, iron and steel. His activity in these fields was substantial and contributed directly and significantly to the industrial and economic mobilization for aggressive war. Here again, participation in this specialized sector was with knowledge of the military objectives of the programs in which he participated.

His early start in connection with the economic mobilization was in the KEPPLER Bureau. He was the top expert in the Iron Department of the Office for German Raw and Synthetic Materials. As early as 1936, PLEIGER was sufficiently important to be called in by Goering in the meeting of the select group of experts. He heard Goering's now well-known address of 26 May 1936 in which the problems in connection with war mobilization were discussed. With the promulgation of the Four Year Plan PLEIGER, like KEPPLER, went over to Goering's office. Thereafter, PLEIGER participated in many important meetings where the fundamentals of the Four Year Plan production program were planned in detail.

On 17 March 1937, he was present at a meeting where Goering opened the discussion with these words:

> "This may well be the most important session concerning the Four Year Plan dealing with the questions of the iron and steel production, its output, capacity, supply of raw materials and iron distribution. Primarily involved is German ore procurement. *** Lack of ore must not endanger the program of munitions supply or

of armaments in case of war. Everything possible must be undertaken on the part of the German firms and the State must take over when German firms have proven themselves no longer able to carry on."

The Hermann Goering Works was the brainchild of PLEIGER, not of Goering. This he proudly admitted when he testified:

"I was firmly convinced that the iron and steel situation was one which was bound to interest Goering, as Plenipotentiary for the Four Year Plan. ... so, in my opinion, the situation was very favorable and I decided that I would by-pass the official channels, through Office Chief Loeb and State Secretary KOERNER, and approach Goering directly ... I had ... a short memorandum submitted to Goering, in his capacity as Plenipotentiary for the Four Year Plan ... It contained all the arguments by which I might hope to rouse Goering's interest. That is why I pointed out that the plant was of military importance because we were arming all along the line, the foreign currency question; especially, however, I made it clear to him what it would mean if there should be a miners' strike in Sweden, when in only three months the whole German industry would come to a standstill. The ore stocks at that time amounted to not over a four week's supply. It was a situation for me by which I could make Goering take a bite out of the sour apple. There couldn't have been a more favorable argument." (Tr.14803, 14804)

In July 1937 the announcement of the founding of the Hermann Goering Works was made. PLEIGER's participation in the setting up of this instrumentality and his utilization of the Hermann Goering Works for the development of a wider base for iron ore and iron, is fully disclosed by the record.

The only question presented as we see it is whether PLEIGER had knowledge of the military objectives in connection with this matter. From all the evidence, the record is clear that he did have such knowledge. He acquired further insight in the planning to take over the Austrian deposits in the "A" Case. He was present at a meeting of 17 March 1937, along with KOERNER and KEPPLER, when Goering stated:

"It is important that the soil of Austria is reckoned as part of Germany in case of war. Such deposits as can be acquired in Austria must be attended to in order to increase our supply capacity. *** supply for native German soil, in which in A-Fall receipts from Austria with all her possibilities are to be added *** In Case A one could count on 6 million tons per year from Austria." (Exh.966,NI-090,Bk.118B,p.229).

His participation in the preparations for the exploitation of industrial property in Czechoslovakia appears from the fact, among other things, that the Witkowitz Iron and Steel plant in Bohemia and Moravia which was occupied on 14 March 1939, the day prior to the full scale invasion of Czechoslovakia, was immediately taken over by a board to control and operate the plant for the Reich. The Chairman of that board was PLEIGER. The board was dominated by the Hermann Goering Works. PLEIGER, when asked whether he was aware of such acquisitions, answered: "I don't think there was any acquisition about the carrying out of which I did not know." (Tr.p.15329)

In connection with the spoliation activities of PLEIGER in Czechoslovakia, Poland, France and Russia, the details are set forth in our briefs. We also emphasize that PLEIGER's activity in the acquisition of industrial property in occupied territories matches similar activity by Roechling. We have already pointed out that as to Roechling the General Tribunal in the French Zone held that this constituted the waging of aggressive war within the meaning of the Control Council Law No.10. We ask for a similar finding with respect to PLEIGER.

PLEIGER's activities in connection with slave labor on behalf of the Hermann Goering Works and on behalf of the Reich Coal Association, are detailed in our brief. The evidence shows that he had knowledge of the program regarding the utilization of slave labor as an instrumentality for the waging of war, and he substantially participated in carrying that program out. In addition to constituting War Crimes and Crimes against Humanity, this particular activity of PLEIGER constitutes the waging of wars of aggression under the meaning of Control Council Law No.10.

D A R R E

Among the many and varied fields which of necessity must be regimented in mobilizing a national economy for war, food is of major importance. The defendant Richard Walter DARRE is responsible for mobilizing the agricultural and food resources of Germany, for developing the war important autarchy program of the Four Year Plan, and for formulating plans to acquire the food resources of European countries for the purpose of preparing for and waging aggressive war.

DARRE's general knowledge of Hitler's aggressive objectives is the result of his early association with the Nazi Party. His membership in the NSDAP dates from 1930; his membership in the SS dates from 1931. Directly following Hitler's seizure of power in 1933, DARRE was appointed a Reichsleiter, thus becoming one of the seventeen members of the heirarchy of the Nazi Party. At the same time he acquired the high and responsible government position of Reich Minister of Food and Agriculture. Later he was appointed by Hitler as the Reich Peasant Leader. In his field, his position and his functions are analagous to those of Funk in economic mobilization.

DARRE, as a member of Hitler's Cabinet, signed the law restoring the Wehrmacht in 1935. DARRE, in conjunction with the Plenipotentiary General for the War Economy, drafted plans relative to mobilizing the German Food Economy for war. The purpose was to make available all of the economic forces necessary to the conduct of war. In the month following the Hossbach Conference of November 1937, DARRE prepared a comprehensive program relating to the organization of the War Food Economy. He also issued the administrative decrees relating to the government control of agricultural products. According to this plan, all vitally important foodstuffs were to be covered by a system of rationing certificates. This was effected by DARRE's "Decree on the Safeguarding of the Vital Necessities

of the German People". This decree, and its supplementing legislation, was put into effect four days before the Polish aggression.

After the invasion of Austria, DARRE perfected his plans for mobilizing Germany's agricultural economy for war. On 8 September 1938, DARRE, as Minister of Food and Agriculture, and Frick, as Reich Minister of Interior, issued a secret order calling for an acceleration in the work of their subordinate agencies engaged in mobilizing the Food Economy. This order stated among other things:

> "Since the Fuehrer and Reich Chancellor has ordered the preparation for economic mobilization to be speeded up, one of the most urgent tasks of the leading officials in charge of the establishment of the war food offices, will be to commence immediately, if they have not already done so, the preliminary work according to the mobilization calendar and to insure its speedy completion by the temporary assignment of assistant workers. The deadline is 15 October 1938."

At the same time that this order for accelerated mobilization was issued, secret decrees were prepared and signed by DARRE, defini the particular field of activity of various Reich agencies that were concerned with the questions of food and agriculture. These regulations, among other things, contain the detailed provisions for the conduct of activities during the first four weeks after the outbreak of war. In addition, provision was made for regulating the Food Economy during the course of war.

DARRE set up the administrative machinery and provided himself with a uniform, closely knit organization. This made it possible for him to control and direct completely the food supply of the armed forces and civilian population.

The timing of DARRE's orders in relation to the threatened invasion of Czechoslovakia is significant. DARRE's activities immediately prior to the aggression against Bohemia and Moravia again show that he had knowledge of the aggressive character of his measures designed to further continuing aggression by Germany. It was only a month before the invasion of Bohemia and Moravia that DARRE directed a survey of the food supply situation for the

express purpose of controlling and directing that supply during war. This order was issued by DARRE on February 1939. During a DARRE/Goering conference in February 1939, relating to the preparation measures respecting the grain situation, Goering put to DARRE the question of the absolute minimum of grain needed as a national reserve in order to be prepared for the occurrence of the "A" Case. DARRE had the answer: A grain reserve of at least six million tons was required. The purpose of the grain storage program undertaken to reach that huge figure assumes further significance, by virtue of the fact that at the time of the attack against Poland, DARRE had succeeded in accumulating a war grain reserve exceeding the six million ton figure.

On 27 August 1939 DARRE issued a decree which put into effect the food ration plans which he had theretofore prepared. Details of the rationing program for the first four weeks of the war included the issuance of ration cards and the detailed administration of wartime food controls. The same day, 27 August 1939, DARRE issued another decree setting into motion the administrative agencies entrusted with the allocation and administration of the food economy on a wartime basis. However, they had been secretly drafted and signed a year before with the intention of issuing them if the threats against Czechoslovakia produced war. In August 1939 it was plain to DARRE and the other Reich Ministers that Case "A" was now at hand. The decrees were issued.

That DARRE knew his preparations in this particular field were for the waging of aggressive war is clear. Shortly after the invasion of Poland, he made a report to Goering and to Hitler, dated 29 November 1939, which stated in part:

> "The whole work of agrarian policy since the seizure of power was already dominated by the preparation for a possible war *** The fact that Germany could in this war set its supply position as desired despite the heavy demands made on agriculture for a period of many years, is due primarily to the efforts of the agrarian sector in the battle on production. Henceforth the issue depends on insuring and maintaining to the widest possible extent the degrees of intensity already attained. (Exh.1043, NG-453,DB-102,p.109).

DARRE's activities are resolved briefly in the short sentence which he wrote after the war was under way:

> "In a gigantic effort before 1939, I created the requisite which made it possible for the Fuehrer to wage this war at all from the point of view of food." (Exh.1048,NIP-12720,Doc.Bk.102,p.126).

We turn now to the discussion of War Crimes and Crimes against Humanity.

COUNT III

WAR CRIMES: MURDER AND ILL TREATMENT OF BELLIGERENTS AND PRISONERS OF WAR.

In June 1945 a U.S. Military Commission was arraigned to try the German civilian - Peter Back. He was charged with having violated

> "the laws and usages of war by willfully, deliberately, and feloniously killing an American airman, name and rank unknown, a member of the Allied Forces, who had parachuted to earth at said time and place in hostile territory and was then without any means of defense".

The Commission found Back guilty as charged and imposed death sentence on him. (2559-PS, Exh. C-245, Bk.216).

The case of this German civilian was by no means an isolated one. A great many German civilians were tried and convicted after the war by U.S. and British Courts Martial for having mistreated and murdered defenseless allied soldiers who had been forced to bail out of their disabled planes and land on German territory. The German civilians who were thus brought to justice paid the supreme penalty, the sentence of death, because they were murderers. But they were only the trigger men, turned into murderers by the leaders who had encouraged and incited them to commit murder by promising them impunity. The systematic slaying of allied soldiers by the German populace was the direct result of a vicious scheme which was evolved and promoted by the highest governmental agencies of the Third Reich. The record reveals that the defendants LAMMERS, DIETRICH, and RITTER played a conspicuous part in this scheme.

The International Military Tribunal held that:

> "When Allied airmen were forced to land in Germany they were sometimes killed at once by the civilian population. The Police were instructed not to interfere with these killings, and the Ministry of Justice was informed that no one should be prosecuted for taking part in them." (Trial of Major War Criminals, Vol. I, p.229).

This was the official policy.

The evidence which the Prosecution has submitted in support of the further charges in Count III of the Indictment is very extensive. We shall not attempt today to describe again the terrible events which the documentary evidence so eloquently portrays. The facts establishing the criminal responsibility of each defendant under Count III will be outlined in detail in the individual briefs.

It is well established by the laws of war that a defenseless enemy who surrenders to the mercy of the victor shall not be killed or wounded, but shall be taken as a prisoner. This principle is embodied in Article 23 of the Hague Convention. Equally revered is the rule that prisoners shall be humanely treated as embodied in Articles 4 through 20 of the Hague Regulations and the Geneva Convention of 1929.

The crimes committed against prisoners of war have been established by the IMT:

> "Prisoners of war were ill-treated and tortured and murdered, not only in defiance of the well-established rules of international law, but in complete disregard of the elementary dictates of humanity." (IMT, p.227).

The defendant BERGER was responsible as Chief of Prisoner of War Affairs for such crimes. After 1 October

1944, he was at the apex of the chain of command. One of the most disgraceful acts committed in this connection was the brutal murder of the French General Mesny, a prisoner of war in German custody. This is not the first time that the Mesny case has come to the attention of the Nurnberg Tribunals. In finding the defendant Ribbentrop guilty of the commission of War Crimes and Crimes against Humanity the IMT said:

> "In December 1944 Von Ribbentrop was informed of the plans to murder one of the French generals held as a prisoner of war and directed his subordinates to see that the datails were worked out in such a way as to prevent its detection by the protesting powers." (IMT, p.287).

In finding the defendant Kaltenbrunner guilty of the commission of War Crimes and Crimes against Humanity, the IMT said:

> "In December 1944 Kaltenbrunner participated in the murder of one of the French generals held as a prisoner of war." (IMT, p.292).

At the time the plot to murder General Mesny was conceived and continuing to the time it was actually carried out, BERGER was Chief of the Office of PW Affairs. He knew of the insidious plan from the very start and it was BERGER who picked General Mesny to be murdered in accordance with the plan. The defendants STEENGRACHT and RITTER participated in the cover-up in order to prevent its detection by the protecting powers, and by the civilized world at large.

The killing of confined prisoners, as well as forced marches of prisoners was also carried out in direct violation of the laws and customs of war. Under the provision of this policy, the defendants of the Foreign Office were fully advised and prepared "cover up" diplomatic notes to the protective powers upon inquiry.

No defense, and no mitigating circumstances, can be adduced in connection with these acts. The defendants in this case are more culpably responsible and deserve no less punishment for such crimes than the German soldiers and civilians who have been sentenced to death for enforcing the murder policy transmitted to them from above.

COUNT V

WAR CRIMES AND CRIMES AGAINST HUMANITY: ATROCITIES AND OFFENSES COMMITTED AGAINST CIVILIAN POPULATIONS

Count V of the indictment charges certain defendants with criminal responsibility for atrocities and offenses committed against civilian populations. The criminal conduct involved under these charges is so wide sweeping that we make no extended comment here. The defendants are charged with criminal participation, under the requisites of criminal responsibility set forth in Article 2, Control Council Law No.10, for the following, among other types of conduct: The systematic evacuation of non-Germans from their homes and the resettlement of non-German areas by so-called "ethnic" Germans; the forcible "Germanization" of persons of foreign nationality who were thought to fulfill the mystic standards of so-called "racial" Germans; the deportation to forced labor, the confinement in concentration camps and the millions of cases of liquidation of those persons who were not found to fulfill the mystic standards of alleged racial Germans; the forced resettlement into the Waffen SS of prisoners of war and civilians of military age from countries overrun by the Wehrmacht; the use of a perverted judicial process as a weapon for the suppression, persecution and extermination of opponents of the Nazi occupation and of alleged "inferior peoples"; the arrest, imprisonment, deportation and murder of so-called hostages; the persecution, torture and extermination of the Jews who fell into the clutches of Nazi Germany with each succeeding aggression and the planning and the execution of a program to exterminate all surviving European Jews beginning in the winter of 1941 and 1942; the deprivation of civil rights and the expropriation of the property of Austrians,

Czechs, Poles and other nationals in the occupied countries; and the receipt, conversion and disposal for the benefit of Germans or the German Reich all properties taken from the victims subject to extermination.

Concerning these crimes, no new legal problem can be raised here. The law is clear. Except where the defendants have claimed non-involvement, which we will answer in our briefs, the overall defense has been to claim superior orders or what has variously been termed as necessity, duress or compulsion. This general defense will be discussed later.

COUNT SIX - PLUNDER AND SPOLIATION

Under Count Six of the Indictment very extensive charges have been made, based upon a wide range of conduct by the defendants in dealing with diverse kinds of property in the several economies of the occupied territories. It is well beyond the compass of the closing argument to consider each legal issue which has been raised or is essentially involved in these charges. Detailed analysis of the legal principles applicable to these kinds of international crimes has been offered in a separate brief upon the subject. Here we shall discuss only certain general questions of law.

The principal issues involved in the cases of alleged spoliation, it seems to the Prosecution, are:

(1) Do the laws and customs of war apply to invasions and occupations pursuant to acts of aggression, such as the invasions and occupations of Austria, the so-called Sudetenland, and the so-called Protectorate of Bohemia and Moravia.

(2) Do general standards governing the conduct of belligerent occupation exist? If so, what are the limitations on the conduct of the occupant in the course of belligerent occupation?

(3) Under what conditions is the belligerent occupant entitled to exercise authority over property in the occupied territory under the obligation to maintain public order and safety?

(4) What protections are afforded to private property in occupied territory and under what circumstances do these protections disappear?

(5) Do the laws and customs of war limit the belligerent occupant in dealing with public, or state-owned, properties?

(6) For what forms of participation in spoliation is the individual defendant criminally responsible?

(7) Is there a special right to violate the provisions of the Hague Convention in the case of "military necessity" such that the belligerent occupant may generally exploit the occupied territories in furtherance of the waging of war?

(8) Can the defendants be held criminally responsible for the spoliation of property in cases where they have invested additional capital in the seized or administered enterprises such that, regardless of removals of capital stock and equipment, the total value of the property has increased.

(1) Austria and Czechoslovakia

It is contended by the Defense that the rules governing belligerent occupation cannot be applied to the territories of Austria, the "Sudetenland", and Bohemia-Moravia because these territories were occupied without the waging of actual hostilities. But the evidence in this case and the determinations and findings of the International Military Tribunal establish conclusively that the occupations of each of these areas was a direct consequence of the threat of force or the use of force on the part of the German State. That is, the invasion and occupation of each of these territories was an act of aggression. In each case German forces massed upon the frontiers of the country; in each case ultimata were delivered; in each case "voluntary" accession of the government of the occupied territories was obtained through coercion; in each case the territory was declared to have become a part of the German Reich in substance; and in each case the occupation was a part of an aggressive plan. In truth, as Lord Halifax has said, referring to such invasions and occupations, "wars without declarations of war" occurred. (Documents Concerning German-Polish Relations and the Outbreak of Hostilities Between Great Britain and Germany on 3 September 1939, Foreign Office, Misc. No. 9 (1939), London, HMSO, p. 15) When the general European conflict was waged, the Allied States proclaimed, as this Tribunal may judicially notice, that the liberation and reconstruction of the frontiers of Austria and Czechoslovakia were included within war aims. Allied armies were in the field contesting on behalf of the true governments and the populations of these lands.

In determining the applicability of the laws and customs of war to the occupation of Bohemia and Moravia, the International Military

Tribunal found that a hostile occupation by force or the threat of force is governed by the traditional laws of war:

> "Bohemia and Moravia were occupied by military force. Hacha's consent, obtained as it was by duress, cannot be considered as justifying the occupation . . . The occupation of Bohemia and Moravia must therefore be considered a military occupation covered by the rules of warfare. Although Czechoslovakia was not a party to the Hague Convention of 1907, the rules of land warfare expressed in this Convention are declaratory of existing International Law and hence are applicable."1/

Furthermore, in judging the criminality of the SA, the International Military Tribunal indicated adherence to the principle that occupations pursuant to acts of aggression are governed by the rules of war. The judgment at this point very definitely implies that the occupation of both Austria and the Sudetenland could and did give rise to war crimes and crimes against humanity:

> "Isolated units of the SA were even involved in the steps leading up to aggressive war and in the commission of War Crimes and Crimes against Humanity. SA units were among the first in the occupation of Austria in March 1938. The SA supplied many of the men and a large part of the equipment which composed the Sudeten Free Corps of Henlein . . ." 2/

The judgment of the IMT appears to be quite explicit in meaning. But if any doubt should exist, it is fully dispelled in the analysis of the judgment by Donnedieu de Vabres, French member on the Tribunal. Observing that the Tribunal convicted von Schirach of crimes against humanity in Austria, and that such crimes had to be linked with crimes against peace or war crimes, according to the general principle of the Tribunal, de Vabres explained:

> "That is to say that the occupation of Austria being the effect of an aggressive act assimilated by the Tribunal to the character of a war operation, the designation 'war crime' is applicable to common law crimes committed on its territory."3/

We submit that the judgment of the International Military Tribunal sustains the position of the Prosecution and that the determination of the IMT on this point is controlling under Article X of Ordinance 7.

1/ Trial of Major War Criminals, Vol. I, p. 334.
2/ Trial of Major War Criminals, Vol. I, p. 274.
3/ de Vabres, The Judgment of Nuremberg and the Principle of Legality of Offenses and Penalties, "Review of Penal Law and of Criminology", Brussels, July 1947, as translated by J. Herisson, pp. 14-15.

There is nothing novel in the idea that a "belligerent occupation", that is, an occupation governed by the rules of the Hague Convention of 1907, such as to give rise to war crimes, may exist in the absence of actual armed hostilities. As Quincy Wright has stated, ". . . the law of war has been held to apply to interventions, invasions, aggressions and other uses of armed force in foreign territories even when there is no state of war . . ."[1/]

We conclude that war crimes did arise in law in the German occupation of Austria, the Sudetenland, and Bohemia-Moravia.

(2) General Standards

The Prosecution submits that the specific laws and customs of war regulating the belligerent occupant in his conduct with regard to various kinds of property in the occupied territories express particular applications of general principles and standards which govern belligerent occupation. These principles require that the occupant may not (1) exploit the occupied territory beyond the needs of the army of occupation; (2) drain the occupied territory beyond the resources of the economy; (3) disregard the needs of the inhabitants; or (4) utilize industries in the occupied territory for the furtherance of war production.

From a consideration of several of the articles of the Hague Regulations, the International Military Tribunal concluded:

> ". . . under the rules of war, the economy of an occupied country can only be required to bear the expense of the occupation, and these should not be greater than the economy of the country can reasonably be expected to bear."[2/]

Similar principles were applied in the Krupp Case (Case 6). To quote from the judgment:

> ". . . the economic substance of the belligerently occupied territory must not be taken over by the occupant or put to the service of his war effort - always with the proviso that there are exemptions from this rule which are strictly limited to the needs of the army of occupation insofar as such needs do not exceed the economic strength of the occupied territory." [3/]

1/ Q. Wright, "American Journal of International Law", Jan. 1947, Vol. 41, p. 61.

2/ Trial of Major War Criminals, Vol. I, p. 239.

3/ Opinion and Judgment, Case 10, p. 20.

And further:

> ". . . if as a result of war action, a belligerent occupies territory of the adversary, he does not thereby, acquire the right to dispose of the property in that territory, except according to the strict rules laid down in the Regulations. The economy of the belligerently occupied territory is to be kept intact, except for the carefully defined permissions given to the occupying authority - permissions which all refer to the army of occupation. Just as the inhabitants of the occupied territory must not be forced to help the enemy in waging the war against their own country or their own country's allies, so must the economic assets of the occupied territory not be used in such a manner." 1/

The General Tribunal at Rastatt, in the Case against Hermann Roechling and Others, found the defendant Hermann Roechling guilty of spoliation in that, among other things, he utilized French steel enterprises "for the purpose of bringing about, at the expense of the occupied country, the maximum increase in the war potential of the Reich." 2/

These standards are set forth explicitly in several Articles of the Hague Regulations and they have long been recognized in the writings of eminent jurists such as Garner, Oppenheim, and Feilchenfeld, who have considered the subject.

Where requisitions or confiscations of specific articles are involved in the facts of Case 11, the Tribunal may well look to the precise and controlling Articles of the Hague Regulations. But when, in addition, vast programs for the exploitation of the occupied territories are shown to have been conceived or executed or aided by the defendants, such programs should be judged by the fundamental principles of the Convention, rather than its detail. This was the standard applied by the International Military Tribunal in parallel cases.

(3) Public Order and Safety

Article 43 of the Hague Regulations provides:

> "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

1/ Opinion and Judgment, Case 10, p. 19.

2/ Opinion and Judgment, Roechling Case, p. 24.

This Article permits the occupying power to expropriate or seize either public or private property where necessary to preserve public order and safety. Accordingly, if private property is abandoned, the occupying power may take possession to insure that the property is not destroyed and to re-establish employment. The occupying power is required in such a case to treat this possession as a conservatory for the rightful owners' interest.

Public property, which of necessity must be abandoned by the legitimate power, may also be taken over and operated by the occupant for the same reasons. The necessity for protecting the occupation forces against the dangers of attack may further justify certain types of seizures or expropriation in the interest of public order and safety under Article 43. But this particular phase of securing public order and safety is provided for more specifically in other parts of the Hague Regulations.

The expropriation of property, whether public or private, when required by public order and safety, in no way authorizes the use of such property in violation of the over-all prohibitions against using the property of the enemy territory for needs other than those of the occupation. Seizure which is found necessary for the protection of public order and safety may legitimately be followed only by such action as serves to maintain public order and safety against the threat which occasioned seizure. Where property has been taken over under circumstances which make it clear that these requirements were not the motivating factor, or even considered as reason, the taker cannot later be heard to say that his deed was justified by the needs of public order and safety. To illustrate, seizure of property to provide for German economic and war needs belies a later claim in the course of criminal proceedings that the property was seized under Article 43.

While Article 43 authorizes and requires the occupant to maintain public order and safety, it also limits his activities. The restriction is contained in the clause which requires the occupant to respect the laws in force in the occupied territory unless absolutely prevented,

This provision simply reflects one of the basic standards of the Hague Convention -- that personal and private rights of persons in the occupied territory shall not be infringed except as justified by emergency conditions. The occupant is forbidden from imposing his own tastes in municipal law. Enactments by the German occupation authorities which were designed to propagate Nazi racial theories very surely cannot be justified by the necessities of public order a nd safety.

Where discriminatory laws are passed which affect the property rights of private individuals, subsequent transactions involving such property have been repeatedly held to be violations of both Article 43 and Article 46. For example, the Krupp Tribunal found criminal the lease of a building in Paris from an aryanization "trustee", without more.

(4) Private Property

The basic provision of the Hague Regulations dealing with private property is Article 46, which provides:

> "Family honor and rights, the lives of persons, and private property, as well as religious convictions and practice must be respected.
>
> "Private property cannot be confiscated."

The requirement that private property must be respected is, of course, a broader protection for the inhabitants of the occupied territories than the prohibition against confiscation. Violation of this protection need not reach the extreme of confiscation. Under this article, we submit, interference with any of the normal incidents of enjoyment of quiet occupancy and use is forbidden. Such incidents include, among other things, the right to personal possession or operation, control of the purpose for which the property is to be used, disposition of the property, and the right to the enjoyment of the income derived from the property. Certainly the protections of Article 46 are subject to exceptions, contained in the Hague Regulations themselves, in the Article on public order and safety already considered and in the Articles governing the right of the occupant to requisition.

But the exceptions do not permit actions which constitute a complete dispossession of the owner, or the use of the property simply for the benefit of persons other than the owner, or the exploitation of the property for the economy and war effort of the occupant.

The general Article on requisitions, Article 52, permits requisitions only for the needs of the army of occupation, in proportion to the resources of the country; and it is not otherwise permissible within the meaning of the Article for the occupant to utilize the properties of the occupied territories in furtherance of military operations against the occupied country or its allies.

The taking of property which may appear to be correct as a matter of form constitutes nothing other than a requisition, when the elements of force, threat, compulsion, or duress are present in the transfer. It is clear that such taking must be weighed according to the limitations of Article 52, and payment of full value or consideration does not legalize seizure or transfer which is not permissible in the first instance.

Thus, in the Krupp Case, where the Krupp enterprise seized and sought to compel the sale of a French-owned machine, then being used by Krupp in furtherance of German war production, the Tribunal found a crime against property, in violation of Articles 52 and 46. In the Flick case, where the defendant took over and operated, with the intent to permanently retain, properties which had been seized by the Reich, originally under a justified need to preserve public order and safety, the Tribunal held Friedrich Flick guilty of war crimes. When the I. G. Farbenindustrie organized a company, Francolor, to take over the assets of the individual enterprises composing the French chemical industry and when they forced the French representatives to make "an adjustment to the new conditions", the Tribunal adjudged several defendants participating in the negotiations or informed thereof to be guilty of a completed spoliation transaction.

(5) Public Property

The principal provisions of the Hague Regulations dealing specifically with public property are Articles 53 and 55. Article 53 entitles the occupant to seize such goods as "cash" and "realizable securities" belonging to the enemy state, and also all movable public property which may be used for military operations. Article 55 entitles the occupying state to administer "public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country." The occupying authorities must safeguard the capital of these properties and administer them in accordance with the rules of usufruct.

These articles of the Hague Regulations do not specifically refer to industrial property owned by the State or to mines and mineral reserves publicly owned. No single one of the Hague Regulations is exactly in point. But it seems clear that the restrictions to be applied with respect to the administration and use of such industrial property are not less than the restrictions applicable to public buildings, forests and agricultural lands belonging to the occupied State.

In any event, the use of public properties must be limited to the needs of the occupation and in proportion to the resources of the country. This follows from the judgment of the International Military Tribunal. In view of the importance of public industrial property to the economy of a country, the application of the general standard to such property is supported by more impelling considerations than its application to other State-owned property, and is supported by considerations equally as persuasive as in the case of private property. This is merely to say that the economic utility of a state-owned steel mill is more like that of a private-owned steel mill than of a state-owned park. We submit that the Hague Convention, in its fundamental principles, was not designed to favor a particular system of property, but to limit the use of the occupied territories to the requirements of occupation itself.

If the southeastern section of the United States, containing the public corporation Tennessee Valley Authority, were to be occupied by enemy forces, while the occupant could seize and operate the plants and enterprises of TVA, it cannot be seriously argued that the occupant would be entitled to shut off all electric power to rural and municipal areas and to convert the TVA into a power plant for munitions or related industries to be utilized in pressing the war against the remainder of the United States or its Allies.

We think that it is clear from the judgment of the International Military Tribunal that war crimes and crimes against humanity may exist where public property is exploited beyond the general limitations of the laws and customs of war. As Charles Cheney Hyde has put it, in discussing Article 55:

> "In whatever it does, the occupant should be regarded as the temporary controller rather than as the sovereign of, or the successor to the sovereign of the area concerned . . .
>
> "As such controller, it is highly unreasonable that the occupant should endeavor to enrich itself at the expense of the area concerned." 1/

Only this difference is recognizable in the rights of the occupant when dealing with public property as compared to private property -- that the occupant may exercise and, indeed, is probably compelled by the requirements of public order and safety to exercise a conservatory administration of public properties, whereas special justification is required for seizing and managing private property altogether.

The question of public property in Case 11 arises almost entirely out of the conduct of the defendants in exploiting Russian industries and resources. Abundant evidence which has been introduced in this case has demonstrated that the basic decrees and regulations pursuant to which the German authorities seized and operated Russian properties called for the unrestricted exploitation of such properties for German war production. This objective was one of the underlying reasons for the very invasion of Russia. The German decrees emphasized that the

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1/ Hyde, International Law, 2d Edition, Boston, 1945, Vol. II, para. 696A.

occupying authorities would, on principle, disregard the needs of the inhabitants and the limits of the resources of the country. Furthermore, these same directives emphasized the title of the Reich to all public industrial property in Russia and the complete power of disposition as well as use of such property. All of this was clearly understood, and even promulgated by the defendants themselves in some cases. The "monopoly companies" or "sponsor firms" which took over Russian enterprises recognized, in the trust agreement itself, that they were acting for the Reich as "owner". It seems perfectly clear that an intention to permanently acquire was present and that the intention was completely inconsistent with the obligation of the occupying power, or its agents, to administer public property only as a usufructuary within the general limitations governing belligerent occupation.

(6) Responsibility

Under Paragraph 2 of Article II of Control Council Law No. 10, to establish the responsibility of a defendant for acts of spoliation, it is not necessary to prove that he personally conceived and executed an entire program or transaction. Guilt is established if it is shown, for example, that the defendant was connected with plans and enterprises involving the commission of crimes covered by Count Six, or was a member of any organization or group connected with the commission of such crime. However, in almost all instances these defendants have been indicted for their own personal activities -- for the decrees and orders they issued, for the policies they set, for the advice they offered, for the "contracts" they signed, for the "negotiations" they conducted, for the letters they wrote, and for the monies they appropriated -- in furtherance of spoliation transactions and programs.

The principle of individual responsibility for international crimes is firmly established. And the judgments in the Flick, Farben, and Krupp cases leave no doubt that there is no special immunity for so-called private businessmen.

Furthermore, it is no defense that the acts of the individual defendant were committed within the framework of governmental plans. In some cases that is the gist of the crime, where the program of the Nazi State and Party was obviously criminal. As the Krupp Tribunal observed:

> "The defendants cannot as a legal proposition successfully contend that, since the acts of spoliation of which they are charged were authorized and actively supported by certain German governmental and military agencies or persons, they escape liability for such acts. It is a general principle of criminal law that encouragement and support received from wrongdoers is not excusable." 1/

Nor are these defendants entitled to argue that ignorance of the specific requirements of international law relieves them of criminal responsibility. It is necessary only to establish that the defendant intended what his conduct accomplished; he need not have been aware that his acts constituted crimes as a conclusion of fact and law. Again, as the Krupp Tribunal stated:

> ". . . when a person acting without justification or excuse commits an act prohibited as a crime, his intention to commit the act constitutes the criminal intent." 2/

It has been suggested that persons who participated as brokers or agents in the transfers of spoliated property are immune from an assessment of guilt. But it seems clear that a thief does not gain immunity for his actions merely because he only received a commission for his efforts instead of the proceeds of the entire theft. Conversely, receipt of the proceeds without participation in the theft is also not innocent. Knowledge of the character of the original acquisition or subsequent conversion is a sufficient basis to hold defendants responsible for their participation. The category of criminals known as accessories after the fact is recognized in probably every criminal code in the world.

1/ Opinion and Judgment, Case 10, p. 25.

2/ Opinion and Judgment, Case 10, p. 67.

As Tribunal II in Case 4 (the Pohl Case) stated:

> "The fact that Pohl himself did not actually transport the stolen goods to the Reich or did not himself remove the teeth of the dead inmates, does not exculpate him. This was a broad criminal program . . . and Pohl's part was to conserve and account for the loot. Having knowledge of the illegal purposes of the action . . . his active participation even in the after-phases of the Action makes him participeps criminis in the whole affair." 1/

The same principle has been applied in the Flick, Farben and Krupp cases, where defendants received and managed illegally acquired properties.

(7) Military Necessity

Several counsel for the defense have argued that since it is permitted to destroy private property in the course of war operations, it must be legal to utilize property in occupied territories as needed in the waging of war. Sometimes the same doctrine is phrased in terms of the requirements of "total war" which, it is alleged, was a brutal invention of Anglo-Saxon countries. That is to say, the broad character of war in modern times requires that all restrictions of law be waived at the convenience of the belligerent.

It is almost enough, by way of reply, to simply state the contentions, and we do not think that we are distorting the essential argument at all. But it may be pointed out that many of the programs and transactions involved in Case 11 hardly classify as military necessities under even the most extreme conception of that term. This may be said for most of the aryanization and interlacing business carried out by Rasche, and also, generally, for the programs directed towards permanent German domination of the European economy after the successful conclusion of the war.

When these arguments of military necessity were made before the International Military Tribunal, as before every other Tribunal convened in Nurnberg, the International Military Tribunal not only flatly rejected them, but quite properly pointed out, that the crimes themselves arose

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1/ Judgment, Case 4, Tr. p. 8093.

out of the Nazi conception that "the moral ideas underlying the conventions which seek to make war more humane" were no longer valid. 1/

A variation in the argument states that atomic bombs are used today and unrestricted submarine warfare is no longer forbidden; therefore it follows that the laws of belligerent occupation no longer exist. As the Farben Tribunal pointed out, if uncertainties and changes have developed in the laws which govern phases of waging war, this does not force the "conclusion that the provisions of the Hague Regulations, protecting rights of public and private property, may be ignored." 2/ The very purpose of the Hague Convention was to set standards regulating belligerent occupation. To accept the contentions of the defense would leave us with no law at all.

In the Krupp Case, the defense of military necessity in modern total war was briefly dismissed with the observation that the conditions and necessities of a war cannot possibly excuse violations of the laws of war, since the laws of war are designed precisely for the conditions and necessities of war. 3/

(8) Damages Standard

The argument has been advanced that since certain properties, perhaps wrongfully seized, were returned to their true owners at the end of the war, no loss was really suffered and no crime should be found. Another form of this argument states that where substantial value was given for seized properties, no crime can be found in law. In this connection defense counsel have introduced evidence to show that the properties were actually improved, as an excuse for illegal activities. In some cases where the removal of machinery and equipment is charged, evidence has been offered purporting to show that other machinery and investments were put into the plant.

In the view of the Prosecution, all of these contentions are beside the point. If the taking or the operation of plants was illegal, the

1/ Trial of Major War Criminals, Vol. I, p. 227.
2/ Opinion and Judgment, Case 6, p. 81.
3/ Opinion and Judgment, Case 10, p. 26.

question of damages is completely irrelevant. "Damages" is a concept which is pertinent to civil actions, and to civil actions only. Thus, where Cellini steals a bar of gold and fashions an elegant salt shaker from the gold, the owner, having regained the gold as improved by Cellini's artistry, might have considerable difficulty in recovering damages. But in a criminal case Cellini would have no argument whatsoever.

Equally, where machinery was removed from seized plants, whether public or private plants, the defendants responsible cannot be heard to say that they had added to the value of the plant otherwise. For, whether dealing with public or private property, at most the defendants could have only the right of an administrator or usufructuary. This does not give the authority to dispose of the capital stock and equipment of the enterprise in any fashion inconsistent with that limited right.

The decided cases repudiate this suggested relative value test for the commission of a crime. In the words of the Roechling decision:

> ". . . it is equally vain that Hermann Roechling maintains that he had invested large sums in these plants, while in fact, even admitting that this should be the case, it would in no way modify the responsibility of the defendant, since expenses incurred for an object obtained by means of a criminal act or offense do not eliminate the fraudulent character of such a possession." 1/

Parenthetically, we may note that the affirmative proof offered by the Defense to establish this "justification" has generally consisted of an affidavit by friends or associates of the defendant, asserting that value was put into plants over-all. Even where concrete figures are introduced, they are meaningless unless weighed with regard to changing price levels and economic values and with regard to the availability of the individual kind of machine or other equipment.

Moreover, we submit as a factual matter that the very fact, if established, that the defendant added to the capital of the seized plants

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1/ Opinion and Judgment, Roechling Case, p. 11.

tends very strongly to establish (1) that he planned to permanently acquire the enterprise, in derogation of the rights of the true owner, and (2) that he was utilizing the plants for war purposes, beyond the needs of the army of occupation. It is difficult, in the light of all the evidence, to visualize Pleiger putting funds or equipment into Polish iron mines in order to enrich the Polish owner, or in order to improve economic conditions for the Polish civilian population.

COUNT VII, WAR CRIMES AND CRIMES AGAINST HUMANITY, SLAVE LABOR.

The charges under Count VII involve the criminal conduct which flows from involuntary servitude imposed on a broad scale and from the use of prisoners of war beyond the clear limits imposed by international conventions. Similar charges are more common to the war crimes trials in Nurnberg than any other type of offense - and numerous decisions have discussed the applicable law and recounted the bestiality of the widespread crime generally abbreviated merely as "slave labor".

Germany's first offense in this field came in the first World War when Germany deported Belgians to Germany, an act which called forth such an outcry and such general indignation from the civilized world that the then rulers of Germany withdrew from their criminal conduct. 1/ If any substantial number of leading persons in Germany's Third Reich had learned a proper lesson from Germany's first international crime in this field, countless thousands of human beings would still be living and we would be spared the unfortunate necessity of calling Germany's leaders to account by war crimes trials. The law regarding deportation, enslavement, the illtreatment of foreign labor and concentration camp inmates, the illtreatment of prisoners of war and related matters needs no emphasis by general recapitulation here. We have charged that the offenses connected with slave labor run from the period March 1938 through May 1945. Our view of the international law applicable to the occupation of Austria

1/ See Volume II, Oppenheim, International Law, 3rd Edition, p.20; Vol.VI, Hackworth, Digest of International Law, p.399.

and Czechoslovakia has been summarized earlier in our discussion of the law applicable to plunder and spoliation. If the criminal conduct regarding the enslavement of persons before 1 September 1939 is not found by the Tribunal to be war crimes, then this criminal conduct still falls within the category of crimes against humanity.

Some of the defendants charged under Count VII participated directly in ordering and directing criminal acts involving the entire slave labor program. Others engaged in the execution and application of the slave labor program to particular areas and particular industries. At the least, each of the defendants was an accessory to, took a consenting part in, was connected with plans and enterprises involving, or was a member of an organization or group connected with the criminal slave labor program. In the individual briefs we set forth the responsibilities which each of the indivual defendants incurred in this field. The fact that individual defendants may not have known of some particular detail in the carrying out of a program which they had initiated, supported or approved, is unimportant. No person could know all the detailed ramifications of the execution of all adopted programs. But where, as in the activities here involved, the execution of the specific programs extended over a relatively long period of time, those who are responsible for initiating, approving, or carrying them out cannot claim that they did not know and are not responsible for what was happening during their execution.

COUNT VIII

MEMBERSHIP IN CRIMINAL ORGANIZATIONS

The Indictment charges various defendants with membership in organizations declared to be criminal by the IMT, e.g., the SS, the SD, and the Leadership Corps.

As to the SS, it has been contended on behalf of all the defendants charged, except Berger and Schellenberg, as a matter of law, that membership in a criminal organization does not attach to so-called honorary SS leaders. Such argument, in addition to the legal concept of criminal membership in the SS, specifically as it has been interpreted by the IMT, by other Military Tribunals, and particularly in the decisions of the Denazification Courts throughout Germany, is treated at length in the prosecution's briefs entitled "Circle of Friends," and "Honorary Membership in the SS." The factual basis for the charges contained in Count VIII of the Indictment - the voluntary character of defendants' membership in the SS and their knowledge of SS activities - is left to the individual briefs on defendants.

The IMT does not in any way exempt the so-called honorary SS leaders from the categories of criminal membership in the SS. Such membership in the SS is based on two main elements:

(a) to be officially accepted as a member in the SS and to remain therein until a time later than 1 September 1949, while the act of joining must not be due to compulsion by the State;

(b) knowledge of the criminal activities in which the SS was engaged.

All of the 14 defendants charged with membership in the SS joined voluntarily, since all enlistments into the SS were voluntary until 1940. (IMT, Vol. I, p. 270.) These defendants possess all the requirements of guilt set forth in the IMT Judgment (Vol I, p. 273). The evidence adduced in support of the other charges of the Indictment overwhelmingly establishes knowledge of and participation in the criminal activities of the SS.

Only the defendant Schellenberg is charged with membership in the SD. The SD and the Gestapo were component parts of the RSHA, one of the twelve main departments of the SS. In dealing with the SD, the IMT included members of Amts III, VI, and VII, of the RSHA and all other members of the SD, including all local representatives and agents, honorary or otherwise, whether they were technically members of the SS or not, to be criminally responsible. (IMT, p. 267) Schellenberg was Chief of Amt VI. His guilt is established.

In the case of the Leadership Corps of the Nazi Party, criminal membership was declared to depend upon the position or rank held by the accused. (IMT, pp. 261-262.) The defendants so charged were members of the Leadership Corps in categories declared to be criminal by the IMT. Darre and Dietrich were Reichsleiters; Bohle was a Gauleiter; and, Keppler was a Hauptamtsleiter. These ranks were included in the positions enumerated by the IMT as bearing criminal responsibility. The further requisite of guilt is to have become or remained a member of the organization with knowledge that it was being used for the commission of criminal acts, or to have been personally implicated as a member of the organization in the commission of such crimes. As the IMT said (p. 262):

> "...The basis of this finding is the participation of the organization in War Crimes and Crimes against Humanity connected with the war; the group declared criminal cannot include, therefore, persons who had ceased to hold the positions enumerated in the preceding paragraph prior to 1 September 1939."

These defendants possess all the requirements of guilt set forth in the IMT.

CREDIBILITY OF DEFENDANTS AND WITNESSES

In the Opening Statement of this case, the Prosecution asserted, "The cancer of the Third Reich, spreading crime throughout the political organism . . . was the suppression of truth. And it is the supernal mendacity of these defendants which is most revolting."

If only the testimony of the defendants in this courtroom were to be considered as a basis for that strong charge, we would not withdraw a letter of it. It has been most apparent throughout the trial that the defendants have not changed character since 1945. This Tribunal has listened to lies, inventions, contradictions and evasions which would tax the patience of the most credulous. Almost every document of the hundreds introduced into evidence during cross-examination of the defendants marks the spot where a lie was exposed.

This characteristic of the testimony of the defendants became so systematic that fabrications which were purely superfluous were offered. For example, the defendant Kehrl asserted firmly that he was never aware of economic persecution of Jews prior to 1936. But Kehrl admitted that he joined the Nazi Party early, that he had read "Mein Kampf", that he read the Party journals, and that he lived in the heart of Germany. Furthermore, he was the economic advisor to the Gau Brandenburg until 1938, and the Gau offices were charged with insuring the execution of the "aryanization" program. Herr Kehrl is not and was not then an uncomprehending idiot.

Similarly, Puhl, self-proclaimed hero of the resistance, thought that the only defect of the SS was that it was a military organization. Puhl, so he says today, also thought that all inmates of concentration camps were habitual criminals. But elsewhere he has contended that he was diligent in aiding <u>prospective</u> concentration camp inmates, who were not at all habitual criminals.

Now, these are the merest examples of gratuitous "explanations" of conduct. We do not mean to suggest, in any way, that the large part

of the fabrications presented here were irrelevant. Most pertinent to the defense of "insignificance" put forward on behalf of Lammers was Lammers' own testimony to the effect that he was a chief clerk and notary public of Hitler. However, it appears in the record that Lammers was Chief of the Reichschancellory, with the highest salary of all German public officials, and that upon the occasion of his sixty-fifth birthday he had received the scarcely trifling bonus of six hundred thousand marks from Hitler. To paraphrase the remarks of a well-known American figure: "Some clerk! Some notary public! "

It was also highly relevant in Ritter's case to deny all knowledge of the Jewish exterminations, as Ritter did. But his own witness, Mackeben, stated in cross-examination (at page 11738 of the Transcript) that he had had long discussions with Ritter on that very subject.

Among the other phenomena which appear in the accounts of the dedendants themselves are exposures of total amorality. Thus, Pleiger, recounting his exploits in Austria, Czechoslovakia, Poland, Lorraine, and Russia, constantly emphasized that the enterprises seized and operated by him were very badly managed by their true owners. To Pleiger, German efficiency -- that is, his own efficiency -- was a sufficient reason for taking the properties of other persons. Of course, it is quite clear that he nevertheless would have taken and did take over properties which were well-managed and in excellent condition, such as the Polish plant Stalowa Wola, or the Czech Witkowitz plants which General Keitel described as the "most modern rolling mill in the world."

Among other attitudes blandly put forth by Pleiger, and shared, in their own testimony, by other defendants, were attitudes such as these. If German totalitarianism may force the labor of Germans, what can possibly be wrong with enslaving the populations of other states. Or, if an important and efficient man has several tens of thousands of persons working under him, how can he reasonably be expected to bother about the fact that some hundreds or thousands are concentration camp inmates? As Pleiger stated in reply to the question of why the Hermann Goering

Werke entered into joint operations with the SS, operations employing hundreds of concentration camp laborers!

"A. If my boss Goering said, 'Settle the matter so that Himmler is satisfied' then I carried out that order. With the best will in the world, you could not have a show-down with the two most powerful men in the Reich; the issue was much too small. . .

Q. Let me ask you this: was the employment of several hundred concentration camp inmates a small matter to you?

A. When the matter was under discussion it was a question of a plant employing two or three hundred persons. During the war every woman and every young girl worked. It was not my point of view that prisoners should not work. Let me state that explicitly. . ."

(tr.p. 15501)

We could multiply such examples several times for Pleiger and then multiply again by the number of defendants in the dock. It would take too long. We only mention these matters because the principal evidence offered in defense has been given by the defendants themselves, and the quality of this testimony is one measure of the defense.

By way of striking contrast, we recall the words of the defendant Bohle, stated in open court on 23 July 1948 (tr.p. 13531):

"I think it should be the solemn pledge and foremost duty of every German who held a leading position during the National Socialist regime, to do all in his power to remove from the name of Germany the blot which the deeds of criminal brains have cast upon it. We know that a low estimate of human life and carelessness to human misery is not and never has been a trait of the German character, and for that very reason I think that we should frankly admit the atrocities that have been committed and that have defiled the German name in the world. I do not think that we should attempt to vindicate our own national honor solely by referring to crimes and misdeeds committed by others, some of which are undoubtedly on a par with what National Socialism is accused of. I think we should be too proud for that. And I think it is my firm conviction that the world will regain its belief in our national honesty, only if we ourselves are honest and straightforward in our confessions and thereafter also in our will to make amends. I think we leading men have this responsibility, not only to the victims of these crimes but just as much to the German people, as such, who, with or without our participation, were misled and misguided and are today, without any fault of their own, outlawed in the world. That is what I understand by responsibility beyond that of my own work."

Bohle's view in this respect has been neither shared nor appreciated by his co-defendants, as the proceedings have made clear.

The Prosecution does not begrudge the offer of evidence by any person who is informed about the facts, but we would like to point out aspects of what has developed into a mutual insurance society to play down the responsibility of numerous individuals, both in Nurnberg and in the denazification courts. This condition has come about in the reciprocal exchange of affidavits and testimony.

For example, the affiant von Nostitz gave seven affidavits for Weizsaecker, one for Woermann, and four for other defendants. In exchange, he received one affidavit from Weizsaecker and one from another defense affiant for his personal use in denazification proceedings. The affiant Bruns, a former servant of the Foreign Office, gave six affidavits for Weizsaecker and received in exchange one affidavit from Weizsaecker and at least four more from other Weizsaecker affiants. The defense affiant Sonnenleiter gave four affidavits for Weizsaecker and received one from Weizsaecker. Sonnenleiter gave four affidavits for Steengracht and received one affidavit in exchange from Steengracht. He gave three for Ritter and received one from Ritter. And generally he gave between one and two dozen, as he admitted, to other defense witnesses and received a number in exchange.

As Steengracht's affiant, Mirbach, has explained, he felt that such kind of help was a duty among former Foreign Office colleagues.

It has been apparent throughout the trial that most of the witnesses brought by the defense felt or were persuaded that they were members of a "community of interest" to which the defendants also belonged. This was not only true for the Foreign Office. To illustrate, Kehrl brought as principal witnesses or affiants, his Economic Ministry assistant, Koester, and his aides in the Ostfaser enterprises. Rasche offered a good part of the personnel of the Dresdner Bank, particularly persons such as Ansmann and Rinn, who had been implicated directly in spoliation activities. Such persons were bound to make self-serving statements, and they did so in total disregard of the truth. Similarly, the defendants have displayed a generous spirit of cooperation. Stuckart, now as a legal expert, has written a memorandum on behalf of Koerner, Fleiger, Rasche, and Kehrl, wherein he assures the Tribunal that the occupation of Bohemia-Moravia was entirely justified in international law and recommends that the Tribunal dismiss charges based upon conduct in that area. In the same way, the services of Puhl, as a financial expert, have been commandeered by several of the other defendants.

Fabrications, lies, inventions, contradictions and "explanations" were rampant in the Commission hearings. One illustration may demonstrate the value of statements of defense affiants. Altenburg, of the Foreign Office, gave five affidavits for Weizsaecker, one for Steengracht, one for Keppler, one for Veesenmayer, and one for Bohle, all listing his correct present address. On cross-examination in Commission, he was asked whether he had testified concerning his personal involvement in Jewish persecutions during his denazification trial. He naturally answered in the affirmative. But the denazification files used on cross-examination show that the court was not at all aware of Altenburg's anti-Jewish activities, because this witness had used another address for the denazification proceedings in order to prevent the discovery of damning evidence.

We will not even discuss here the value of character evidence which has been offered, consisting of personality estimates of the defendants by such reputable citizens as Oswald Pohl, Otto Ohlendorf, and Leo Volk of the SS and SD, and of other distinguished gentlemen such as Otto Abetz, Werner Best, Erhard Milch and Franz Schlegelberger, who were high in the Nazi hierarchy.

One other peculiarity of the testimony heard here deserves special mention. It is not strange that the defendants could not recall activities charged against them when such activities occurred six or eight or ten years ago. However, it is unusual that they invariably were able to remember the exact numbers and names of persecutees whom they aided and even the precise devices by which aid was given. Most astounding is the miracle which took place when the defendants had been given documents to refresh recollection concerning criminal transactions. Not only were they instantly able to recall where the secretary erred at crucial points in the transcription, but, wherever necessary, they were readily able to explain how the printed word meant its exact contrary. In this

fashion, Rasche, confronted with the Dresdner Bank Vorstand Minutes of 2 October 1941 (Exhibit 3222), which observed that a "non-guaranteed" credit of twenty millions had been granted to Ostfaser, stated that the minutes were "not quite correct . . . the Reich was liable." (tr.p. 17708). Presented thereafter by his own counsel with the record of a conference between Dresdner representatives and Reich authorities, where the Reich officials flatly rejected any liability (Exhibit 3229), he observed that "The legal opinion expressed is erroneous. . ." (tr.p. 17710). In the same way, Kehrl, having denied "competence" in banking affairs in the "Protectorate", contended that a document stating that he would have a "decisive voice" in such affairs should more accurately be translated as stating that he would have a "decisive part".

> "Q. . . . put it the other way around and I still want to ask you what you think it means?
>
> A. It meant that I was <u>not</u> the decisive factor — that I was one of several decisive factors. That is what the document says. . ."
>
> (tr.p. 16916)

To sum up this section on the reliability of defense testimony and evidence, we will repeat what we consider, in a most <u>charitable</u> view, to have been the attitude typical of the defendants and their witnesses when they were speaking under oath. Koerner candidly stated (tr.p. 14717):

> "I was a witness on behalf of Goering and I had to take certain considerations into account in behalf of my old chief. I didn't defend him, but I gave certain statements which I believed were capable of exonerating him so far as I was able to exonerate him. That is the way we have to look at these things. . . I would never have incriminated a man who was still alive at the time."

SUPERIOR ORDERS, THE DEFENSE OF ALLEGED DURESS, AND THE MITIGATION OF PUNISHMENT FOR CRIMES

Control Council Law No.10, like the London Charter, provides that a superior order does not free an accused from individual responsibility for crime, but that a superior order "may be considered in mitigation". The record before you contains a reservoir of proof on the ramifications of individual responsibility for crime which was not present with such force or detail in the record before the International Military Tribunal. Yet the conduct alleged as criminal in the case here is identical with, runs parallel to, or derives directly from the criminal conduct analyzed by the International Military Tribunal. Hence it is particularly appropriate to refer this Tribunal to the classic statement of the IMT on the general subject of individual criminal responsibility, at pages 222 and 223 of Vol. I, official printed text, English edition. This classic statement concludes with the following much quoted sentence:

> "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."

Particularly in war crimes cases, the law on superior orders cannot properly be separated very far from a consideration of the defense of duress or coercion - and ordinarily the judgments have discussed these two questions as closely related matters.

In Case No.III before Tribunal No.III, the so-called Justice Case, the Tribunal found no circumstances or reasons which warranted any variation in or reformulation of the law on this point as defined by the IMT. In its judgment at pages 10759 and 10760 of the transcript, Tribunal No.III quoted the same provisions from the IMT judgment which we have just read. The Tribunal in that case was also faced with a special type of defense claim to immunity, namely, that "judges are entitled to the benefit of the Anglo-American

doctrine of judicial immunity". In rejecting this particular brand of alleged immunity, Tribunal No.III declared the following at page 10703 of the transcript:

> "In view of the conclusive proof of the sinister influences which were in constant interplay between Hitler, his Ministers, the Ministry of Justice, the Party, the Gestapo, and the courts, we see no merit in the suggestion that Nazi judges are entitled to the benefit of the Anglo-American doctrine of judicial immunity. The doctrine that judges are not personally liable for their judicial actions is based on the concept of an independent judiciary administering impartial justice. Furthermore, it has never prevented the prosecution of a judge for malfeasance in office. If the evidence cited supra does not demonstrate the utter destruction of judicial independence and impartiality, then we 'never writ nor no man ever proved'. The function of the Nazi courts was judicial only in a limited sense. They more closely resembled administrative tribunals acting under directives from above in a quasi-judicial manner."

It will be difficult, it seems to us, for the defense to conjure up any claims of immunity from criminal responsibility in this case of any greater substance than the ill-founded claim of "judicial immunity" which was made in Case No.III.

In Case No.XII, in the judgment recently rendered by Tribunal No.V, the Tribunal declared that the recognition of the contention of superior orders as a defense would be the recognition of absurdity. After stating that paragraphs 4(a) and (b) of article II of Control Council Law No.10 were "clear and definite" on the subject of superior orders, Tribunal No.V went on to say:

> "All the defendants in this case held official positions in the armed forces of the Third Reich. Hitler from 1938 on was Commander in Chief of the Armed Forces and was the Supreme Civil and Military authority in the Third Reich, whose personal decrees had the force and effect of law. Under such circumstances to recognize as a defense to the crimes set forth in Control Council Law No.10 that a defendant acted pursuant to the order of his government or of a superior would be in practical effect to say that all the guilt charged in the Indictment was the guilt of Hitler alone because he alone possessed the law-making power of the state and the supreme authority to issue civil and military directives. To recognize such a contention would be to recognize an absurdity.
>
> "It is not necessary to support the provision of Control Council Law No.10, Art.II, Secs. 4(a) and (b), by reason, for we are bound by it as one of the basic authorities under which we function as a Judicial Tribunal. Reason is not lacking."

This Tribunal further stated:

> "International Common Law must be superior to and, where it conflicts with, take precedence over National Law or directives issued by any national governmental authority. A directive to violate International Criminal Common Law is therefore void and can afford no protection to one who violates such law in reliance on such a directive.
>
> "The purpose and effect of all law, national or international, is to restrict or channelize the action of the citizen or subject. International law has for its purpose and effect the restricting and channelizing of the action of nations. Since nations are corporate entities, a composite of a multitude of human beings, and since a nation can plan and act only through its agents and representatives, there can be no effective restriction or channelizing of national action except through control of the agents and representatives of the nation, who form its policies and carry them out in action.
>
> "The State being but an inanimate corporate entity or concept, it cannot as such make plans, determine policies, exercise judgment, experience fear or be restrained or deterred from action except through its animate agents and representatives. It would be an utter disregard of reality and but legal shadow-boxing to say that only the State, the inanimate entity, can have guilt, and that no guilt can be attributed to its animate agents who devise and execute its policies. Nor can it be permitted even in a dictatorship that the dictator, absolute though he may be, shall be the scapegoat on whom the sins of all his governmental and military subordinates are wished; and that, when he is driven into a bunker and presumably destroyed, all the sins and guilt of his subordinates shall be considered to have been destroyed with him.
>
> "The defendants in this case who received obviously criminal orders were placed in a difficult position but servile compliance with orders clearly criminal for fear of some disadvantage or punishment not immediately threatened cannot be recognized as a defense. To establish the defense of coercion or necessity in the face of danger there must be a showing of circumstances such that a reasonable man would apprehend that he was in such imminent physical peril as to deprive him of freedom to choose the right and refrain from the wrong. No such situation has been shown in this case."

Thus the Tribunal connected up the whole problem of superior orders to a discussion of the requirements for establishing "the defense of coercion or necessity". Now, if there was no "imminent physical peril" to the military commanders which established any "defense of coercion or necessity in the face of danger", it is difficult to imagine what grounds the defendants in the dock here can assert which puts them in a better position.

In all of the cases tried in Nurnberg the defense in one way or another has sought reliance upon superior orders and upon the defense of necessity or coercion. Almost all the judgments discuss the law on these points. Perhaps in the three trials against persons who were principally private industrialists, the Flick, Farben and Krupp Cases, the defense labored longest in attempting to make out a defense of necessity concerning the employment by private industry of large numbers of slave laborers. Although we do not believe that cases involving private industrialists are in point here, we suspect that counsel for certain defendants will cite some of the language in one or the other of these judgments in trying to make a defense of justification in his own case. We believe that there are ample quotations from the legal authorities in the Flick, Farben and Krupp judgments. The judgment in the Krupp Case, under a long section entitled "Necessity as a Defense" (Tr. p.13382-13401), includes extracts from section 52 of the German Criminal Code and a number of references to English and American authorities. We will not repeat these citations here, but we think it important to underline certain fundamental concepts and to note certain elements which must be established by a defendant undertaking the burden of establishing a defense of necessity. Some of these concepts, which are emphasized again and again by the authorities, are the following: the presence of "irresistible force"; a "present danger for life and limb"; a "fear of instant death"; the absence of any opportunity for escape; the imminent injury to the accused must be shown not to be disproportionate to the evil he furthers under duress.

There is no compulsion, as the concept is used by the authorities, where the alleged coercion was spread out through months and even years. There is no compulsion where the alleged overriding compulsion was a force to which the accused attached his energy for any substantial period of time, even though his

attachment was abhorent to him. There is no irresistible force when the accused, having recognized evil, had any possibility to extract himself from the corecion by some available means even though such means were difficult and highly unpleasant. It is not enough that the injury to the accused or the possible methods of escape from coercion involved his loss of professional standing, his loss of property, a substantial re-ordering of his life and habits, or even his confinement and the loss of substantial personal liberty. The historic law has recognized no such personal injuries as a justification for committing evil or invading the rights of others. If in war crimes cases the defense of necessity is stretched beyond the clear and definite limits set down by the authorities, then by judicial interpretation superior orders in effect are made a defense - and by judicial interpretation the provisions of the London Charter and Control Council Law No.10 are in effect voided.

It is really anomalous for these defendants to claim superior orders or some kind of impelling necessity or overriding duress which drove them to the acts for which they are charged here as criminally and individually responsible. In most instances these defendants were not following a specific command as does the soldier. Rather they were following and implementing a great complex of criminal policy under which at one time most of Europe languished. These defendants attached themselves to the making or the execution of these policies with deliberation and over a long period of time. The service they gave the Third Reich during the years of its aggressive expansion required painstaking effort, proposals and counter-proposals, and the writing and consideration of countless memoranda, and the ups and downs of political and economic administration. In a short period of time any one of them could have retired from the limelight of the Nazi stage merely by showing a little less enthusiasm or by making himself a little less indispensable. Of course, such a personal reaction

would have meant some re-ordering of their personal lives, but certainly these were men of enough ability to win their daily bread without giving such formidable insurance and support as they did give to Hitler's Third Reich. Millions of other Germans made their way through these evil times without sitting in the councils of the mighty and many Germans refused entanglements of this kind of their own free will. In a dictatorship one does not win or hold great influence and high position by any genuine reluctance or reticence spread over any period of time.

If finally these worthies before us at a given moment did face a demand from which they inwardly revolted because of what moral fiber still remained to them, the demand was a kind for which they had long been forewarned by their prior knowledge of, and their associations with, the policies of Hitler's Third Reich. The early persecutions of the leaders of the Nazi opposition; the Roehm Purge; the burning of the synoguges; the cavalier treatment of the independent church leaders; the violence against the leaders of the trade unions and the cooperatives; the shake-up of the High Command before the war; the remilitarization of the Rhine by unilateral action and the violation of treaty; the sudden sweep of the Wehrmacht over Germany's sovereign neighbor - Austria; the bold threats before Munich; the overrunning of Czechoslovakia when the ink was scarcely dry on the Munich Pact; the concentration camps in Germany which certainly these defendants had ample reason to know would be extended once Germany had its hands on more so-called "inferior peoples" - all these things, and many, many more were signposts enough. They gave warning to many who had less intimate knowledge of the Nazi policy and less access to the inner circles than did these defendants. Germany had become an open stage of violence in both domestic and foreign policy before the first shot was fired in Poland. These men had more access to knowledge of the true state of affairs than did the

multitude of Germans or of foreigners. Notwithstanding, these men dedicated years of their lives in loyal and essential service to significant parts of Hitler's program. They continued their essential support, even as the aberrations of the Nazi program grew in intensity and with geometric progression. Why did these men go along with Hitler's coterie so long? For one or more of a number of reasons. Because they liked and admired Hitler's early "successes". Because Hitler's Reich gave them a chance to see old scores settled by violence where pacific means had failed. Because they liked the power and the prestige which had eluded most of them before they had raised their hand publicly in the Hitler salute. Because these men had lost the will to exercise a moral choice long before they felt any compelling inward revolt at the violence of the gang of which they were a part. Because these men identified their will with Hitler's cause. No convincing evidence appears that these defendants showed any real revulsion before they had the peculiar kind of reflection which must have come in the air shelters as the Allied flyers paid back the terror of Rotterdam, the London blitz, and the German dive bombers in Poland. As symbolic of their true attitude during the time when Germany was riding high, we refer to the testimony of the defendant Pleiger, testimony perhaps given with intent of humor, but testimony in fact full of ironic truth. Pleiger testified on his support of the Salzgitter iron ore project, which he admitted all the experts considered uneconomic. At page 15289 of the English transcript, Pleiger said: "I said that I would have made a pact with the devil himself in order to achieve my aim". We think Pleiger unintentionally adverted to the true ethical and moral attitude of most of Germany's recent leaders concerning their respective entanglements with the Nazi program. For one reason or another these defendants made their pact with the devil. There is no convincing showing that these defendants felt that the consequences of their pact with the devil were really very hard to swallow, at least until near

the end. We doubt if they considered any part of these consequences a bitter pill until defeat was imminent or until they foresaw that the world's growing regard for the penal enforcement of international law assured them of an accounting in court. But any qualms they had were too little and too late to effect, much less undo, their criminal responsibility for conduct flowing from their various related unholy alliances and entanglements. It would be somewhat humorous, if it were not so tragic, to ask how many of these defendants would now be charged with malfeasance and disloyalty if Germany had won the recent war. None of them showed outwardly enough reluctance so as to be seriously suspect even in the last hours when Himmler and Goebbels became more and more the main pilots of the dying Third Reich. It is well to recall that even Hermann Goering was interned because he was suspected of some disloyalty to the Fuehrer in those last days. We suggest that the claims of duress by these men will ring like a badly cracked bell in the halls of history - and that these claims have received less credence among the broad masses of Germans who kept out of the councils of the mighty than these claims have received attention in the courtrooms of Nurnberg.

UNRESISTING "RESISTANCE"

The defendant Weizsaecker proposes for the serious consideration of this Tribunal that he was in bona fide resistance to Hitler's Third Reich and to its unspeakable evils. He says that he cherished in his heart the final aim of eliminating Hitler and thus destroying the government in which the defendant himself served for twelve long years. If the word resistance can be stretched to cover any of the conduct of Weizsaecker, it can only be described as the most unresisting resistance, a resistance which took no tangible effect, a resistance which prevented none of the crimes charged, and a resistance supposedly maintained while the defendant committed overt act after overt act which planned and furthered aggression and which planned and furthered such vast crimes as the resettlement and ultimate mass extermination of

countless defenseless victims in the occupied countries. The testimony of Weizsaecker's witnesses and dozens of affiants on this point was extremely nebulous and padded with remote hearsay and ex post facto wishful thinking. At best it revealed only that Weizsaecker, like many other persons in the Hitler regime, nurtured no very cordial feelings for some of his colleagues in the Third Reich or for some of their techniques. The maintenance of some professional and social contacts with anti-Nazis, especially during the declining years of the war, does not differentiate Weizsaecker from other leading officials who tried to take out similar last-minute life insurance when defeat was imminent.

The claim of Weizsaecker is not entirely novel in Nurnberg, although for some reason it has received an abundance of attention. In the Krupp Case the defendant Loeser offered concrete evidence which identified him "with the underground to overthrow Hitler and the Nazi regime". Loeser was "arrested by the Gestapo in connection with the plot of 30 July 1944" and was scheduled for trial". Even real resistance was not found by the Tribunal to be a justification for the crimes in which the defendant Loeser participated, although one of the judges felt that his sentence was too severe in view of his resistance.[1/] The defendant Sievers in Case No.I, the Medical Case, claimed that he took high position in the Nazi government "so that he could be close to Himmler and observe his movements" and so he could "obtain vital information which would hasten the day of the overthrow of the Nazi government". The Tribunal in that case stated with respect to this claimed defense:[2/]

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1/ See pages 13451-2, Tr., Case No.X.

2/ See pages 11486-7, Tr., Case No.I.

"Assuming all these things to be true, we cannot see how they may be used as a defense for Sievers. The fact remains that murders were committed with cooperation of the Ahnenerbe against countless thousands of wretched concentration camp inmates who had not the slightest means of resistance. Sievers directed the program by which these murders were committed. It is certainly not the law that a resistance worker can commit no crime and least of all against the very people he is supposed to be protecting."

CONCLUSION

There is much opportunity for us to go much further into the typical Nazi double talk which has been conceived here to deceive the unwary. We doubt if any other series of trials have been filled with such circumventions of truth, such fantastic explanations and such absurd professions as the defendants have proffered in Nurnberg. But, in view of the entire evidence in this case, we think it fitting to conclude the closing statement in this last trial at Nurnberg with the same words with which Justice Jackson concluded the closing address for the United States of America in the first trial:

"If you were to say of these men that they are not guilty, it would be as true to say there has been no war, there are no slain, there has been no crime."